



DERBY CITY COUNCIL

**PLANNING CONTROL COMMITTEE**  
**21 OCTOBER 2010**

# ITEM 12

Report of the Director of Planning and Transportation

## **Application to Register Land at Sturgess Fields, Kedleston Road, Derby as a Town or Village Green**

### **SUMMARY**

- 1.1 This report concerns an application to register land at Sturgess Fields, Kedleston Road, as a Town Green, under the Commons Registration Act 2006.
- 1.2 It reports on a public inquiry into this matter held in March 2010 and the recommendations of the independent inspector appointed by the City Council to run the inquiry and advise the City Council on this application.
- 1.3 It contains recommendations, in line with the advice of the Inspector, that around two thirds of the site should be registered as a Town Green.
- 1.4 It also reports on and welcomes, proposals by the University of Derby, who own the site, to produce a community based management plan.

### **RECOMMENDATIONS**

- 2.1 To refuse the application to register the whole of Sturgess Fields, Kedleston Road, Derby as a Town Green.
- 2.2 To refuse the application to register Field B at Sturgess Fields, Kedleston Road, Derby as a Town Green.
- 2.3 To accept the application to register Fields A and C at Sturgess Fields, Kedleston Road, Derby as a Town Green.
- 2.4 To accept that the boundaries of the area to be registered are as shown on Plan 2 so that so far as Field A is concerned, the southern bank of Mackworth Brook, should be its division from Field B and, so far as Field C is concerned, the western bank of the drainage ditch between Mill Dam Pond and Mackworth Brook should be its division from Field B.
- 2.5 The reasons for these recommendations are those stated in the Inspector's report dated 10 July 2010.
- 2.6 To welcome the University's commitment to produce a community based management plan for the site and to note the Director's commitment to offering City Council staff time to assist, in an advisory role, in its production, subject to availability of resources.

## REASONS FOR RECOMMENDATIONS

3. To enable the application to register the site as a Town Green to be determined and to demonstrate the City Council's support for the University in its efforts to seek to manage the site in the optimum way.

## SUPPORTING INFORMATION

- 4.1 On 9 January 2008, the Council received an application from Mr Patrick Browne to Register Land at Sturgess Fields, Kedleston Road, Derby as a Town or Village Green on land at the site of the former Sturgess School, Kedleston Road and known as Sturgess Fields.
- 4.2 The application land is a large site of some 8.9 ha (22 acres) contained within an area which is enclosed on the north west by the A38, on the north east by Kedleston Road and Watson Street, on the south east by the Ashbourne and District Allotment Association site and the Scout Hut site, and on the south west by Markeaton Street and the path which extends towards the A38 from the end of Markeaton Street. The land comprises three fields referred to during the course of the inquiry as Field A, the northern-most field, bounded by the A38 and Kedleston Road, Field B, the western-most field, bounded by the A38 and the path from the northern end of Markeaton Street, and Field C, the southern-most long field, which borders the allotments. It generally consists of areas of trees, grassland, hard standing and is crossed by a number of brooks and ditches associated with the Markeaton Brook system. (See Appendix 2 Plan 1 which shows the divisions of the site and the site access points all as discussed at the Inquiry). It is mostly owned by the University of Derby.
- 4.3 The site was, until its demolition in 1989, the site of the former Sturgess School and its playing fields. In December 1993, the University of Derby purchased the site from the County Council, as the then education authority.
- 4.4 The Council considered the application to be duly made and posted public notices of the application on site and published one in the Derby Evening Telegraph on 5 September 2008. The public consultation period lasted for just over six weeks and ended on 17 October 2008. During this period we received an objection from Eversheds solicitors, dated 16 October 2008, on behalf of the University of Derby. The applicant was given the opportunity to respond to the Council's objection and did so by letter dated 13 November 2008.
- 4.5 In order to assist the Council in coming to a decision on the status of the land, the Council appointed an independent barrister, Miss Lana Wood, to act as an Inspector and hold a public local inquiry into this matter.
- 4.6 The Council gave notice of the public local inquiry on 6 February 2010 with notices published in the Derby Evening Telegraph and posted on site. The public inquiry was held at Friar Gate Studios, Fox Street and ran for five days from Monday 15 March 2010 to Friday 19 March 2010 with two evening sessions. 38 witnesses gave evidence and more than 200 individuals and couple provided witness statements, on behalf of the applicant. There were two witnesses who gave evidence on behalf of the objector.

The Inspector has sent us her report on the application, dated 10 July 2010. The report sets out the evidence presented by the witnesses and summarises all other documentary evidence. As her report runs to 196 pages, we have extracted relevant sections from it to assist Members in reaching a decision (Appendix 4). A paper copy of the full report has been circulated to Members. The Inspector's report sets out the evidence presented by the witnesses and summarises all other documentary evidence. Her principal conclusions are found in paragraph 14 of the report with the finalised conclusions and recommendations in paragraph 15. They have been reproduced in full in appendices 4 and 6 along with the commentary on the legal tests relevant to this application. Her recommendations are set out below.

“(1) I recommend that the application should be refused in relation to Field B. The Applicant failed to show that Field B has been used as of right for the whole of the relevant period. Part of Field B was occupied by the former Sturgess School buildings at the beginning of the relevant period and until at least July 1989. There was little evidence that that part of Field B which was not occupied by the school buildings was used before the school buildings became derelict, other than to give access to the remainder of the land. Once the buildings became derelict people tended to avoid the area, and no-one claimed to have used the remainder of Field B whilst the buildings were in the course of demolition.

(2) I recommend that the Registration Authority should register Fields A and C as a new town green. There was a substantial amount of evidence to support the Applicant's case that Fields A and C had been used by the inhabitants of the West End, a neighbourhood within the locality of the City of Derby for lawful sports and pastimes for a period of 20 years ending in August 2007. I was satisfied that such use was use as of right.

(3) I recommend the boundaries of the area to be registered, dividing those areas from Field B should be, so far as Field A is concerned, the southern bank of Mackworth Brook, and, so far as Field C is concerned, the western bank of the drainage ditch between Mill Dam Pond and Mackworth Brook.”

- 4.7 Officers are satisfied that the Inspector has assessed the application properly and thoroughly. In accordance with the Inspector's recommendations, it is recommended that Members: refuse the application to register the whole of Sturgess Fields as a town green; refuse the application to register Field B at Sturgess Fields as a town green; but accept the application to register Fields A and C at Sturgess Fields as a town green; all as shown on Plans 1 & 2 in the appendix, and having an area of some 5.6 ha.

#### *Potential future management of the site*

- 4.8 As noted above, the site has been managed by the University for several years. Over that time the City Council has worked together with the University to undertake a number of very successful joint partnership events on the site, including, this summer, the Schools Bioblitz, run with the BBC.

- 4.9 Appendix 5 provides a brief note on some of the implications, for users and the landowner, of registering the site as a Town Green. As noted here, in addition to the rights local inhabitants could gain from the registration of the site as a Town Green, the University would be entitled to continue to use the land in the way it has since its acquisition. The site has features within it features of recognised biodiversity and arboricultural importance that need careful management and a wildlife management plan for the site has been produced on behalf of the university.
- 4.10 Officers have had informal discussions with the University about the implications of Registering the land as a Town Green. We agree that it would be important to balance these potentially competing demands on the site and to help maintain its quality, for all lawful site users. The University have therefore stated that they wish to work with representatives of the community, through the Darley Neighbourhood Board, to produce a management plan for the site. They suggest that this plan could include agreed conditions of use and definitions of access and show how the site would be beneficially enhanced for sports use and use by the wider community to continue to enjoy the ecology and wildlife on the site.
- 4.11 The commitment by the University to produce this community led management plan is very much welcomed and as such we have agreed that we will seek to assist them in the process of producing it, subject to the resources we have available. These points are reflected in the recommendations

## OTHER OPTIONS CONSIDERED

- 5.1 Not to accept the advice of the independent inspector and either not to register any of the site as a Town Green or to register the entire application site as a Town Green. Both these options were rejected as not being sound or legally defensible ways forward given the evidence presented to the Registration Authority.

This report has been approved by the following officers:

<b>Legal officer</b>	Mr S Teasdale
<b>For more in formation contact:</b>  <b>Background papers:</b>  <b>List of appendices:</b>	Name <b>Ray Brown, Senior Planning Officer, Tel - 01332 255024</b> E-mail - <a href="mailto:Ray.Brown@derby.gov.uk">Ray.Brown@derby.gov.uk</a>  <b>Application to register land at Sturgess Fields as a town or village green and supporting evidence. All evidence associated with the public local inquiry</b>  <b>Appendix 1: Implications</b> <b>Appendix 2: Plan 1 showing the divisions of the site and the site access points as discussed at the Inquiry</b> <b>Appendix 3: Plan 2: Land proposed to be registered as a Town Green at Sturgess Fields</b> <b>Appendix 4: Extracts from the Inspector's Report</b> <b>Appendix 5: Future Use of the Sturgess Town Green site</b> <b>Appendix 6: Full inspector's report. Paper copy for Members only. The report is also available on CMIS</b>

<b>IMPLICATIONS</b>
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**Financial**

1. The costs associated with the Inquiry and the Inspector's report have been met within existing budgets.

**Legal**

- 2.1 The Council has carried out its duty to determine the application in line with the Commons Act 2006.
- 2.2 The full legal implications are set out in the Inspector's report which is attached.

**Personnel**

3. None arising from this report.

**Equalities Impact**

4. None arising from this report.

**Health and Safety**

5. None arising from this report.

**Carbon Commitment**

6. None arising from this report.

**Value for Money**

7. None arising from this report.

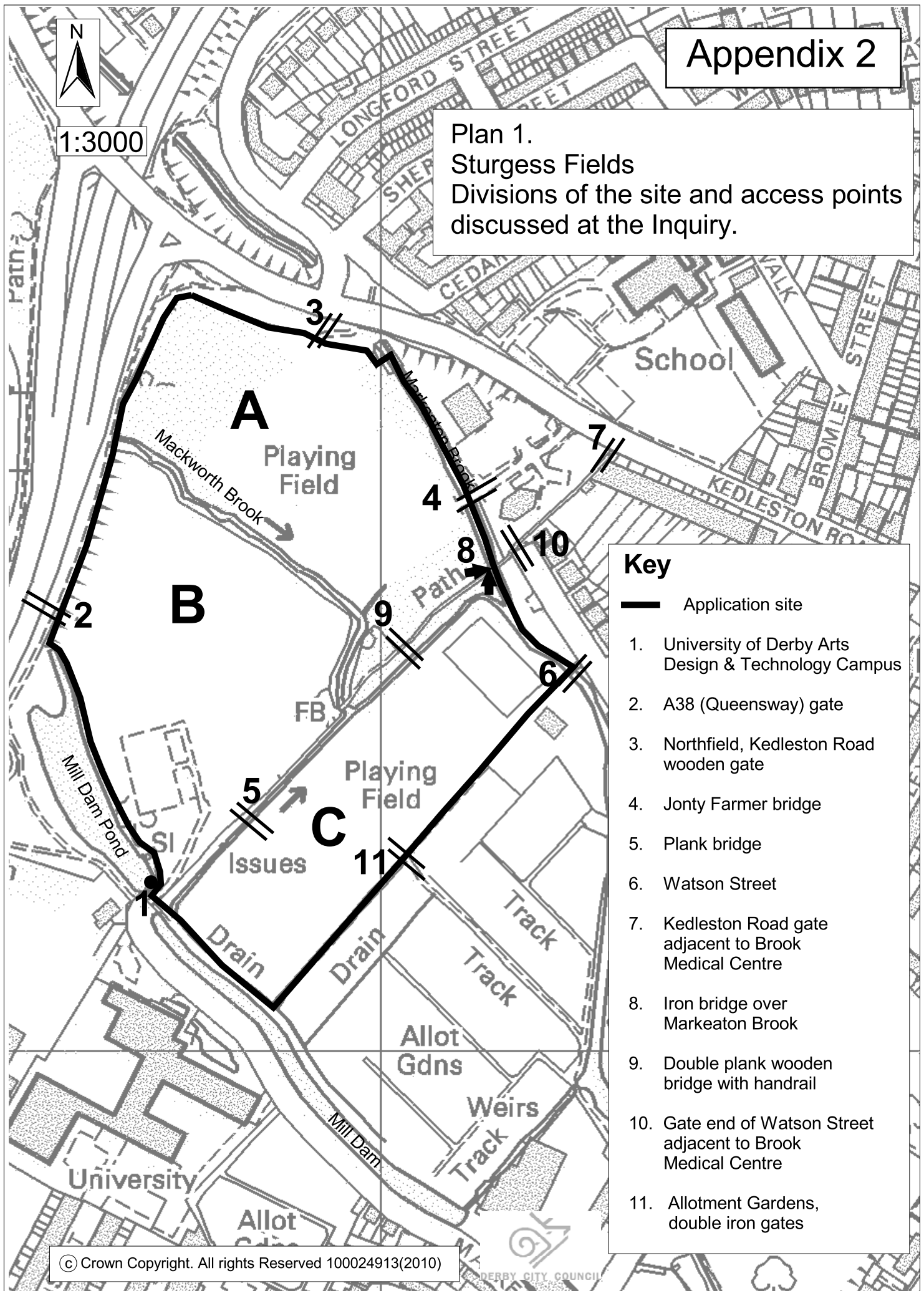
**Corporate objectives and priorities for change**

8. The process adopted furthers the corporate objective "To deliver value for money across all services."



# Appendix 2

Plan 1.  
Sturgess Fields  
Divisions of the site and access points  
discussed at the Inquiry.



## Plan 2.

[illegible]



**An Application to Register Land at Sturgess Fields, Derby as a Town or Village Green**

**REPORT OF THE INSPECTOR MISS LANA WOOD**

**(Extracts and numbering by Commons Registration Officer)**

**The Application**

- 1.1 The application was made on prescribed Form 44, as required by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, and was supported by a statutory declaration declared by Mr Browne on 9<sup>th</sup> January 2008. The application was stated to be made under section 15(3) of the Commons Act 2006, and the Applicant stated that he considered that use as of right had ended in August 2007. The application land was described as located between Markeaton Rec and the A38 ring road in West Derby and shown outlined in red on the map attached to the application. The locality or neighbourhood within a locality in respect of which the application was made was stated to be polling districts DL2 and DL3 of Darley Ward, outlined in yellow on the map attached to the application. The justification for the application was stated to be indulgence by a significant number of inhabitants of the locality as of right in lawful sports and pastimes for a period of at least 20 years under section 15(3) of the Commons Act 2006, as witnessed by the statements enclosed with the application. The Applicant stated that he believed that Derby University was an owner, lessee, tenant or occupier of the land. He included, as supporting information, the two maps, and 9 witness statements.

**The Law**

- 2.1 The Commons Registration Act 1965 provided for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31<sup>st</sup> July 1970 for the registration of greens. By s. 1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be...a town or village green unless it is so registered".
- 2.2 The concept that land could be registered as a new town or village green if it had been used as of right by the inhabitants of any locality for lawful sports and pastimes for more than 20 years was introduced by sections 13 and 22 of the Commons Registration Act 1965 which provided for the amendment of the register where any land could be shown to have become a town or village green after the end of the original registration period. The courts placed a narrow construction on the words "inhabitants of the locality", and by section 98 of the Countryside and Rights of Way Act 2000, this aspect of the requirements for registration was widened, so that it was sufficient if user was by "a significant number of the inhabitants of any locality or of any neighbourhood within a locality". The amended provisions were repealed and replaced by section 15 of the Commons Act 2006, which was brought into force on 6<sup>th</sup> April 2007 by the Commons Act (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007<sup>1</sup>.
- 2.3 The present application was made under section 15 of the Commons Act 2006, falls to be determined under that section. Section 15 provides (as relevant):

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<sup>1</sup> SI 456/2007

“(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(3) 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;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).”

- 2.4 Many of the words and phrases used in section 15 of the Commons Act 2006 are identical to the words and phrases used in section 22 of the Commons Registration Act 1965. The decided cases on what those words meant in the 1965 Act remain authoritative when considering the meaning of the same words in the 2006 Act.

***a significant number...***

- 2.5 “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers<sup>2</sup>. It is not necessary that the users come predominantly from the claimed locality or neighbourhood: provided a significant number of the inhabitants of the claimed locality or neighbourhood are among the users, it matters not that many or even most come from elsewhere<sup>3</sup>. The requirement is that the users include a significant number of inhabitants of the claimed locality or neighbourhood, so as to establish a clear link between the locality or neighbourhood and the proposed town or village green, even if such people do not comprise most of the users.<sup>4</sup>

***...of the inhabitants of any locality...***

- 2.6 A “locality” cannot be created by drawing a line on a map<sup>5</sup>. A “locality” must be some division of the county known to the law, such as a borough, parish or manor<sup>6</sup>. An ecclesiastical parish can be a “locality”<sup>7</sup> but it is doubtful whether an electoral ward can be a “locality”<sup>8</sup>.

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

- 2.7 The clear intention of Parliament in introducing these words was to relax the requirements necessary and to weaken links with the old rules relating to common law village greens. In a neighbourhood case, the technical difficulties in the word “locality” that have arisen in relation to common law greens should not be imported. As a result, where the locality relied upon is, for instance, a town, it can be a relevant locality even if it is not (or is no longer) a recognisable local government unit.<sup>9</sup> A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood<sup>10</sup>. A neighbourhood need not lie wholly within a single locality<sup>11</sup>: the claimed neighbourhood

<sup>2</sup> R (McAlpine) v Staffordshire CC [2002] EWHC 76 (Admin) at para. 77

<sup>3</sup> Oxfordshire and Buckinghamshire Mental Health Trust v. Oxford City Council [2010] EWCH 2010, paragraph 71.

<sup>4</sup> Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 69.

<sup>5</sup> R (Cheltenham Builders Ltd) v South Glos, DC [2004] 1 EGLR 85 at paras 41-48

<sup>6</sup> Ministry of Defence v Wiltshire CC [1995] 4 All ER 931 at p 937b-e, R (Cheltenham Builders Ltd) v South Glos. DC at paras 72-84 and see R (Laing Homes Ltd) v Buckinghamshire CC [2003] 3 EGLR 69 at para. 133

<sup>7</sup> R (Laing Homes) Ltd v Buckinghamshire CC

<sup>8</sup> R (Laing Homes) Ltd v Buckinghamshire CC

<sup>9</sup> Leeds Group PLC v. Leeds City Council [2010] EWHC 810, paragraph 89.

<sup>10</sup> R (McAlpine) v Staffordshire CC

<sup>11</sup> Oxfordshire County Council v. Oxford City Council (“the Trap Grounds case”) [2006] UKHL 25, para. 27 disapproving R (Cheltenham Builders Ltd) v South Glos. CC at para. 88

can fall within two or more localities. Further an Applicant may rely on two or more qualifying neighbourhoods within a locality or localities<sup>12</sup>.

- 2.8 It was said in *R (Cheltenham Builders Ltd) v South Gloucestershire County Council*<sup>13</sup> that a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness<sup>14</sup>:

“a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a locality... I do not accept the Defendant’s submission that a neighbourhood is any area of land that an Applicant for registration chooses to delineate upon a plan. The registration authority have to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise, the word “neighbourhood” would be stripped of any real meaning. If parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so.”

- 2.9 However, these words have to be read in the light of the fact that “neighbourhood” is an ordinary English word, defined in the dictionary as “a district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity” and of Lord Hoffman’s comment in *Oxfordshire* that the word “neighbourhood” was deliberately imprecise<sup>15</sup>. There are various factors to be taken into account in determining whether there is a neighbourhood, including whether the area has community facilities and shops, whether estate agents sell properties by reference to the area, the names of the street, whether the area contains connecting streets, the style and date of the housing within the area<sup>16</sup>. The boundaries of a neighbourhood are often not logical, and it is not necessary to look too hard for reasons for the boundaries.<sup>17</sup>
- 2.10 In my judgment there must be a reasonable spread of users throughout the claimed locality (in a locality case) or neighbourhood (in a neighbourhood case), so that it can sensibly be said that the users come from the claimed locality or neighbourhood as a whole. In a neighbourhood case, it is not necessary for the locality within which the claimed neighbourhood falls itself to be small enough to accommodate a proper spread of qualifying users: it is sufficient if the neighbourhood is small enough to accommodate such a spread.<sup>18</sup>

**...have indulged as of right...**

- 2.11 Use of land “as of right” means use that is not by force, nor stealth nor with the licence of the owner (“*nec vi, nec clam, nec precario*”) <sup>19</sup>. Whether use is of right does not turn on the subjective beliefs of users<sup>20</sup>. User “as of right” must be use as a trespasser and not use pursuant to a legal right<sup>21</sup>. The requirement that use should not be by force includes a requirement that use is not contentious, that is that the use is not one which continues despite the land owner’s protests and attempts during the relevant period to interrupt it<sup>22</sup>.
- 2.12 Where the owner has erected notices on the land, the fundamental question is what the notice conveyed to the user: if the user knew or ought to have known that the owner was

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<sup>12</sup> Leeds Group PLC, paragraph 96.

<sup>13</sup> [2004] 1 EGLR 85

<sup>14</sup> at para 85

<sup>15</sup> Leeds Group PLC, paragraph 103

<sup>16</sup> Leeds Group PLC, paragraph 104

<sup>17</sup> Leeds Group PLC, paragraph 105

<sup>18</sup> Leeds Group PLC, paragraph 90

<sup>19</sup> *R (on the application of Lewis) v. Redcar and Cleveland BC* [2010] UKSC 11, para 20.

<sup>20</sup> *R v Oxfordshire CC ex p Sunningwell PC*

<sup>21</sup> *R (Beresford) v Sunderland CC* paras 3, 9 & 30

<sup>22</sup> *Lewis*, para 89-91

objecting to and contesting his use of the land, the notice is effective to render the use contentious. The notice should be read in context, and in a common sense, rather than a legalistic way<sup>23</sup>. If it is suggested that a landowner should have done something more than erect a notice, the decision maker should consider whether anything more would have been proportionate to the use in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user<sup>24</sup>.

- 2.13 In *R (on the application of Lewis) v Redcar & Cleveland Borough Council*<sup>25</sup> the Supreme Court held that, where the land had been used concurrently by both the landowner and by local people during the qualifying period, the apparent deference of the recreational users to the landowner's own use of the land did not preclude their use being use as of right. However where there have been successive periods in the qualifying period during which recreational users are first excluded and then tolerated as the owner decides, for instance a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals are indoors for the worst of the winter, the use over the qualifying period as a whole is not use as of right<sup>26</sup>.

**...in lawful sports and pastimes...**

- 2.14 The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play<sup>27</sup>. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way<sup>28</sup>.

**...on the land...**

- 2.15 "Land" is defined as including land covered by water<sup>29</sup>. In *Oxfordshire County Council v Oxford City Council*<sup>30</sup> it was held that land, substantial parts of which were overgrown and inaccessible for recreation, could be registered as a new green, provided that the land could be regarded as having been used as a whole for recreation.

**...for a period of at least 20 years and they ceased to do so before the time of the application but after the commencement of this section; and the application is made within the period of two years beginning with the cessation.**

- 2.16 The House of Lords held in *Oxfordshire* that the relevant 20 year period under section 22(1)(a) of the Commons Registration Act 1965 was the 20 years immediately before the date of the application (rather than the date of registration, as the Court of Appeal had held). The 2006 Act sets out this aspect of the test clearly in the statute: in order to satisfy the criteria contained in section 15(3), the qualifying use must have ceased before the application was made but after 6<sup>th</sup> April 2006, and the application must have been made within two years of that date.

### **Procedural issues**

- 3.1 A number of important procedural issues have been decided by the courts:

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<sup>23</sup> Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 22.

<sup>24</sup> Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 22.

<sup>25</sup> [2010] UKSC 11 delivered on 3<sup>rd</sup> March 2010

<sup>26</sup> Per Lord Walker at paragraph 27

<sup>27</sup> *R v Oxfordshire CC ex p. Sunningwell PC* [2000] 1 AC 335 at pp 356F-357E

<sup>28</sup> *Oxfordshire CC v Oxford CC* [2004] Ch 253 at paras 96-105

<sup>29</sup> Commons Registration Act 1965, section 22; Commons Act 2006, section 61.

<sup>30</sup> [2006] UKHL 25, [2006] 2 AC 674, at para 44.

- **Burden and Standard of Proof.** The onus of proof lies on the Applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be “properly and strictly proved”<sup>31</sup>. However, in my view, this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.
- **Defects in application form.** The House of Lords held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4 of Form 30, provided that there is no procedural unfairness to the Objectors. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green
- **Withdrawal of application.** The Court of Appeal held in the *Oxfordshire* case that the Applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the Applicant’s wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view.
- There is no power to award costs.
- **Applying the law to the facts**

**a significant number of the inhabitants of any locality or of any neighbourhood within a locality...**

- 4.1 I am satisfied that the West End is a neighbourhood within the locality of the City of Derby and that a significant number of the inhabitants of the West End have used the application land. The number of local inhabitants using the land has been sufficient to alert the landowner to the fact that his land was in general use by local inhabitants, rather than occasional use by individual trespassers.

***...have indulged as of right ...***

- 4.2 There was no evidence at all to suggest that Derbyshire County Council objected to the use being made of the application land by local people between the beginning of the relevant period and the sale of the land to the University in December 1993. I am satisfied therefore that for the first 6 years or so of the relevant period, use of the application land was as of right.
- 4.3 I am satisfied that as a result of the erection of the new fencing, gates and signs by the University in August 2007, use of the land ceased to be use as of right. I therefore turn to consider whether use between December 1993 and August 2007 was as of right, as required by the statutory test.
- 4.4 I accept Dr Choongh’s submission that the owner may destroy the peaceable nature of the local inhabitants’ use of the land by showing that he contested their use of the land. Lord Roger’s remarks on the question of forcible use in *Redcar*<sup>32</sup> show that use is not only *vi* when it is gained by employing some kind of physical force against the owner, but also if the user had done something which he was not entitled to do after the owner had told him not to do it<sup>33</sup>. If use continues despite the landowner’s protests and attempts to interrupt it, it is treated as being *vi*, and so does not give rise to any right against the

<sup>31</sup> *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *R (Beresford) v Sunderland* at para. 2

<sup>32</sup> Lord Roger agreed with Lord Walker and gave his own reasons for his decision. Lords Hope and Kerr agreed with everyone else’s reasons, as well as giving reasons of their own. Lord Roger’s reasons were therefore concurred in by 3 out of 5 of the Supreme Court judges.

<sup>33</sup> *Redcar* at paragraph 88-91.

landowner. A landowner is entitled by continuous and unmistakeable protests to destroy the peaceable character of the user, without actual interruption, and so to annul one of the conditions upon which the presumption of right is raised. Use is only peaceable (*nec vi*), if it is neither violent nor contentious. The unifying element in the three vitiating circumstances: *vi*, *clam* and *precario*, is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

- 4.5 Dr Choongh also sought to persuade me that use of the application land was impliedly permissive, by reason of the fact that the University regulated use of the land. I accept Dr Choongh's submission that use as of right may be disproved by showing that the owner of the land regulated access to the land on occasion during the relevant period. The effect of such regulation was characterised as showing implied permission in *Beresford*, because that was the point which was being argued, but is considered more generally as part of the question whether use was as of right in *Redcar*. I accept Dr Choongh's submission that if the University had closed the land to all-comers on occasion during the relevant period, that would suffice: in *Beresford* Lord Walker characterised such overt conduct as giving rise to an implied or inferred permission, because it is an assertion of title by the landowner which has an impact on members of the public and demonstrates that their access to the land, when they do have access, depends upon the landowner's permission<sup>34</sup>. Lord Bingham in *Beresford* stated that a licence may be implied where a landowner so conducts himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission, for example by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days. The landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude, and so permits such use. In *Redcar* Lord Walker explained a situation where there have been successive periods when recreational users are first excluded and then tolerated as the owner decides as destroying the necessary "as of right" character of the user<sup>35</sup>.
- 4.6 On the facts of this case I am not satisfied that the University did close the whole of the land to the public (or endeavour to do so) at any time after its acquisition of the land in December 1993 and before August 2007. Although I accept that the July 1995 letters do suggest that the University (in the person of Mr Norman)'s future intention was to secure the boundaries of the land and take control of it, that intention did not come to fruition. The boundaries of the land were not secured until August 2007.
- 4.7 Had I been satisfied that it was possible to close the land and that it had been closed overnight or at Christmas during the relevant period, I would have considered that this defeated the Applicant's claim that use had been as of right, but on the evidence I was not so satisfied. Before July –August 1995 when the gate and fence were erected at Access 6, there was open access at that point. By the time the gate and fence were erected at Access 6, the trench had been dug across the old school drive at Access 1, and a section of the fencing to the north of the gate had been removed. The fencing was not replaced until 2006, a long time after the gate at Access 6 had been removed. In my judgment it was not physically possible at any time before August 2007 to close the land. Further, and in any event, I was not satisfied that the University's evidence that it did lock the gates before August 2007 was reliable.
- 4.8 I turn next to consider whether any of the actions of the University short of closure of the whole of the land were sufficient to put the use of the land by local residents in contention. It is not necessary for a landowner to take all possible steps to prevent access to his land in order to cross the threshold of this test: he is not required to turn his land into Fort

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<sup>34</sup> *Beresford* at paragraph 83.

<sup>35</sup> At para 27

Knox in order to make it clear that use of his land by local inhabitants is contentious. Rather he must take reasonable steps, having regard to the nature of the land, to draw to the users' attention the fact that he does not wish them to use his land. Such steps might involve physically impeding access by securing the fencing and blocking access points, erecting notices, leafleting the local neighbourhood and/or statements in the local press.

*The changes in the available accesses*

- 4.9 During the period from the beginning of the relevant period until December 1993, what would have appeared to be uncontested access was available to the land at the following points: Access 1, Access 8, and Access 3. There was no evidence that any of these Accesses were blocked at this time.
- 4.10 During the period after the University purchased the land and before 2007, what would have appeared to be uncontested access was available to the land at the following points: Access 1, Access 3, Access 8 (until 1995), Access 6 (from 1993, and with the exception of a period of 5 weeks in 1995).
- 4.11 At all times during the relevant period, although other accesses may have been locked from time to time, access was freely available at these points. There was also no physical barrier at any time to obtaining access by fording or using stepping stones over Markeaton Brook. In my judgment (with the possible exception of the 1995 erection of fencing at gates at Access 6, which I deal with in detail below), the changes that the University made to the other accesses to this land would not have been sufficient to alert users to the fact that their use was contentious or to render their continuing user impliedly permissive. The changes to these accesses were not nearly sufficient to amount to continuous and unmistakable protests against the local inhabitants' use of the land so as to destroy the peaceable character of their user.
- 4.12 I am satisfied that a reasonable owner would not have considered that the installation and locking of the vehicular gate at Access 3 in about 1993 or 1994 whilst a gap sufficient to accommodate a pedestrian or a stile next to it provided pedestrian access to the land would be sufficient to communicate that access at that point was contentious. Access 8 was blocked off during the relevant period, but a reasonable person would have understood that it was blocked because the bridge over Markeaton Brook at that point had become unsafe, rather than because the owner was seeking to control use of his land. I do not think the fact that the University installed a bridge and vehicular gates at Access 4, which were generally kept locked, communicated a desire on the part of the University to exclude people from the land: the gate was a vehicular gate, and like the gates at Access 1, one would have expected a vehicular gate to be kept locked, to ensure that travellers' and other unauthorised vehicles could not gain access to the land.
- 4.13 The 1995 erection of fencing and a locked gate at Access 6 would, in my judgment, had the fencing and gate been maintained, have been a sufficiently positive and assertive step by the landowner to put use of the land into contention. A reasonable landowner would conclude that the majority of users would, as a result, be aware that the University objected to their use of the application land, even though the other accesses to the land were not secured at the same time. I am supported in this view by the evidence of the actual reaction of local residents: their reaction was one of outrage and protest.
- 4.14 A number of objections were raised to the gate and fence, including a claim that there was a right of way through the application land, and a claim that the gate and fence contravened planning legislation because of its height. Had the University maintained the gate and fence in the face of these protests then, in my opinion, then any continuing use of the land after that time would have appeared to the University to have been use by force, in disregard of the University's known opposition to the use of the land being made by local people, rather than use as of right.

- 4.15 However, the University decided to in the first instance to unlock, and then to take down the gate and fence, and had taken it down within a matter of weeks of its erection. It did not apply for planning permission to re-erect the fencing and gate, and nor did it erect an alternative at a lower height. It did not seek to fence in the alleged footpath, so as to prevent access to the remainder of the land. In my judgment the analogy that Mr Petchey drew with the *Cheltenham Builders* case was apposite: it seems to me that this would appeared to the local residents effectively to be an acceptance by the University that it should not have erected the gate and fence at all. The landowner would have appreciated that local users would have felt vindicated in their belief that they had a right to go onto the application land. A landowner who wishes to stop the acquisition of prescriptive rights over his land must not acquiesce and suffer in silence.<sup>36</sup> In these circumstances a reasonably alert owner would have understood that the user by the local inhabitants “was the assertion of a right, and would mature into an established right unless the owner took action to stop it”<sup>37</sup>.
- 4.16 In my judgment therefore, although the gate and fence prevented access to the application land via Access 6 for about 5 weeks in 1995, use of the land as of right was not interrupted by the erection of the gate and fence.
- 4.17 Looking at the situation as a whole from the point of view of the landowner, in my judgment, a reasonably alert owner of the land could not have failed to recognise that the user by local inhabitants was the assertion of a right which would mature into an established right unless the owner took action to stop it. It may well be correct that the University chose not to continue to challenge the local inhabitants’ assertion of a right for political reasons, because it wanted to avoid conflict with the local people, rather than because they were in fact content to have local inhabitants using the land for recreation, but nevertheless it is clear in my judgment that the University did choose not to challenge the use by local inhabitants.

*The carrying out of various works on parts of the land*

- 4.18 Dr Choongh sought to persuade me that it could be implied that the owner gave the public permission to use the land because it regulated the public’s use of the land by excluding them from various parts of the land whilst works were being carried out to those parts. I do not accept Dr Choongh’s submission that all that is required in order to negative use as of right is a temporary exclusion from any part of the land. I am not satisfied, as a matter of law, that such a submission survives the decision of the Supreme Court in *Redcar*: Lord Walker<sup>38</sup> draws a distinction between concurrent competing uses of land, and successive periods where users are first excluded and then tolerated as the owner decides, and says that the latter situation is the explanation for Lord Hoffman’s dicta about *Laing Homes in Oxfordshire*<sup>39</sup>. Lord Hope<sup>40</sup> deals with the question of rights post-registration on the assumption that registration is possible where use for recreation has co-existed with the owner’s use of the land and states that in his opinion “the question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist”<sup>41</sup>. Lord Brown similarly viewed the effect of registration as being “to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights, but not at the expense of the owner’s own continuing entitlement to use the land as he has been doing”<sup>42</sup> and said that as Lords Hope, Walker and Kerr

<sup>36</sup> Per Lord Walker at para 77 of *Beresford*

<sup>37</sup> Per Lord Walker at para 36 of *Redcar*

<sup>38</sup> Lord Walker gave the leading opinion, and all the other Supreme Court judges agreed with him.

<sup>39</sup> *Redcar*, paragraph 26 and 27.

<sup>40</sup> Lord Hope agreed with Lord Walker and gave his own reasons for his decision. Lord Brown agreed with Lords Walker, Hope and Kerr. Lords Hope and Kerr agreed with everyone else.

<sup>41</sup> *Redcar*, paragraph 72, 74 and 75.

<sup>42</sup> *Redcar*, paragraph 100.



made plain, “the focus must be on the way the land has been used by the locals, and, above all, on the quality of that user”<sup>43</sup>.

4.19 I was satisfied that an area around the school buildings would have been fenced off during the school’s demolition in 1989, that a trench was dug across the former school drive in 1995, that part of Field A in the vicinity of Access 4 would have been affected by the works of construction for the bridge at Access 4 in about 1999, that the digging of the trench for the network cables in 2000 would have necessitated some localised fencing around the area where the trench was being dug, and that the hardstanding area in Field B was used as a construction compound in connection with the University’s Markeaton Street development between late 2005 and early 2007.

4.20 However, I do not consider that the restriction of access to parts of the land where works were being carried out is the type of conduct from which permission to use the land can be implied. In my judgment, such temporary exclusions from parts of the land for reasons which would be obvious to a user (the danger which would be posed to him if works were not fenced off and the need for security for dangerous and valuable construction equipment), fall within the category of activities in respect of which one might expect give and take between owner and user, and do not show that the owner of the land was regulating its use, so as to render use at other times permissive. The obvious purpose of the digging of the trench was to alleviate flooding. Although the University expected and desired to achieve by digging the trench a side-benefit that it would be more difficult for local inhabitants to access the land, this intention was not communicated to users, and in my judgment would not have been objectively obvious.

***...in lawful sports and pastimes ...***

4.21 The land was used for lawful sports and pastimes including walking, dog walking, children’s play, family and group ball games, nature observation, playing and fishing in the brooks, kite flying, sledging, cycling (including BMX riding in the woods), picnicking, relaxing, some overnight camping and blackberry and raspberry picking. The tennis courts on Field C were used for tennis, learning to bicycle, and playing with remote control cars.

***...on the land...***

4.22 The application land has been sufficiently clearly defined to constitute “land”.

***...for a period of at least 20 years and they ceased to do so before the time of the application but after the commencement of this section; and the application is made within the period of two years beginning with the cessation.***

4.23 The date on which it is claimed that qualifying use of the land ceased in this case is August 2007. This date is a date after the commencement of section 15 of the 2006 Act. The application was made within 2 years of this date. The relevant 20 year period in relation to the application is therefore August 1987 to August 2007.

4.24 I was satisfied that the whole of Field A and the whole of Field C have been used by local residents for lawful sports and pastimes throughout the whole of the relevant period.

4.25 I was not satisfied that the whole of Field B had been used for lawful sports and pastimes throughout the whole of the relevant period. I was satisfied that once the school buildings had been demolished (1989), and after the site began to grow over, Field B began to be used by local inhabitants for informal recreation, although my impression was that it was less well used than Fields A and B, with much of the use being right of way-type user rather than village green-type user. However, there was scant evidence that that part of Field B which was not occupied by the school buildings was used for lawful sports and pastimes at the beginning of the relevant period when the school buildings were unused

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<sup>43</sup> Redcar, paragraph 107.

but before they became derelict, and I was not satisfied that there was any use of Field B for lawful sports and pastimes whilst the demolition of the school buildings was in progress.

- 4.26 I do not consider that Mr Petchey's submission that the presence of the school buildings fell into the category of something in relation to which there could be give and take, was correct. It is clear in my judgment that the presence of buildings on a site prevents any use of the land for lawful sports and pastimes for the period that they are present. There is no question during that time of any give on the part of the landowner.
- 4.27 Similarly, I do not accept Mr Petchey's submission, based on *Oxfordshire*, that I should draw an analogy between the fact that in *Oxfordshire* only 25% of the land was accessible, but the whole was found to have been used, and the fact that in the instant case, the building was present on the site for 2 years out of 20 (10% of the time), and therefore it could be said that the site had been used for the whole of the period. Each element of the statutory test has to be properly and strictly proved, and the test requires 20 years' use. 18 years' use is simply insufficient.

### **Conclusion and Recommendation**

- 5.1 I therefore conclude, in relation to Field B, that the Applicant has failed to satisfy the statutory test, because he has failed to show 20 years user of Field B for lawful sports and pastimes.
- 5.2 The statutory test is satisfied in relation to Fields A and C.
- 5.3 I recommend that the Registration Authority should accede to the application in part and should register Fields A and C as a town green. I recommend the boundaries of the area to be registered dividing those areas from Field B should be, so far as Field A is concerned, the southern bank of Mackworth Brook, and, so far as Field C is concerned, the western bank of the drainage ditch between Mill Dam Pond and Mackworth Brook.
- 5.4 The Registration Authority is required by Regulation 9 of the 2007 Regulations to give written notice of its determination to the Applicant, to every person whose address is known and who objected to the application and to every concerned authority and, where the Registration Authority has granted the application, details of the registration, and where it has rejected the application, the reasons for its decision. I recommend that the reasons are stated to be "the reasons set out in the Inspector's Report dated 10<sup>th</sup> July 2010."

**Future Potential Use of the Sturges Fields Town Green site**

- 1.1 As noted in the report, in registering this site as a Town Green, inhabitants of the locality or neighbourhood in which the green is situated, would gain certain rights to engage in any “lawful sports and pastimes” on the green.
- 1.2 These might include formal and structured sports such as organised team games or pastimes including children’s play, walking with or without dogs (although not including “walking of such a character as would give rise to a presumption of dedication as a public right way”); family and group ball games, nature observation, playing in the brooks, kite flying, sledging, cycling, picnicking, relaxing,. This is not a definitive or inclusive list and a range of other activities could come under this category.
- 1.3 The limitation of “lawful” activities as Defra notes, in their advice note on the management of town and village greens, 2010, would particularly be limited by Section 29 the Commons Act 1876 and Section 12 of the Inclosure Act 1857. The note suggests that activities which would not be allowed could include” wilfully laying” rubbish on the green, digging of soil or generally interrupting the use or enjoyment of the green as a place of exercise or recreation.
- 1.4 As the inspector noted in a recent Supreme Court judgement ( R (on the application of Lewis) v Redcar & Cleveland Borough Council <sup>1</sup>) it was held that, where the land had been used concurrently by both the landowner and by local people during the qualifying period, the apparent deference of the recreational users to the landowner’s own use of the land, did not preclude their use being use as of right. She concluded that this was what happened in this case. Thus the University would continue to have certain rights to continue to use the land in the way it had done since they had taken over the site.

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<sup>1</sup> [2010] UKSC 11 delivered on 3<sup>rd</sup> March 2010



<b>Name</b>	<b>Address(es)<sup>1</sup></b>	<b>Period of use</b>	<b>Use / <i>Other relevant evidence</i></b>
J Adkin	81 Cedar Street 56 Kedleston Street 7 Nun Street	1970s-2010	Playing as a child, walking and playing with own children (after 1995), blackberry picking, dog walking, shortcut. Son: cycling.
U Allanson	67 Sherwin Street	1982-2010	Golf practice, dog walking (1987-1999), playing with grandchildren (1995-). Son: playing football with his friends (1989-) and playing with own son.
R Anderson	1 Broadway	2000-2004	Dog walking, playing with children, picnicking, bike riding, fishing in the streams. Family: same.
N Arlott	10 Quarn Gardens	1989-2008	For exercise. Family: same.
P Arlott	9 Elms Street 11 East Avenue 10 Quarn Gardens	2000-2008	Dog walking, recreation. Family: recreation.
R Arlott	51 Whitecross Gardens	2000-2008	Dog walking. Family: same.
B Armstrong	8 Woodland Road	1978-2010	Dog walking. Sister and family: dog walking for 10 years.
R Armstrong	8 Woodland Road	1978-2010	Dog walking, kite flying, playing with children and grandchildren, cycling. Family: sports, picnics.
R Atkinson	4 Walter Street	2002-2008	Cycling. Family: same.
N Atterbury	33 Sherwin Street 185 Watson Street	1980-2010	Dog walking (1995-), playing with son (b.1996) and niece and nephew. Son: playing with friends: football and BMXing, den building, tree climbing and playing with a boomerang.
W Atterbury	185 Watson Street	1986-2008	Dog walking, berry picking and wildlife watching. Also used land 1960-1965 with school. Family: dog walking.
A Backler	10 Walter Street	1984-2010	Dog walking, exercise, bird and nature watching. Playing with children: fishing and sledging. Blackberry, raspberry and mushroom picking. Family: same.
A Bannigan	54 Riddings Street 15 Walter Street	2005-2008	Jogging, walking, picnicking, games, creative writing, Easter egg hunts, circus skills.

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<sup>1</sup> When using the land

	22 Cowley Street		
S Barker	25 Sherwin Street	2006-2010	Dog walking and training. <i>Fence at access 3 went up in April/May 2007.</i>
D Barnes	89 Kedleston Road	2000-2008	Walking, fruit picking. Family: same.
F Barnes	89 Kedleston Road	2000-2008	Walking, jogging, blackberrying. Family: blackberrying and walking.
S Barnes	82 Watson Street	Not specified	Painting, use with family. Son and grandchildren playing: exploring, climbing trees, fishing with nets, picnicking, looking for insects and butterflies, kite flying, blackberrying, collecting conkers.
W Barnes	82 Watson Street	1967-2010	Games with own family, now with grandchildren, blackberrying, fish watching, bird watching.
K Beard	11 Cowley Street	2005-2007	Walking, jogging, exercise.
M Bennett	85 Sherwin Street 24 Sherwin Street	1999-2008	Recreation, dog walking, bird watching, photography, fruit picking.
E Bills	44 Leyland Street	1971-2008	Hiking, bird watching, dog walking. Family: same.
R Bird	201 Watson Street	1982-2010	Dog walking, photography. Family: same.
A Bodill	7 Merchant Street	2006-2008	Recreation, walking, sport, meeting place, pet walking, picnics. Family: recreation.
N Bregartner	70 Cedar Street	1985-2007	Walking around and through. <i>Notice at access 3 for a short time a few years ago.</i>
J Brett	37 Longford Street 49 Sherwin Street	1970s-2000	Recreation with friends/family including football, dog walking, tennis, and short cut to allotment.
D Bruce	54 Wheeldon Avenue 8 Greenwich Drive North	1993 and 1997-2010	Playing with children in the woods, tree climbing and bike riding. Shortcut to Scout Hut, blackberrying, walking, taking visitors with dogs. Children: used land with Cubs and Scouts. <i>Used access 2 until 2003. Prevented from using land when heavy rain caused flooding.</i>
R Bull	92 Watson Street	1968-2010	Walks, exercise, nature watch, dog walking, ball games, with grandchildren. Family: walks, collecting fruit, nature study.
J Burton	24 Broadway 37 Walter Street	1995-2010	Playing with family: Football, rugby, cricket. In earlier years practising walking, riding bikes, feeding ducks, blackberrying, playing hide and seek, tricycling, go-karting. Picnics, walking. Children now play there by themselves.
P Capewell	82 Sherwin Street	1975-2008	Taking children for games, picnicking, football, fishing with nets, watching school football team. Family: football and meeting friends.

S Chester	25 Redshaw Street	1998-2008	Walking, picking blackberries and raspberries, collecting leaves for pet rabbit. Family: short walks.
V Churchhouse	2 Broadway	1997-1998; 2005-2007	Exercise and enjoyment: family walks, playing in the stream, BMX biking, children's birthday party activities, picking blackberries and raspberries. Family: same.
B Clee	73 Longford Road	1955-2004	Observing wildlife, dog walking, taking children to play and see trout in stream. Family: same.
D S Cockayne	61 Cedar Street	1996-2010	Taking grandchildren to fly kites and remote controlled toys, walking through with husband, chatting to friends who they have bumped into. <i>No access off Kedleston Road from 2007.</i>
J Cockayne	61 Cedar Street	1996-2010	Walking, taking grandson to learn to ride bike, fly kite, search for tiddlers in the brook and kick a football around. Practising golf. Family: walking and having fun. <i>Could not get access from Kedleston Road from when it was fenced off in 2007.</i>
E Cook	8 Tivoli Gardens	1967-2007	Picking blackberries, walking dogs, shortcut to the park. Wife walked other people's dogs between 1997-2007, grandchildren have walked dogs with wife and also picked blackberries. <i>For a short while, 10-11 years ago (?), a gate with a chain/padlock was put up for a short time near the Scout Hut but it did not stop me getting onto the fields.</i>
N Cooper	157 Watson Street 23 West Avenue	1982-1989; 1990-2008	As a play area when a child. Now, walking/jogging and taking an interest in local area.
P Cooper	48 Redshaw Street	1980-2008	Using area with children with three nieces when they were visiting their grandmother, who lives off Ashbourne Road and with grandchildren, walking and blackberry picking, observing wildlife. Children: playing ball games, cycling.
R Cooper	14 Cowley Street 48 Redshaw Street	1990-2008	Used with Watson Street Scout Group 1994 to play hide and seek and other games,. Also did brook clean-up with Scouts (1997). Used with Markeaton Primary School (1990-1996) for wildlife study and boat-making science lesson, which took place when the wooden bridge was still there. Used with Army Cadets (2000) for military-themed activities. Also used land to walk through, to watch fireworks on Bonfire Night, to play football and to practice golf.

C Coxon	98 Broadway	2000-2008	Dog walking, walking, jogging, blackberrying. Family: dog walking.
Helen Cwynar	72 Watson Street	1976-1983; 1987-2010	Dog walking, taking children for walks and picnics. Teaching children to ride bikes on tennis courts, pathway to Markeaton Park, blackberrying, ball games. Children: bike riding, and as they grew up, as a playground and as a place to meet their friends. Use with Brownies: as Leader taken Brownies to the application land on several occasions for pond-dipping activities and on fund-raising days for “duck racing”. Also used land as a visitor to relatives in Watson Street 1983-1987. Family: mother-in-law took children and dogs walking, picnicking and blackberrying. Other relatives used land for similar activities when visiting.
Hernryk Cwynar	72 Watson Street	1967-2010	As a child, when school was there, to play. When school demolished continued to use area for fishing and walking and dog walking. After children born (1991 and 1992) used field for dog walking and to take children for walks/picnics. Golf practice. . Children: bike riding, and as they grew up, as a playground and as a place to meet their friends.
A Davis	62 Sherwin Street 14 Longford Street 78 Longford Street 57 Longford Street	1991-2010	Working away for two 6 month stints in the mid 1990s. Dog walking with parents when visiting, short cut on foot or on bike to work and to visit friends, general recreation, occasionally stopping and playing on bike jumps in the woods, sometimes with friends.
B Day	45 Statham Street 2 Little Noel Street	1972-2007	Use from 1972 as a pupil at Sturgess School. Later dog walking, and when children born, taking them for walks and games. <i>The pathway across Mill Dam into the Old Sturgess School was dug up. A bridge from the playing fields with the tennis courts across the brook was destroyed.</i>
R Dean	10 Broadway 87 Radbourne Street 2 Middlefield Close, Allestree	1994-2010	Use with own children (b 1990 and 1994) and with partner’s child (b 2000): walking, playing, kite flying, Frisbee, ball games and relaxing. Dog walking since 1998. Children: meeting friends and playing. Family: jogging, playing, dog walking.
J Devey	135 Kedleston Road	1991-2010	Taking children (b 1988 and 1991) for recreational walks, exploring woods, crossing brook by ramshackle bridges, watching fishing, cycling, watching wildlife and birds. Family: same. <i>Seemed like fencing was ignored for years.</i>



B Diminico	66 Whitecross Gardens 3 William Street	2003-2008	Blackberry picking, sunbathing, dog walking, walking with friends, observing wildlife, listening to brook, reading, studying. Family: walking, blackberrying, wildlife observation.
M Djavid	100 Broadway	1988-2010	Used with children for games, walks and picnics, group football games and bike rides.
Mrs Doohan	73 Kedleston Road	1978-2008	Dog walking. Family: dog walking, football.
C Doughty	51 Markeaton Street 64 Arthur Street	1996-2008	Walking, fruit picking.
N Douglas	130 Kedleston Road 48 Percy Street Nunnery Court, Nuns Street	2002-2008	Walking as a shortcut or more desirable path, sitting and drinking, cycling through and jumping bike over jumps near stream, blackberrying, petting.
P Downes	36 Wheeldon Avenue 58 Redshaw Street	1991	Playing football with group of friends on a Sunday 1991-1994. Since 1994 jogging through, studying, walking with children (b 2005 and 2007) to explore and as a route to Markeaton Park. <i>Involved with Wheeldon Avenue Group. Went to WAG summer party at the Scout hut.</i>
J Dutton	2 Queensway	mid 1980s-2010	Dog walking mid 1980s-1992. Taking visiting grandchildren 2006- to walk, watch wildlife and feed ducks and swans.
R East	23 Highfield Road	2000-2008	To practice for cricket matches. Wife led Cub activities there.
E Edge	11 Woodland Road	2001-2010	As teacher at Markeaton Primary School (from 1998) used land for teaching geography, for various science projects, for watercolour landscape drawing, and for afternoon fun games of cricket and rounders which the school field cannot accommodate. Also used land for personal recreation. Taken daughter (b2006) to play and walk, sometimes with friends and a picnic.
Jane Elliott	109 Kedleston Road	2006-2010	Walks, social meetings, picnics, pond dipping.
John Elliott	109 Kedleston Road 41 Co-op Street	1995-1996; 2002-2008	Walking, picnic, games with children.
L P Evans	35 Kedleston Road	1980-2007	Dog walking, fruit picking and bird watching. Family: same. <i>There was a bridge just behind the tennis courts used to cross over the stream. There was a really wet</i>

			<i>winter when the land was flooded, taking the bridge with it, and it was not replaced.</i>
S Fewtrell	18 Cedar Street	2001-2007	Dog walking (in the past) and to show children the brook, nature hunting.
J Fitchett	26 Markeaton Road	1987-2008	Blackberry picking, bird watching, exercise, dog walking, taking strolls. Family: same.
Z Fletcher	42 Wheeldon Avenue	1998-2008	Running as part of routes around area including Markeaton Park.
J Flewitt	15 Redshaw Street 80 Manchester Street 41 Bromley Street	1993-2008	Dog walking. <i>Not prevented from using the land but access has been made more difficult. Fencing by the University - 2007.</i>
I Footring	29 Park Grove	1997-2008	Walking. Family: walking, playing/exploring.
J Fraser	16 Woodland Road	1994-2003	Walking. Family: same.
B Freeman	110 Kedleston Road	1991-2008	Blackberrying and walking. <i>Locked gates/open spaces beside them intermittently.</i>
A Frodsham	81 Cedar Street 28 White Street	1978-1988; 1995-2008	As a child to play. Dog walking, taking own children to play, playing football. Children use land as short cut to grandparents' house. Father-in-law: dog walking.
C Gale	45 Highfield Road	1983-2008	Walking for exercise/pleasure. <i>Many years ago the old iron gate on Kedleston Road into the now overgrown path next to the new Doctor's surgery was not locked.</i>
A Gallacher	19 Quarn Way	1992-2010	Dog walking, blackberrying with grandson (2009).
M Gargaro	3 Shaw Street	1988-2008	Recreation, dog walking. Family: walking, dog walking.
L Gill	80 Kedleston Road	1987-2010	Dog walking, walking, walking with friends, observing wildlife, picking blackberries and elderberries. With children (b 1976 and 1978) when they lived at home, playing.
R Gill	80 Kedleston Road	1987-2010	Dog walking, walking, wildlife observation, gathering fruit and mushrooms. Children (b 1976 and 1978) used to accompany them before they left home.
J Green	51 Sherwin Street 34 Cedar Street	2006-2010	Dog walking, photography, bird watching with binoculars, wildlife observation. <i>Summer 2007 metal fencing put up without warning.</i>
I Griffiths	26 Wheeldon Avenue	Statement: 1974-early 1980s then 1990-2010 EQ: 1990-1992	Statement: Playing on field with school friends (1970s and early 1980s), sometimes organised football matches or informal sports events such as rounders and cricket. Since 1990 dog walking, and walking for exercise, picnics, photography. EQ: dog walking 1990-1992. NB the internal inconsistencies between the statement and the evidence questionnaire render this evidence completely unreliable.

A Hall	4 Buckland Close	1989-2008	Dog walking, walking with daughter. As a child, taken for walks and played there.
D Hall	107 Watson Street	2005-2008	Dog walking and recreation. Family: walking. <i>Fencing erecting a few years ago is in situ but has open gates suggesting public access.</i>
Mr & Mrs J Hallam	2 Brookside Close	1974-2010	Walking in fields and woods, fishing in the brook, enjoying the open space, access to Markeaton Park. With child (b 1980) walking through fields and woods, fishing in brook, playing games and picnicking, picking blackberries, raspberries and damsons, nature observation.
M Handley	66 Watson Street	2003-2008	Walking, cycling, dog walking. Family: playing games with their children and walking.
N Hardcastle	8A Park Grove	1972 [EQ1977]-2010	Dog walking, meeting people on the fields while doing so. Children (b 1966 and 1968) used fields for recreation. Grandchildren use fields for playing, blackberrying and dog walking. <i>Some years ago a gate was locked [2007 EQ: about 13 years ago], but we were not deterred and carried on walking, using other access points. The gate was reopened after a few days [EQ:the gate was only locked for 2 days]. Although Sturgess School was demolished in 1989, it was boarded up and becoming derelict for a considerable amount of time, at least 2 years, before demolition. I continued using the tennis court field and occasionally the school field during that time. At a later date the Council constructed a walkway past the tennis courts leading from the recreation ground and also a bridge. This obviously encouraged people to use the fields and the woods. There were signs erected which indicated the river walk.</i>
J Hayes	24 Arthur Hind Close	2000-2008	Dog walking, bird watching, butterfly spotting, wild plant spotted before the land was mowed. Daughter (now left home) used land regularly as a child. Grandchildren now accompany me.
B Healey	70 Sherwin Street	2006-2008	Dog walking
S Hind	10 Broadway	2006-2008	Dog walking, playing with children, watching football, shortcut. Family: same.
A Hinds	44 Walter Street	2001-2008	To run, walk, pick blackberries, social events (2003 picnic). Family: walking, riding bikes, blackberrying.
A Hobday	67 Park Grove	1986-2010	Playing with friends, ball games, dog walking. Family: walking, dog walking.

I Hobday	67 Park Grove	1979[EQ1981]-2010	Walking with children (b 1977 and 1981) and dog. Son: playing with friends, cricket and football, dog walking. Enjoying flora and blackberrying.
D Howarth	187 Watson Street	1955-1968; 2005-2008	Earlier period as a pupil at Sturgess School. Exercise, berry picking, enjoying natural habitat. Family: same.
G Hudson	84 Sherwin Street 9 Wheeldon Avenue 41 Redshaw Street 65 Longford Street	1987-2010	Dog walking (1990-), for access to Mackworth Road recreation ground. From 2000-, for leisure activities: sledging, kite flying, watching firework display, snowman making, picnicking and playing games, teaching daughter to ride bike, practising erecting new tent in 2002, and to air tent after holidays since, paddling and pond-dipping in the brook, photography. Attended sports day on the field organised by Sobers pub. Daughter: involved in litter pick. <i>Metal gate at access 8 was still serviceable and open for public access when he moved to Derby in 1987. Wooden bridge added after 1990 across the brook, adjacent to old tennis courts as part of Markeaton Brook walk, washed away from the bank during heavy rains and was eventually removed and never replaced.</i>
N Hunt	14 Bromley Street	1964-1967; 1995-2008	Walking, blackberrying, exercise, bird watching. Family: same.
J Hyde	137 Kedleston Road 52 Longford Street 21 Park Grove	1991-2008	Dog walking, Frisbee, walking, picnicking, playing games. Family: same.
N Jefferies	8 Bromley Street 23 Walter Street	2003-2007	Walking and running.
T Jenkins	5 Woodland Road	1996-2007	Walking, playing with children, football, tree climbing, conker collecting, bike riding, listening to birdsong, nature walks. Activities: ball games, Dawn Chorus walk, strolls, crossing streams, mini-adventures for young children. Family: same.
A Jennens	26 White Street	1986-date	Taking two daughters (b c.1979 and 1983) and various dogs to enjoy the peace, open space, fresh air and wildlife: picnics, meeting friends and families and neighbours doing the same. Daughters live nearby and continue to enjoy the area with their partners, friends and dogs. <i>Area has a wonderful community atmosphere. Fencing but public access through gates in the past few years (2008).</i>

Lesley Johnson	17 Cedar Street	1983-date	Dog walking from 1984. Taking children (b.1972, 1974 and 1980), blackberrying. 1990 onwards walking. Children playing hide and seek with friends and riding bikes, taking picnic lunch, fishing in the stream (Markeaton Brook).
Linda Johnson	35 Markeaton Street	1994-2008	Dog walking, blackberrying picking, playing games with brother's children (rounders, football).
D Jones	270 Broadway	1992-2010 [EQ 1989-2008]	Used land as a couple for walking, including as a short cut, and wildlife observation, and then with children (b.1994, 1996 and 2000) to watch football games, kite flying. <i>Fences and notices put in place in 2007: before then never challenged.</i>
E Jones	85 Park Grove	1998-2006	Dog walking, blackberrying. <i>No discouragement to using land before fence erected.</i>
S Jones	20 Shaws Green 4 Derwent Park House, New Rd, Darley Abbey	1988-2008	Recreation and use as a short cut.
H Joyce	30 Statham Street	2006-2008	Walking, sports, blackberrying, bird watching. <i>Scouts use land. Prevented from using land when fencing put in. Not erected before summer 2007.</i>
R Kelly	75 Kedleston Road 24 Bromley Street 6 Walter Street	1994-1996; 2003-2008	Walking, picnics, Frisbee, blackberrying, sitting in the sunshine to read. Husband dog walks on the land daily. <i>Community Fun Day summer 2004. Community picnic summer 2007. No discouragement to use before summer 2007, quite the opposite: there was a signposted public footpath across the land.</i>
J Kemp	99 Peel Street		<i>Formerly employed by Derby College of Further Education at Wilmorton in 1987. Sent to cover a painting and decorating class at Sturgess School in spring 1987.</i>
D Kerry	4 Broadway	1998-date	Taking visitors to look at wildlife, playing ball games, hide and seek and what's the time Mr Wolf, walking, kite flying, dog walking when dog sitting (2004). Used with daughter (b 2005), playing, exploring, blackberrying and climbing trees. <i>Photographs of niece taken 2002 in long grass at edge of mown area, and crawling on mown area</i>
J & P Kinsey	82 Kedleston Road	1986-1998	Dog walking, fishing with children/grandchildren, walking, bird watching, fruit picking, playing football with children/grandchildren.
C Lea	11 Park Grove	1974-date	Walking, enjoying wildlife, exercising friends' dogs, building nest boxes in trees

			around fields, helped on litter picking days (Nov 2007). <i>Fences and gates erected 2007.</i>
R Limb	81 Park Grove	2001-2008	Dog walking, picnics, jogging, nature ramble.
K Lloyd	24 Tivoli Gardens	1977-date	Dog walking (1993-), playing with children (b. 1979 and 1982). Fishing, golf practice, football, cycling, sledging, looking for conkers, blackberrying, rounders, picnics. <i>Field used by Markeaton Primary School for football matches when his children were at school (1983-), and for school field trips.</i>
Mr & Mrs Lynch	3 West Park Road	1987-2010	Dog walking.
C Mabbutt	71 Sherwin Street	2001-2003	Dog walking
S & B Marshall	90 Kedleston Road	2001-2007	Blackberrying, picnicking, kite flying, bird watching. Family: same. <i>Community picnics 2004, 2005, 2006</i>
S Masters	62 Nuns Street	July 2006-2008	Blackberrying and walking
G McCauley	3 Tivoli Gardens	1970-2010	Playing with children and now grandchildren: sport: football, cricket, rounders. Family: blackberrying and general walking about.
V McCauley	3 Tivoli Gardens	1985-2009	Dog walking, playing football with grandchildren, blackberrying, flower collecting. Her children and their friends used the land from about 1978. Family: tennis, fishing, tree climbing, hide and seek, football.
C McCormack-Sharp	37 Bromley Street	2001-2008	Berry picking with her children. <i>Community picnic 2004 or 2005.</i>
Mr & Mrs R McFadden	90 Sherwin Street	1988-2008	Used as schoolchild at Markeaton Girls' School. Walking and wildlife observation.
R McMorrow	7 Bromley Street	1994-date	Dog walking (1994-). Used with children (b 1994 and 1997), particularly woods. Blackberrying, playing football, rugby, rounders, picnicking, enjoying the stream, hide and seek. Children take their friends, and she takes visitors. <i>University put up illegal gate near Scout Hut when they first got the land, not sure of date. Access 3 closed summer 2007, but Access 4 opened.</i>
D Mee-Bishop	78 Watson Street	1974-date	Taking grandchildren to play football and other ballgames, go to the woods and fish and feed ducks. Taught one of the kids to ride his bike on the tennis court. Used to play tennis with neighbours until courts fell into disrepair. Walking for exercise.

			Picnics.
G Mee-Bishop	78 Watson Street	1974-date	Taking grandchildren to play ballgames, sometimes take a picnic. Go to the woods and feed ducks. Blackberrying. Eldest granddaughter goes dog walking with a neighbour on occasion.
L Mellor	23 Longford street	1993-2008	Walking, wildlife observation, bonfire night firework display, sledging, photography. <i>I think there was an occasion prior to summer 2007 when fencing and re-routing of the brook was undertaken.</i>
G Mellows	46 Whitecross Gdns 9 William Street	1990-2008	Training, walking, access to Markeaton Park, running, picnics, fishing, stress relief, entertaining his children, quiet time for self and partner.
G Millington	89 Mundy Street	1998-2008	Fun, walking, running. <i>Church groups use land for sports or pastimes.</i>
P Milner	91 Park Grove	1963-2008	Dog walking. Fishing in the past.
L Morgan	78 Sherwin Street	1991-2001 2008	Dog walking (2008), meeting point for friends, flat ground for training for charity 5K and 10K runs.
K Morris	74 Cedar Street 67 Allestree Lane, Allestree	1984-1985 1996-date	As a pupil at Woodlands school. Dog walking, wildlife observation, conker and blackberry picking, playing football, cricket and tennis. Shortcut. Family: stepson (b 1993): bike riding, playing in woods, dog walking, playing football, cricket, tennis. Wife uses too.
R Morrison	19 Redshaw Street	2005-2008	Dog walking, playing games with friends.
M Moss	4 Broadway Park Close	1995-2007	To access Markeaton Brook and the tennis courts and blackberrying with grandchildren, rambling.
P Moss	34 White Street	1992-date	Running, blackberrying. 2000-06 walking with children and kickabout football, stream jumping, scrambling over rough ground. <i>Daughter visited in 2005 with Markeaton Primary School for history and natural history and art work.</i>
A Muir	165 Kedleston Road	2002-2008	Walk with pram and children, blackberrying, children playing, cycling. Family: same. <i>Community picnic 2007.</i>
F Newton	52 Leyland Street	1980-2008	Walking and wildlife observation. Family: same.
A Nicholson	140 Kedleston Road	1966-date	Used with children (b. 1969, 1963, 1968, 1970) and 8 grandchildren (5 b. c1982-2006, ages of other 3 not specified). Rope swings over the brook, den-making, hiding among the trees and in the long grass, pond and brook dipping, football,

			tennis on the courts, golf practice (Field A), picnicking, watching American football, blackberrying, walking, wildlife observation. Dog walking.
S Oakes	45 Cowley Street 72 Park Grove	1982-date	Dog walking, socialising. <i>Fencing and signs in 2007. Gates/ fencing approximately 13 years ago when the University first purchased the land. I managed to gain access through other means.</i>
J Olejnik	49 Merchant Street	2005-2008	Recreation, playing with children, football, cycling, picnicking.
L Oliver	48 Kedleston Road	2000-2008	Dog walking.
S Orridge	31 Shaws Green	June 2006- summer 2007	Walking and dog walking, mountain biking, exploring and wildlife watching with nephew (b.2005). Reading, picnics, running.
J Palmer	177 Kedleston Road 1B Haslam's Lane, Darley Abbey	1965-1998; 2002-date	Use with children (now aged 33-17) and now with grandchildren (aged 12-5), walking, picnics, exploring, making dens, playing ball games, running around. Dog walking.
N Palmer	161 Markeaton Street	1998-2008	Dog walking, relaxing in summer, blackberry picking. <i>Used for Scout activities and wildlife study. Gate locked bank holiday August 2008.</i>
M Parkes	Lawden House, Kedleston Old Road	1990-2008	Dog walking, playing sport using rugby posts. <i>Seen by owner/occupier when grass cutting. Nothing said.</i>
D Parry	110 Kedleston Road	1991-2008	Walking, blackberry picking. <i>Before the summer of 2007 locked gates (open spaces beside them) intermittently.</i>
J Pegg	2 Tivoli Gardens	1960-2008	Taking children to play, dog walking, exercising. Family: walking, bird watching, blackberry picking.
R Prior	13 Walter Street 24 Cowley Street	2005-2008	Walking for peace and quiet, picnics, fishing, games, drawing, blackberrying. <i>Used by Scouts for outdoor activities.</i>
M Raisin	66 Brackendale Ave	1968-2008	Used land from Scout Hut, Watson Street: for football, athletics and other games, canoeing on Mill Dam.
R Reeves	12 Leyland Gardens	1996-date	Walking with children and grandchildren (b. 2001, 2003 and 2007) round the fields and through the woodland, blackberry and raspberry picking, ball games, exploring Brook. Dog walking. Family: blackberrying, fungi and tree studying, pond dipping. <i>Allegedly gifted by the Mundy family.</i>
F Rennie	35 Statham Street	1987-2008	Walking and cycling.



	97 Longford Street 64 Cedar Street		
W Ridgway	2 Queens Court, Woodland Road Allestree late 1960s- 2000	Late 1960s-date [EQ 1925-2008]	Dog walking until 1995. Walking since.
F Rimmer	175 Kedleston Road	1989-date	Walking, taking grandchildren (now aged 12 and 14) when young to play. Picnics, fruit picking. Family: walking and dog walking.
Jane Roberts	77 Park Grove 87 Kedleston Road	1990-date	Taking children (b. 1994, 1996, 1999 and 2003) to land for recreation from when they were small. Wildlife observation, walking in the stream, pond dipping, sledging, making snowmen, picnics, meeting with friends, children riding bikes. Son: BMXing, football with friends from Woodlands school and local friends. Dog walking (2006-). Participated in Dawn Chorus walk over the years. Local school has nature walks. <i>Photograph of children in snow and sledging taken in December 2005 on Field A. Rugby posts visible in background.</i>
C Rogers	181 Watson Street	1986-2008	Walking and dog walking.
S Rogers	181 Watson Street	1980-2008	Dog walking, picking blackberries, playing as a family.
E Rumble	174 Broadway 70 Broadway	2003-2008	Dog walking, playing sports, short cut to Markeaton Street, jogging, walking, picnicking. <i>Land used by re-enactment group.</i>
C Russell	64 Markeaton Street	2005-2008	Family walks, enjoying peace and quiet. Family: same.
G Russell	94 Watson Street 56 Stables Street	1965-date	Fished in Markeaton Brook with own children (b.1965 and 1968) and used land as short cut to Markeaton Park. Since 1998 taking two grandchildren to play, kite flying, fishing and used as a short cut to Markeaton Park, blackberry picking, wildlife watching, playing around the trees. Crosses brook in wellies.
Philip Sainty	62 Ashbourne Road	1987-2001; 2005-2008	Dog walking, collecting conkers when younger, as a short cut, tennis (in his youth).
T Scattergood	127 Kedleston Road	Most of 1950- 2008	Dog walking. <i>Local Scouts day activities take place on the land.</i>
J Sear	44 Merchant Street	1988-1993;	Playing as a child with friends from West End. <i>I recall they used to practice</i>

	15 West Bank Road, Allestree	2007-2008	<i>American football there.</i>
A Shelton	6 Woodland Road 53 Cedar Street	1983-date	Walking with children when little (now aged 18 and 20): exploring and playing ball games, sledging. Now: dog walking, and with children of friends. Family: walks, picnics.
J Sidebottom	149 Watson Street 31 Cedar Street	2005-2008	Dog walking, blackberry picking. Family: same.
Jamie Sircom	29 West Avenue 127 Watson Street	1978-1983; 1984-	Play football, holiday play schemes at school, blackberrying. Family: exercise, blackberrying. <i>Some time ago, gates put up.</i>
Judith Sircom	29 West Avenue 127 Watson Street	1973-2008	Exercise, short cut to Markeaton Park, blackberrying, games, walking. <i>Gates were put up, not sure of date, possibly 1980s.</i>
P Sladen	35 Leaper Street	1971-2001; 2002-date	Dog walking, taking children to walk, look for wildlife and blackberrying. Family: walking. <i>A few weeks back we couldn't get in, the gates were locked (written Sept 2008)</i>
C Smith	9 Tivoli Gardens	1998-2008	Running, rugby practice, dog walking, fruit picking, biking in the woodland area, fishing. Family: dog walking, fruit picking, recreational activities and cycling. <i>Dog training takes place yearly.</i>
G Smith	1 Markeaton Street	2002-2005	Exercise/jogging.
M & B Smith	7 Broadway Park Close	1998-2010	Walking, blackberrying
Martin Smith	70 Broadway 174 Broadway	2003-2007	Recreation: dog walking and playing fetch with dog, blackberry picking, jogging, playing football, family picnics.
F Stevens	41 Bromley Street	July 2005-2007	Kite flying and taking daughter to play.
T Storey	6 Queensway	1960-2010	Dog walking, nature study, painting, as a quiet and pleasant retreat.
E Stuart	12 Quarn Gardens	1993-2008	Walking, fruit picking. Family: exercise. <i>Wild Derby summer scheme 2006 used the land. Friends of Markeaton Brook organised pond dipping/bug hunts. A metal gate was erected at the corner of the entrance over the bridge from Watson Street [Access 6] around 1998. It was taken down as it blocked the right of way at the back of the old tennis courts.</i>

G Sweeney	19 Statham Street 37 Cedar Street	April 2001-2008	Taking his daughter for a walk and to play, exploring nature. Partner and daughter also use the land for family recreation. <i>A fence was put up on Kedleston Road but this was after the summer of 2007.</i>
B Swift	19 Arthur Hind Close	1982-1990; 1997-2000	Walking.
M Swift	19 Arthur Hind Close	1982-1990; 1997-2000	Walking.
R Talaska	13 Bromley Street	1987-1990	Walking.
C Thomas	21 Woodland Road	1989-1998; 2000-2008	Recreational activities: football, cricket and related leisure activities. Family: similar.
S Toms	188 Kedleston Road	2004-2008	Dog walking, ball games: rounders, football, cricket.
K Toombs	59 Arthur Hind Close 40 Howe Street	1934-2008	Walking, nature observation. Family: same. <i>Pattern of use has remained the same apart from when the Sturgess School was built, which it should never have been. Built on a bog it sank.</i>
N Wainwright	91 Kedleston Road	1986-2007	Dog walking, collecting berries, playing with children, sledging. <i>Gates installed off Kedleston Road into field, also between Jonty Farmer and surgery. Not sure of date but around 2007. Map also signed by E Wainwright.</i>
A Walker	83 Sherwin Street	2001-2008	Walking, bird spotting. <i>Markeaton School used to use the fields about 15 years ago.</i>
L Ward	8 Leyland Gardens	1982-2008	Walking, watching wildlife, exercising the dog, taking the grandchildren, sitting and relaxing. Family: similar.
C Warsop	69 Cedar Street Kedleston Road	1965 approx-2010	As a pupil at Markeaton School. Dog walking (last dog 1998-2006, and with earlier dogs). Taking children onto the field when young to dog walking, kick a football about, paddle in the brook, or squirrel watching. <i>Used field for nature walk with Brownie Pack who meet at St Barnabus [Radbourne Street].</i>
G Waterhouse	39 Cedar Street	1980-2008	Walking. Family: pleasure with children.
R Watkins	2 Broadfields Close 7 Markeaton Street	1980 approx-date	Dog walking, playing and fishing with son (now aged 22). Wife played on the land as a young child.
A Watts	98 Watson Street	July 2001-2010	Walking, playing football, blackberrying. <i>Land is used for American football by Derby University and re-enactment.</i>

J West	173 Watson Street	2006-2008	Blackberrying, bike riding, teaching son to ride bike. Family: same. <i>Land is used by Scout group.</i>
D Williamson	17 Mundy Street 22 Arthur Hinds Cl	1971-2008	Walking, conkering, dog walking, blackberrying, looking for things for Christmas decorations. Son: bike riding when young. Family: exploring, playing, bikes, building dens. <i>Community activities: school sports</i>
M Winfield	48 Sherwin Street	1963-1975	Taking sons, grandchildren and great-grandson to play football, nature walks, bike rides, hide and seek, sledging, watching activities. <i>Able to get straight onto the field until railings were put up.</i>
Charles Wood	4 Wheeldon Manor, Woodland Road	2006-2008	Walking, recreation.
Chris Wood	14A Park Grove	1988-2001	Used as a child to play: bike riding, dog walking, playing football with friends, sledging, tree climbing, exploring, playing. Family: supervising me when young. <i>My Scout organisation, the 35<sup>th</sup> Scout Troop used the land for various scouting activities.</i>
M Wood	12 Eaton Court, Leaper Street	2003-2005	Exercise, football, golf practice. Family: golf practice, rounders.
S Wood	14A Park Grove	1988-1995; 2000-2008	Short cut, use as a family at weekends and in school holidays with friends for picnics and games: group games, rounders, cricket, football. Walking, nature walks, kite flying. Son (b.1985): played with friends in woods, BMXing. <i>Used by Scout Groups and by Derby County Football in the Community for a short while. Summer 2008 tractors spread sand on the field.</i>
M & A Worrell	26 Bromley Street	Oct 2001-2008	Walking, running, cycling, playing with children.
N Wray	20 Highfield Road 36 Bromley Street	1983-1985; 1996-	First period of use dog walking with friends who lived on Kedleston Road before moved to the area. Blackberrying, picnicking, playing with children.
A Wright	72 Park Grove 8 Hedgebank Court, Oakwood	2003-date	Dog walking
G Wright	159 Markeaton Street 1 Brookside Close	Sept 2001-Feb 2010	Walking/recreation.

N Yeomans	57 Leaper Street	1982-1995; 2001-2008	Playing as a child. Dog walking.
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**In the Matter of**  
**an Application to Register land at**  
**Sturgess Fields, Derby**  
**as a Town or Village Green**

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**REPORT OF THE INSPECTOR**

**Miss LANA WOOD**

**10<sup>th</sup> July 2010**

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### **Executive summary**

I recommend that the Registration Authority should accede to the application in part:

(1) I recommend that the application should be refused in relation to Field B. The Applicant failed to show that Field B has been used as of right for the whole of the relevant period. Part of Field B was occupied by the former Sturgess School buildings at the beginning of the relevant period and until at least July 1989. There was little evidence that that part of Field B which was not occupied by the school buildings was used before the school buildings became derelict, other than to give access to the remainder of the land. Once the buildings became derelict people tended to avoid the area, and no-one claimed to have used the remainder of Field B whilst the buildings were in the course of demolition.

(2) I recommend that the Registration Authority should register Fields A and C as a new town green. There was a substantial amount of evidence to support the Applicant's case that Fields A and C had been used by the inhabitants of the West End, a neighbourhood within the locality of the City of Derby for lawful sports and pastimes for a period of 20 years ending in August 2007. I was satisfied that such use was use as of right.

(3) I recommend the boundaries of the area to be registered, dividing those areas from Field B should be, so far as Field A is concerned, the southern bank of Mackworth Brook, and, so far as Field C is concerned, the western bank of the drainage ditch between Mill Dam Pond and Mackworth Brook.



**In the Matter of**  
**an Application to Register land at**  
**Sturgess Fields, Derby**  
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**REPORT OF THE INSPECTOR**

**MISS LANA WOOD**

**10<sup>th</sup> July 2010**

**1. The Application**

- 1.1. On 9<sup>th</sup> January 2008 Derby City Council, as Registration Authority, received an application dated 22<sup>nd</sup> November 2007 from Patrick Browne of 75 Kedleston Road, Derby DE22 1 FR to register land known as Sturgess Fields as a town or village green.
- 1.2. The application was made on prescribed Form 44, as required by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, and was supported by a statutory declaration declared by Mr Browne on 9<sup>th</sup> January 2008. The application was stated to be made under section 15(3) of the Commons Act 2006, and the Applicant stated that he considered that use as of right had ended in August 2007. The application land was described as located between Markeaton Rec and the A38 ring road in West Derby and shown outlined in red on the map attached to the application. The locality or neighbourhood within a locality in respect of which the application was made was stated to be polling districts DL2 and DL3 of Darley Ward, outlined in yellow on the map attached to the application. The justification for the application was stated to be indulgence by a significant number of inhabitants of the locality as of right in lawful sports and pastimes for a period of at least 20 years under section 15(3) of the Commons Act 2006, as witnessed by the statements enclosed with the application. The Applicant stated that he believed that Derby University was an owner, lessee, tenant or occupier of the land. He included, as supporting information, the two maps, and 9 witness statements.
- 1.3. The application was duly publicised.

## The Objection

- 1.4. An objection dated 16<sup>th</sup> October 2008 was received from Eversheds LLP on behalf of the University of Derby, the freehold owners of the application land. The grounds of objection were (in summary):

- (1) The main uses of the application land appeared to be dog walking and walking: walking along routes that are or are perceived to be permissive routes across the land should be discounted, as should the enjoyment of views of the land.
- (2) Other uses of the land were relatively sporadic: some are seasonal in nature, and others, viewed over the 20 year period, had not been carried out with sufficient frequency to be regarded as more than occasional and sporadic.
- (3) Parts of the land were inaccessible, and it is necessary for the applicant to show that it was possible to walk over the land generally.
- (4) The land is surrounded by palisade fencing with gates which are locked at 22:30 and opened at approximately 06:00 every night by the Objector's security staff. Use of the land outside these times is therefore subject to implied permission.
- (5) There has been deferral to the sporting activities of the Objector and its licensees.
- (6) The Objector had been approached for permission for specific activities in the past. These arrangements were commonly known to local residents.
- (7) The land had not been used by a significant number of the inhabitants of the locality: users are not sufficiently distributed throughout the whole of the claimed locality to satisfy the statutory requirements. All the users of the land live very locally to it, and are, in the main, residents of the few streets neighbouring the land rather than residents of the claimed locality as a whole.
- (8) The locality claimed did not contain the requisite quality of cohesiveness.

## **2. The Public Inquiry**

- 2.1. I was instructed by Derby City Council, as Registration Authority, to hold a non-statutory public inquiry into the application and to report in writing with my recommendation as to whether the Registration Authority ought to accept or reject the application. I gave directions for preparation for the Inquiry on 18<sup>th</sup> December 2009. I held the Inquiry at Friargate Studios, Ford Street, Derby DE1 1EE on Monday 15<sup>th</sup> March 2010, Tuesday 16<sup>th</sup> March 2010, Wednesday 17<sup>th</sup> March 2010, Thursday 18<sup>th</sup> March 2010 and Friday 19<sup>th</sup> March 2010. I held evening sessions on 15<sup>th</sup> and 16<sup>th</sup> March 2010 to enable those whose work commitments meant they could not attend during the day to attend and give evidence.
- 2.2. The Applicant, Mr Patrick Browne, was represented by Mr Philip Petchey of Counsel. The Objector, the University of Derby, was represented by Dr Satnam Choongh of Counsel, instructed by Eversheds LLP, solicitors. I thank both Counsel for their helpful submissions.

- 2.3. I am also grateful to Mr David Slinger, Mr Ray Brown and Mr Graham Toon, officers of the Registration Authority, who made the arrangements for the Inquiry, and provided me with efficient and cheerful support and administrative assistance during the Inquiry.

### **3. The Applicant's case**

- 3.1. Mr Petchey made a brief oral opening statement at the beginning of the Inquiry. He said that the evidence suggested that part of the site, Field B, had been occupied by the school building at the beginning of the relevant period. He said that the site is large, and it may be that the existence of a disused building on part of the site might not prevent the registration of the whole. The applicant would say that in any event, such parts of Field B as were not covered by buildings are registrable.
- 3.2. Mr Petchey described the access points to the land by reference to a helpful map provided by the Applicant, a copy of which is appended to this Report. Access point 1 is the end of Markeaton Street: the old drive to the school site. The existing metal gates date from 2007. Before that, there was a metal gate and a side gate, but the Applicant's case was that the side gate was never locked.
- 3.3. Access point 2 is a pedestrian gate. Before 2007 that gate was locked, from time to time, but access was available to the side of the gate, where the fencing was broken down throughout the whole of the relevant period. That fencing was replaced in 2007.
- 3.4. Point 3 is where there was a gate and stile before 2007. It was fenced off in 2007, but before 2007 was accessible. The gate was never locked.
- 3.5. Point 4 is the new bridge. Historically, there was no access there: the bridge was built in 1995. That access was not generally open between 1995 and 2007. It replaced an earlier bridge at point 8.
- 3.6. Point 8 is the old iron bridge which survived until 1995. Mr Petchey submitted that it appears, on the face of it, to be part of a historic footpath, linking Kedleston Road and Markeaton Street. There is no historic definitive footpath map for this area. There was no obstruction immediately after the bridge, and the gate at the other end of the fenced in path dates from 2007 as well. It is never locked.
- 3.7. Point 6 is the Watson Street bridge. There was unrestricted access here between 1989 and 2007. 1989 is the date on which the Markeaton Brook walkway was opened. In 2007, a fence was erected obstructing the walkway.
- 3.8. Point 11 is the access between the south field and the allotments. That gate is generally locked, and always has been.

- 3.9. Internally, at point 5, there is access between the western and southern fields: at present there is a plank bridge, but there has always been a crossing point or some sort, a plank or stepping stones.
- 3.10. At point 9 there was a historic bridge, dating from the 1940s, which was replaced with another bridge in 1989, which was washed away in the 1990s. There has been no bridge there since.
- 3.11. There is also an internal gate in the fence between the northern and southern fields, which the Applicant says dates from about 2007, although it is not part of the modern fencing works. It has never been locked.

**Witnesses who gave oral evidence on behalf of the Applicant**

- 3.12. I heard oral evidence from 38 witnesses on behalf of the Applicant. The Objector had the opportunity of testing these witnesses' evidence by cross-examination.

**(1) Anthony J Adkin**

7 Nun's Street DE1 3LR

- 3.13. Mr Adkin provided a written witness statement dated 7<sup>th</sup> February 2010 and an evidence questionnaire dated 11<sup>th</sup> October 2008.<sup>1</sup> Mr Adkin has lived at his present address since 1983. From 1973 to 1983 he lived at 56 Kedleston Street. Both addresses are within the claimed neighbourhood.
- 3.14. Mr Adkin stated that his two sons, born in 1967 and 1972, used the fields in their childhood and youth. As they got older they went to the fields with a group of friends from the area to play games: they used the wooded area to make dens and play "war games". Mr Adkin picked blackberries with his children.
- 3.15. Mr Adkin has used the fields to walk his dogs from 1972 to date. He has four grandchildren, and over the years has taken his children and grandchildren for a walk with the dog, to observe the birds, trees and wildlife on the fields and in the brook.
- 3.16. Mr Adkin said that many amateur bridges had been built over the brook over the years. For the last two years there had been a more robust bridge, but it had been removed.
- 3.17. Mr Adkin said that he has been a local resident for many years. His family use all the amenities in the area: local schools and nurseries, the local church, he local scout group and his son owns one of the local pubs.
- 3.18. He always used the land without permission or hindrance.
- 3.19. In his evidence questionnaire Mr Adkin stated that he had used the land most days since 1983. He gained access to the land from the path by the Scout hut.

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<sup>1</sup> A001

- 3.20. In oral evidence Mr Adkin was asked to identify the access he used: from the Recreation Ground off Markeaton Street, you walk along the brook, past the back of the houses on Watson Street which back onto the brook, past the Scout hut, and into the application land.
- 3.21. Mr Adkin was asked whether he had seen organised sports and games: he said he had seen American football being played twice on the south field. He had also seen football matches on the north field several times.
- 3.22. Mr Adkin had seen people with theodolites, doing engineering work, he thought students doing classes, in the western field, but had not seen any organised sports there.
- 3.23. He had never been asked to leave the fields.
- 3.24. In cross-examination Mr Adkin was asked which route he took around the site: he said that he walks across the disused tennis courts (not around them), then across C, to halfway up the field, up to the plank bridge between C and B. He was asked what route he took around the field: it depends how much time he is: sometimes he walks around the whole field. He does not walk the same place every day. If it was nice he would walk all around the field, through the woods, and would be out an hour. If he did not walk around C, he would walk along the brook, and, once over the bridge, he would walk around the perimeter of B.
- 3.25. When the school was there, he did the same: it was empty for years, the gates were open, and he walked around. He was asked whether he walked around the field for the school, or around the whole area. He said he kept away from the buildings, because the windows were smashed, and there was glass around them, but his route varied and sometimes he went round the school. Access to the school site was blocked when the demolition works were going on. Access from Markeaton Road was blocked. He did not use the field when they were demolishing. He stuck to C and through the woods. He agreed that the demolition works went on for a period of time, a few weeks. He agreed that generally he stuck to the path.
- 3.26. Mr Adkin was asked about his children and grandchildren's use: he agreed that they stuck mainly to the wooded areas around the site.
- 3.27. Mr Adkin agreed that in 1995 the University put a short piece of fence and a gate up blocking the access from the Scout hut. However, he never saw the gate locked. He agreed there was some controversy about the gate and fence. He agreed that a number of locals wrote complaining. He never saw the gate with a lock on it. The University did not lock it, and you could walk straight through.
- 3.28. In re-examination Mr Adkin was asked what path he meant when he said he generally kept to the path. He said that at the bottom end of C, it sometimes gets boggy and muddy. It is boggy in the winter months from October to

March, so you cannot go round the perimeter. You go so far, and cut across to the plank bridge. In the summer months he would do the full lap, usually keeping to the perimeter of the field. He normally went around the outside of the school field, B. He never used field A very much, only occasionally: he stuck to C and B most of the time. He normally kept to the outside of both C and B. There is wildlife in the grass.

**(2) Alan John Williamson**

17 Mundy Street DE1 3PS

- 3.29. Mr Williamson provided a written witness statement dated 5<sup>th</sup> February 2010 and an evidence questionnaire dated 12<sup>th</sup> January 2008.<sup>2</sup> He has lived at his present address since 1995. His address is within the claimed neighbourhood. Between 1984 and 1995 he lived in King Alfred Street, outside the claimed neighbourhood. Prior to 1995 he used the land mainly at weekends when visiting his parents at 102 Quarn Way, also within the claimed neighbourhood, where they lived from 1969 to 2009.
- 3.30. Mr Williamson has two daughters from his first marriage who were born in 1971 and 1975, and a son from his second marriage who was born in 1993.
- 3.31. Mr Williamson took his two daughters together with his brothers and sister and their children to the application land on a Saturday when visiting his parents. They walked to Markeaton Recreation Ground and then on through to Sturgess Fields for the children to “explore”, messing around in the woods and brook, and searching for blackberries and conkers. When the children were younger, they went to the Rec and fields on their own. They were not ever stopped from accessing the fields.
- 3.32. When he moved to his present address Mr Williamson took his son to the application land to explore. As Mr Williamson’s son has got older, he has gone to the land with his friends to use the woods for biking and collecting conkers.
- 3.33. Mr Williamson has been a keen jogger since the 1980s. He uses the fields at least 3 times a week, passing round and through them on a circular route, taking in Markeaton Park. When he is recovering from any injuries, he jogs around the fields to rebuild his strength and stamina. Originally he jogged through the fields over the stream via a rough bridge made of a fallen tree, as the original bridge had been removed by the Council some years previously. This bridge has been replaced in later times by a couple of builders’ planks joined together, left over from the recent building of the university media centre. He then used to turn right, run through the woods, and exit the site where the A38 and Kedleston Road meet. He can no longer go this way, as a fence has been erected which makes access to the junction impossible. He now has to go straight over the land to exit via the gate at the A38 near the footbridge.

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<sup>2</sup> A202

- 3.34. Mr Williamson said that over the time he has used the fields he has seen other activities on the land including people flying kites and model aircraft, children playing in the woods and in parts of the brook. He had seen tents pitched on the odd occasion, but did not know whether they were just there for the day. The land is also a popular area for dog walking. At one stage, some years ago, the field next to the old tennis courts was laid out as a football pitch and was used, Mr Williamson believed, by some Derby County youngsters, who at that time were boarding on Kedleston Road, near St Alkmund's Church.
- 3.35. In oral evidence Mr Williamson was asked about his statement that he came out where the A38 and Kedleston Road meet: he said that the point he referred to was point 3. He now exits by the A38 at point 2: the University has recently opened the gate there: before that, the railings were bent and he could squeeze through.
- 3.36. Mr Williamson was asked about his answer to question 10, that he gained access to the land on foot via Watson Street or Markeaton Rec. He said that he runs along the Markeaton Brook walkway, on the northern side of the brook to start with, switching to the other side at the end of Mundy Pleasure Ground, where the path crosses the brook, on a bridge, and then the path passes the Scout Hut and you come out by the entrance on Watson Street. Before the bridge was there, you had to go along Watson Street itself to get to the land: there was no bridge in the corner of Mundy Pleasure Ground. At that time he gained access to the application land via Watson Street, over the bridge.
- 3.37. Mr Williamson has not seen organised sports or games on the field. He had seen Derby County juniors training on there, and had seen the American footballers walking off, although he had not seen them playing. The Derby County juniors had been on C, and the American footballers he saw on A. He was asked how frequently and he said infrequently. He had seen the American footballers more than once, a couple of times, but had never seen them playing. He had seen the Derby County juniors over the short period they were there, but he was not sure how often.
- 3.38. He had never been approached on the fields, and had never been asked to leave.
- 3.39. In cross-examination, Mr Williamson agreed that he uses the same access point, Access 6, when jogging. He did not remember that point being blocked in 1995 with a gate and fencing. His jogging route depends on the weather: if it is muddy he takes a short cut through the tennis courts, if not, he goes around the side, diagonally to the bridge, through the woods, across A and exiting at point 3. He did not agree that he sticks to the path: he said that he is wary of dogs and would take a loop to avoid them. He has exited at point 2 since 2007.
- 3.40. Mr Williamson was asked about his use of the land with the children: he said that they played in the wooded area, but the blackberries are all over, in C, B and by the brook and on the northern boundary in A. He agreed that the blackberries were around the perimeter of those areas.

**(3) Ian Harper**

88 Watson Street DE1 3SP

- 3.41. Mr Harper provided a written witness statement dated 17<sup>th</sup> February 2010 and an evidence questionnaire of the same date. He also provided a DVD, and a cutting from the Derby Evening Telegraph.<sup>3</sup> Mr Harper's parents-in-law live on Watson Street, and he first went to the application land with his now wife when visiting them for the first time.
- 3.42. Between spring 1987 and 1996 Mr Harper used the land when visiting his in-laws. Mr Harper's daughter was born in December 1993. In oral evidence he said that he also has a son who was born in April 1996. They moved to Watson Street because his son had a heart condition and they needed to be closer to the hospital and near his parents-in-law for babysitting.
- 3.43. Since 1996, Mr and Mrs Harper, their children and the children's grandparents have used the fields for recreational purposes, including playing football, flying kites and even throwing boomerangs.
- 3.44. Mr Harper walks his present dog on the fields every weekend in winter, and daily during the summer. He uses all entrances and exits, and crosses Markeaton Brook by the current temporary footbridge.
- 3.45. Mr Harper has witnessed many other people using the fields, including children playing games and sports, dog walkers, fruit pickers, picnickers and cyclists. His house directly overlooks the fields, and he has seen countless members of the community using the land over the years.
- 3.46. Mr Harper stated that access to the fields was unrestricted. He never sought permission to go on the land and was never challenged while on the land.
- 3.47. Mr Harper stated that the video footage he had supplied was taken in 1995, and was taken from Watson Street and the Scout Hut bridge.
- 3.48. The newspaper cutting was a cutting from the 24<sup>th</sup> May 1997 edition of the Derby Evening Telegraph and included a photograph of Mr Harper's in-laws and his daughter, Emily, together with a neighbour.
- 3.49. In his evidence questionnaire Mr Harper stated that he had used the land intermittently between 1987 and 1996, and regularly from 1996 to 2010, for dog walking 2-3 times a week in winter and daily in summer, and had also taken part in cycling, kite flying and football with his children on the land.
- 3.50. In oral evidence Mr Harper was asked about his answer to question 10 in the questionnaire, where he said he gained access to the land via the Scout Bridge off Watson Street: that is the access he uses because it is directly across from where he lives.

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<sup>3</sup> A085



- 3.51. Mr Harper has seen organised games of American football on the land since 2007, but had not seen any such games before 2007. He had seen youngsters playing football on the land, which he had thought was the Scouts, but he now thought was the Derby County junior squad. They had goalposts, so looked more organised than children on their own. That did not go on for long, although he did not remember how long.
- 3.52. Mr Harper has not been asked to leave the application land on any occasion.
- 3.53. In cross-examination Mr Harper was asked where he went once he got into the fields, generally speaking, (although it was accepted that it would depend on whether he had children with him). He said that they would go into field C, around or through the tennis court they would play football or cycle or throw boomerangs on field C. They lost a boomerang into the allotments, so after that they moved the boomerangs onto field B. He agreed that the field gets waterlogged sometimes towards the brook and around the tennis court, but the middle bit is alright. His use would be quite frequent, not every day, but reasonably frequent. They went to Australia in 2004, and came back with the boomerangs and used them after that. Mr Harper agreed that field B gets waterlogged, but said it is not waterlogged all the time. He uses it as and when, changing his route as necessary.
- 3.54. With the dog he does not have a set route. He tries to avoid other dogs.
- 3.55. Mr Harper was asked whether he remembered the access being closed in 1995. He said he did not know: he moved onto Watson Street in 1996. There was no restriction on the day in April 1995 when he took the video.
- 3.56. I was satisfied that Mr Harper was an honest witness and I accept his evidence.

**(4) John Edwin Landon**

90 Watson Street DE1 3SP

- 3.57. Mr Landon provided a written witness statement dated 14<sup>th</sup> February 2010 and an evidence questionnaire dated 9<sup>th</sup> February 2010.<sup>4</sup> Mr Landon has lived at his present address since 1967. It is within the claimed neighbourhood. Mr Landon is Mr Harper's father-in-law.
- 3.58. Mr Landon's children were 4, 7 and 9 when the family moved to their present address. They played on the land as children. During the past 10 years his grandchildren have done the same. Mr Landon stated that the 35<sup>th</sup> Derby (Markeaton) Scout Group regularly uses the fields for activities.
- 3.59. Mr Landon stated that there was a community event on the occasion of a public holiday to celebrate Derby becoming a City. In oral evidence he said that he thought that it was on the occasion of the Queen's Silver Jubilee.
- 3.60. Mr Landon said that he is also a keen angler, and has frequently walked across the fields to reach the lake alongside the ring road.

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<sup>4</sup> A112

- 3.61. In oral evidence Mr Landon was referred to question 10 in his questionnaire where he said that he gained access to the land from the footbridge across Markeaton Brook. He said in 1973 the Scout Group put a bridge over the brook. Prior to that there was a metal corrugated iron bridge over the brook, somewhat dilapidated, but which could be crossed if you were careful. That was used occasionally. At certain times of the year, the brook is shallow, and stepping stones or Wellington boots could be used. He did not cross the bridge. When they first went there they just crossed the brook. His children went across the corrugated iron bridge. That bridge was not the bridge the remains of which are still visible on the site. He thought that the corrugated iron bridge had been removed by the council at some time. He had used the Scout Group bridge. He thought that the corrugated iron bridge might have survived into the relevant period, but he said it probably looked just like a bit of scrap metal. He said that he would guess it was removed within the last 10 years, but he could not be sure. He said that his wife would say he is not very observant. He said that if you see things every day you take them for granted.
- 3.62. The footbridge across Markeaton Brook he referred to was the one by the Scout hut. He did not use any other access to get onto the land.
- 3.63. Mr Landon was asked whether he has seen organised games or sports on the field in the last 20 years. He said not really. He did see the Derby County juniors but did not realise who they were. He had seen American footballers walking away from the ground, but not participating in the sport. He said whether he would have seen such activity would have depended on when it took place. On Saturday afternoons, he would be at Pride Park anyway. The American footballers he had seen probably within the last 10 years. He had not remembered the Derby County footballers having been there until a previous witness mentioned them. He did not know for how long they used the field.
- 3.64. Mr Landon has never been asked to leave the fields.
- 3.65. In cross-examination Mr Landon was asked about his children's use of the fields. They used the fields both by themselves, and with him. When they were younger, he or his wife would go with them. When they got older, they went alone. Mr Landon was asked how often he used the fields after 1987. He said that he has four grandchildren born in 1984, 1987, 1994 and 1996. His son-in-law, Mr Harper, lives next door, and his daughter lives in Spondon. In the grandchildren's early years, they did quite a lot of child-minding. In school holidays, he took them onto the land quite frequently: their parents were working, and they looked after them. The Harper grandchildren would usually be with Mr and Mrs Landon until bedtime in the summer, but they might not have them at all in the wintertime. As part of the child minding, they went to the fields, perhaps once a week, although he had written fortnightly, because he was trying to be honest: weekly was not strictly true, but they went most weeks. When he went with the grandchildren, quite a bit of the time they messed around in the brook, but they also played ball games and flew kites, chased around and played hide and seek.

- 3.66. Mr Landon was asked whether point 8 was the bridge he referred to: he said that it was near enough point 8 on the map. He has stopped using the field recently, within the last couple of years. His grandson has gone onto other things. Until then he had always used the same access point.
- 3.67. Mr Landon was asked whether he remembered the access being closed off in about 1995: he said that he remembered a gate being erected. He is secretary to the Scout group and went that way quite frequently. He was asked whether it stopped people getting access. He said it was locked and he did not think many people got past it. He agreed it could have been around 1995. He did not make a note of it. It was there for a brief period. He was not sure why the Council had required it to be opened up again, but the locals were happy that access was available again. It was put to him that the gate and fence were up and locked for several months before the gate was opened. He said that he thought it was very quickly that the gate was opened: within 2 or 3 days, there was outrage from the local public. The people who use it for dog walking were not happy at all. He did not know who complained to whom, but it was reopened fairly rapidly. The Council had put the pathway from the City of Derby to Markeaton Park, and people were annoyed when it was closed: as far as they knew they had every right to walk along that pathway.
- 3.68. I asked Mr Landon where the path went through the site. He said he could not say, and he now wondered whether it ever got to completion. It was supposed to go round the fields.

**(5) Helen Bousie**

18 Woodland Road DE22 1GF

- 3.69. Mrs Bousie provided a written witness statement dated 7<sup>th</sup> February 2010 and an evidence questionnaire dated 13<sup>th</sup> October 2008.<sup>5</sup> She has lived at her present address since 1981. Her address is within the claimed neighbourhood.
- 3.70. Mrs Bousie stated that she has two children, born in 1981 and 1983. They attended Markeaton Primary School. Her younger child used the fields from 1993 onwards to play football with his friends after school and at weekends. He also used to cycle through the wooded area at times. He played in Markeaton Primary School's football teams from around 1993 or 1994. The team played home matches on the field at the back of the Jonty Farmer.
- 3.71. The family has had a dog since February 1999. Mrs Bousie regularly walked the dog on the fields from 2000. She walked the dog on the fields 2-3 times a week. Until 2007, when the fences were erected, she regularly gained access to the field by going down the slope leading off Kedleston Road or from Markeaton Street. Her usual route took her across the field, through the woods and into the second field. Before the bridge appeared, she crossed the brook by edging along the fence near the Markeaton Street entrance, as countless other dog walkers did. There were always other local people walking their dogs there, and she often chatted to people whilst their dogs played together.

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<sup>5</sup> A026

- 3.72. There were never any notices around stating to whom the land belonged. She assumed it was waste land left by Sturgess School. No-one ever discouraged her from using it.
- 3.73. Whilst dog walking, she had seen people people birdwatching, and had observed birds and butterflies herself. She had seen people picnicking on the field in the summer, and sledging down the hill in the winter. Local children constructed a BMX track in the woods, and she had often seen them playing there during the school holidays.
- 3.74. Mrs Bousie stated that during the time she has lived in the area she has regularly used the local shops, and, since 1984, has regularly attended St Alkmund's church with her family. She worked at both the grocer's shop before it became Jacksons (and later Sainsbury's), and at the greengrocers, now the chip shop, and got to know lots of people living in the area. The family used to go out for meals at the Clovelly Hotel, and subsequently at the Indian restaurant it later became. Mrs Bousie has used the local vets since 1990. She still uses the existing shops in the area, as she has always felt she should support her local community. The Bousie children both attended local nursery schools. Mrs Bousie's son attended Beavers at the Watson Street Scout hut. She also often used to take her children to play on the equipment at Mackworth Rec. She said that the application site is an important part of the local community.
- 3.75. In her evidence questionnaire Mrs Bousie stated that she had known the application land from 1985 to date, and had used it from 2000 to date daily for dog walking and for blackberry picking. Her family had used the land for playing football and games with a group of friends.
- 3.76. In oral evidence Mrs Bousie was asked to identify the accesses she used to use. The slope off Kedleston Road she had referred to was point 3. Point 1 was where she accessed the land from Markeaton Street, and, although she had not put it in her statement, she had also used point 6. Point 3 was not obstructed until 2007. There was a metal five bar gate there which used to be left open. She did not remember there being a stile there.
- 3.77. She did not remember point 1 ever being obstructed. She did not remember point 6 being obstructed either: that had always been open as far as she remembered.
- 3.78. Mrs Bousie was asked where the sledging took place: it was on the hill across the north western corner of field A.
- 3.79. Mrs Bousie had seen children playing football on field A. Her own son used to play football on there with his friends, often after school and weekends. She thought she had seen one game of American football on field C, some time ago, and maybe two or three games of American football on field A. She was not sure whether that was before 2007, and suspected it was after, although she could not be sure of the date. She was not sure when the game on C was: she

remembered it because someone got injured, and she met the ambulance and they were wondering how to access the field.

- 3.80. Mrs Bousie confirmed that she had never been asked to leave the fields.
- 3.81. In cross-examination Mrs Bousie was asked about her children's use of the field, cycling through the wooded area. The football was with the School when they were younger, but then her son used to play on field A just with his friends, from about the age of 15, about 1998, to 2002 or 2003. They would get organised and meet down there to play.
- 3.82. Mrs Bousie's route was through point 3, throwing the ball all over A, through the footpath into B, along the southern edge, up field C, exiting through the walkway. Other times, she through Markeaton Rec, up Markeaton Road, and back round the way. It varied according to the time available, and how fit the dog she was walking was.
- 3.83. Mrs Bousie was asked whether the gate next to the stile at point 3 was locked. She said whenever she used that access there was open access there. The gate was no longer on its hinges: it was laid back against the wooden fence. It was never closed. She was asked whether she remembered signs in 1993. She said she only got the dog in 1999, and started using that point in 2000, so she could not comment about signs which might have been there in 1993.
- 3.84. Mrs Bousie was asked about point 1: she said that she remembered seeing the school from the ring road in the car, there and not there, but she did not use the fields then. She did not know what the situation was in relation to point 1 in 1989. She started using that entry point in about 2000.
- 3.85. She was asked whether she remembered the access being blocked off at point 1 at some time after 2000, whilst the university was carrying out some works. She said she could remember the works, but could not really remember the access being blocked off. She remembered the land being used as a compound in 2005-2007. She said that it was possible to gain access through there at that time: it was freely open. The portacabins were there, but there was no limited access at all.
- 3.86. Mrs Bousie was asked whether she remembered a locked gate at point 1 from 1995. She said that the access was not locked from when she started using it in 2000 until Christmas this last year. She never came across it locked. It was put to her that the objector's case was that there was a locked gate there, and that entry was only possible via some broken fencing. She was asked whether she remembered broken fencing. She said that she did not.
- 3.87. In re-examination Mrs Bousie was asked about the 2005 compound. The portacabins were on the concrete base in B, but you could walk through. If there was traffic, she waited until it was gone, and then just went through. She thought the works were the construction of the University, but she was not sure. She remembered the compound, but was not sure what the works with which it was used in connection were.

- 3.88. She was asked how many portacabins there were there. She said that they were stacked two high, and she thought there were about six, in three lots of two. She did not remember whether or not the compound was fenced off. She was asked whether she could still access the bit beyond the compound. She said it was just the compound area that she could not access. The land was more muddy underfoot because of the machinery.
- 3.89. Mrs Bousie was asked to describe the access at point 1 at that time: she said that she could not remember whether there was a gate there or not. She used to come into field B but could not remember what the access was like.

**(6) Francis Salter**

38 Wheeldon Avenue DE22 1HN

- 3.90. Mr Salter provided a written witness statement dated 13<sup>th</sup> February 2010 and an evidence questionnaire dated 10<sup>th</sup> November 2008.<sup>6</sup> Mr Salter has lived at his present address since 1986, and has lived in the local area for all but 14 years of his 58 years. His present address is within the claimed neighbourhood. When he was a choirboy at St Alkmund's Church, the Vicar's son went to Sturgess School, which was then on the application land.
- 3.91. From 1986 Mr Salter walked his dogs on the land on a daily basis. In the mid-1990s his granddaughter was born, and he and his wife took her to the fields, and later she went by herself. In 2006, another granddaughter and, shortly afterwards, a grandson were born, and they now regularly visit the land.
- 3.92. Mr Salter stated that he had assumed that the land was common land, and certainly the local community had used it as such. Access was open at several places. There were no signs that he remembered telling him to keep out, and no-one ever questioned him regarding his use of the land. Once the remnants of the old school had been removed finally, the land reverted to nature, and walks there became really enjoyable.
- 3.93. Mr Salter had seen people other than dog walkers using the land: children played there daily, cyclists used it, and some people, Mr Salter included, used the land to access Markeaton Street without having to walk all the way around. Mr Salter said that he believed that local residents had enjoyed the amenity and natural habitat of the application land for well over 20 years, and he resented the thought that Derby University planned to take it away from them. Mr Salter's opinion was that the University was arrogant, cared only about its own expansion and did not care for the local community or the fact that the application land was green land.
- 3.94. In his evidence questionnaire, Mr Salter stated that he had known and used the land from 1986 to date for walking either alone, with dogs, or with his granddaughter. His immediate family used the land for playing.

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<sup>6</sup> A165

- 3.95. In oral evidence Mr Salter was asked about his answer to question 10 in his questionnaire where he stated that he gained access to the land from Kedleston Road, Watson Street and Markeaton Street: he said that his most frequent point of access was via a driveway with a five bar gate at the bottom into field A, at point 3. He also accessed the land from Markeaton Road at point 1. He had also accessed the land from Watson Street, although not in the earlier years. There was also, although he had not mentioned it in his questionnaire, a gate on Queensway which he had used. That was not always locked, although he had known it to be locked. He said that gate was probably the point marked on the map as point 2. There is a metal fence along there which is in poor repair, but which has a gate in it, through which he has accessed the land.
- 3.96. Mr Salter said that he had seen children playing football on the land, but did not remember anyone wearing strip, as you would do in a formally organised game. He said his house does not overlook the fields, and he would have to be there at the right time to see it. The children he had seen were using coats for goalposts: children playing, really.
- 3.97. Mr Salter said that he had never been asked to leave the fields.
- 3.98. In cross-examination Mr Salter was asked what he did on the fields. He said he did not have a set routine: he used the land as recreational ground. He went on his own with the dogs, from time to time, or with the children, to play games including Frisbee. He was asked whether his use was restricted to the paths and wooded areas. He said it was not. He used the open fields, mostly field A because it was closest to his house, but they walked around, and his wife and he would sometimes walk around the fields in the evening. His use of the land to gain access to Markeaton Street would involve him coming in through point 3 and out through point 1, along the path alongside the brook.
- 3.99. Mr Salter did not remember there being a locked gate at point 1: he did not remember ever not being able to get through there. He was asked whether he remembered broken fencing alongside the gate which people got access through, and said that he did not remember that specifically, but much of the fencing was broken.
- 3.100. In relation to the school site, Mr Salter agreed it might be that the school was demolished in 1989: he remembered it being present on the site. He had nosed around the buildings looking inside them when they were derelict once, but he would not have gone in there with the dogs: it was too dangerous. He said that he had walked the perimeter of the field, but corrected himself, saying it was not a field then, it was a derelict school.
- 3.101. Mr Salter said that his most frequent access point was point 3. He did not remember a locked gate and a stile next to it. He remembered a five bar gate, but did not remember it being locked. He was always able to access the land, until the gate disappeared and the fence appeared, relatively recently. He did not remember any signs being erected there in 1994 or 1995: he did not know until recently that it was University land, when the recent signs went up. He had no recollection of signs telling him he should not be on the land.

- 3.102. Mr Salter did not use the access by the Scout hut until the 1990s. He did not remember the University erecting a gate and fence there to block off access.

**(7) Sophie Powell**

19 Pittar Street DE22 3UN

Formerly of 89 Mundy Street

- 3.103. Ms Powell provided a written statement dated 11<sup>th</sup> February 2010 and an evidence questionnaire dated 6<sup>th</sup> October 2008<sup>7</sup>. Ms Powell used the application land between June 2001 and June 2004 whilst she was living at 89 Mundy Street DE22 3LE, which is within the claimed neighbourhood. She was involved with the Rainbows, and in 2006, after she had moved from the area, she stayed overnight at the Scout Hut for two nights with the Rainbows. On the Sunday morning they all went for a walk on the application land.
- 3.104. Ms Powell said that when she lived in the area she often drank out in the evenings, at the Victoria on Cowley Street, the Ram on Bridge Street, the Five Lamps on Duffield Road, the Seven Stars on Duffield Road, the Maypole on Nunn Street, the Woodlark on Bridge Street and sometimes at the Jonty Farmer. She attended events at the West End Community Centres: community parties called Winter Warmers, and City Zen events (an alternative community event with creative activities for children, live music and food). She also went to talks and public meetings there. She used a lot of local shops: Select & Save on Parker Street, Pizza Palermo (a takeaway on Parker Street), the newsagents on Duffield Road (opposite the Five Lamps) and the Five Lamps bathroom shop. She also used the Kedleston Road post office, the Chinese takeaway on Duffield Road, Mathus newsagent on Cowley Road, the chip shop on Kedleston Road and Jacksons on Kedleston Road and an engraving shop called Rayal Trophies on Nuns Street. There was a really good greengrocers on Kedleston Road which is now closed.
- 3.105. In her evidence questionnaire Ms Powell stated that she had used the application land from 1998 to date for walking and playing. Her immediate family did not use the land.
- 3.106. In oral evidence Ms Powell was asked how she had used the site since 2004. She has walked around the area since 2004, and used it with the Rainbows on the occasion she mentioned in her statement. She has never been asked to leave the fields.
- 3.107. In cross-examination Ms Powell confirmed that she knew nothing of the site during the 1988-1989 period. She was also unable to comment on whether the Watson Street entrance was closed in 1995.

**(8) Edward Topley**

88 Sherwin Street DE22 1GN

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<sup>7</sup> A148



- 3.108. Mr Topley provided a written witness statement dated 8<sup>th</sup> February 2010 and an evidence questionnaire dated 28<sup>th</sup> September 2008.<sup>8</sup> Mr Topley's present address is within the claimed neighbourhood. He first knew the land from August or September 1979 when he moved his service and repair business into garage premises at 19A Longford Street DE22 1GN, which is also within the claimed neighbourhood.
- 3.109. Mr Topley began using the fields when he was working at 19A Longford Street to exercise his dog. He sometimes relaxed on the land on a sunny afternoon. Mr Topley had seen other people using the area at that time: children fishing and messing about in the brooks, dog walkers, and people relaxing in the long grass and flowers on a sunny afternoon. He has observed a large variety of birds on the land. He has fished the lake and brooks, and checked what fish are there. Mr Topley said that there is more wildlife in the fields than you would encounter on a walk around the whole of Markeaton Park or Darley Park, both of which areas are close to where he now lives. He has also camped out on the application land on summer nights. He has picked blackberries every year from a large bush which has grown larger over the years. In 2009 he picked 4 kilograms of blackberries from it, and there were plenty left.
- 3.110. Mr Topley had seen other people camping. He had seen young families playing ball, tennis, fathers and children playing, and children playing kick-about football. He had seen the Cubs using the land on several occasions. He had seen the teachers and children playing games and holding table-top stuff [sales?]. He had seen young couples walking on summer evenings, children on mountain bikes and skateboards, tree swings, and children playing in the woods and streams.
- 3.111. Mr Topley said that someone had placed proper bridges in two separate places to enable people to cross the brook into the long field. The bridge was washed away one bad winter, and has never been replaced. He mentioned it to the Council on one occasion, but nothing happened.
- 3.112. Mr Topley said that there was never one main entrance to the fields: it was possible to enter in a variety of places. He had continued to enjoy walking round the land until his dog died recently of old age, but had found it more and more difficult to use the land, as the whole area had been fenced off, and the entry points reduced to one between the doctor's surgery and the Jonty Farmer. He said that the land does not look very inviting as a result of being fenced off: the visual message is "keep out". He says that there are now very few people using the land.
- 3.113. In his evidence questionnaire, Mr Topley stated that he had used the land from 1979 to date for wildlife observation. His immediate family did not use the land.

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<sup>8</sup> A191

- 3.114. In oral evidence Mr Topley was asked about his answer to question 10 on his questionnaire, where he had said that he gained access to the land mainly by the unobstructed entrance on Kedleston Road opposite the new Broadway. He said that that is the entrance marked as point 3 on the Applicant's map. He was asked to describe how that access was when he used it to gain access to the field. He said that back in the mid 1980s there was no gate on it: it was possible to walk straight into the field. Some time later a gate was put on, but it was not locked. About 12-18 months later, the gate was padlocked, he thought to stop lads on motorbikes getting onto the land, and perhaps to keep people out while the field was being mown. There was no fence into the woodland at the side of the gate, along the whole of the northern boundary of the site, so the presence of the gate did not prevent you getting onto the field.
- 3.115. Mr Topley was asked whether he remembered a stile at point 3. He remembered two posts to the side of the gate, one the gate post and the other another post, which you could walk between. There was nothing to step over, you just walked between them.
- 3.116. He was asked to explain the other entrances he used. He said his dogs did not get on with other dogs, so he would give other dog owners a wide berth. Because of that situation if he saw someone on A, he would walk along the road, either come in at point 2, or walk a little way around Mill Dam Pond, and gain access either at point 1 on Markeaton Street, or between point 2 and the pond, because the fence was always down at that point. If there were a lot of people about he would go further round, along Mackworth Street, through Mundy Pleasure Ground and enter at point 6, 8 or 4.
- 3.117. Mr Topley agreed that point 6 is the bridge by the Scout Hut. He was asked what is at point 8: he said that it was another bridge across the brook, near the Scout Hut, near the tennis courts. He thought it was something someone had put in at some stage. The water was shallow, and you could walk down one side of the embankment and up the other side. It was made of wooden planks. At point 4, that was the woodland again, and he could get through the bushes and back into the wood. There was no fence there. You did not have to cross the brook: you can walk down the embankment and up the other side.
- 3.118. He was asked whether he remembered any bridges across the brook apart from the Scout Hut bridge: he remembered a bridge at 9, a footbridge, and a bridge at number 5. The bridge at 9 is no longer there: that is the one which he said in his statement was swept away one bad winter, he thought in the late 1980s or early 1990s.
- 3.119. Mr Topley was asked how point 5 appears now. He said he did not think that there was anything there, other than what people had collected from the old bridges and put across the brook. In the past, there were two proper wooden bridges which spanned the brook, and enabled you to walk across. The one at 9, he thought built by the Council. The one at 5 was not so substantial, but plank-type wood had been used to make a crossing.

- 3.120. Mr Topley was asked whether he had ever seen organised games or sports on the fields. He said that he seemed to remember young children having a proper football match on a Saturday morning. He had also seen older people, probably students, dressed up, but not having a proper match, more a kick-around. The children he had seen on several occasions. He had not seen grown-ups playing a proper game with a referee. He had seen the goalposts both locked away, and out on the field, but not in the context of a proper match, just a kick-around. He thought that had started within the last 5 or 6 years.
- 3.121. The children playing on a Saturday was quite some time ago, not recently, he thought round about 2000, a good 10 years ago. They had used the land for 12-18 months, then their use just seemed to fizzle out. After that he did not see any more proper football training sessions on the field.
- 3.122. Mr Topley had never been asked to leave the fields.
- 3.123. In cross-examination Mr Topley was asked about point 3: he agreed that he had said that a gate was put up in the mid 1980s. He was asked for a date, and he said he thought in 1993 or 1994. It was not padlocked initially, but was padlocked 12-18 months later. Then there was a gangway, then a post for the existing post and rail fence which carries on up the hill. He was asked whether the gap appeared to be a gap which had had a fence across it. He said it did not, it was just a gap he could walk through.
- 3.124. Mr Topley was asked about entrance 2: he said that he is aware that there is a pedestrian access there now. He agreed that there was always a gate there, but when it was put to him that it was locked, he said it was not always locked. It was not locked when he started going up there when the A38 was being constructed, but he did remember it being locked later: someone had put a fresh padlock on it. He did not remember when. He said that even so his access was not restricted because where the fence ended, he walked into the wooded area at the top of the Mill pond and could get in there. The fence was broken: what was there was on the ground, and there were bushes growing through it. You would not have known it was there, except that you could feel it underfoot, and if you were not careful you could trip up on it. You could get in that way.
- 3.125. Mr Topley was asked whether he used point 1: he said that in the 15 years he has had his dog, he had used all the access points. He did not mind where he got into the land, and used various points to avoid other people with dogs. He was asked whether he remembered a locked gate at point 1: he did not. He said that that gate gives access to the mill pond. The majority of the fencing around the mill pond was down, with a couple of sections standing. The other fencing was to keep people off Mill Dam which was 102's fishing waters. That area was fenced effectively, although it was possible to get to it, by going up the embankment at the southern end of field C.
- 3.126. Mr Topley remembered the school buildings being present on field B. He wandered around the closed up school out of curiosity, more than once or

twice. There was a lot of broken glass, so he did not go there with his dogs, but went there on his own to see what was going on. It was derelict and vandalised once the school had closed down.

- 3.127. Mr Topley was asked about access point 6: he did not remember that being blocked off by the University in the mid 1990s. It was put to him that point 8 was an old iron bridge which went in the mid 1990s, and that there was no access there after that. He agreed that there was a bridge there, but said that he did not know when it came down. He said that there was still access there, because the brook is shallow and if it had not been raining, he could walk across and get in that way.
- 3.128. It was put to Mr Topley that at point 4, when the gates were put up, there was no access there. He said you could walk up through the wooded area and get in there. After the new road was put in the gate was closed. It was not possible to gain access through that gate because it was locked. It has only been opened recently. He said that you can still get in there, through the wooded area, even since the new gate has been put in. The access was not restricted by fencing.
- 3.129. He was asked about the bridges at access points 9 and 5. He agreed that the bridge at 9 went some time ago, he thought in the mid-1990s, but said that he was not sure when. It was never replaced. The bridge at 5, he agreed, was just two planks across the stream, old planks which had been put across the brook. It was put to him that the planks were removed in 2006. He agreed that it was possible that they might have been removed in 2006: planks appeared and disappeared, and chunks of wood appeared and disappeared to make makeshift bridges across the brook.

**(9) Fred Sykens**

32 Park Grove DE22 1HD

- 3.130. Mr Sykens provided a written statement dated 9<sup>th</sup> February 2010 and an evidence questionnaire dated 21<sup>st</sup> September 2008<sup>9</sup>. Mr Sykens has lived in Derby since 1984. In 1987 he, his wife and daughter (who was born in 1986) were living at 188 Francis Street. Francis Street is not within the claimed neighbourhood, it is on the other side of town. They moved to their current address in March 1989. Park Grove is within the claimed neighbourhood.
- 3.131. Mr Sykens stated that he had used the application land from 1989 through to the summer of 2007 on an intermittent but fairly regular basis. The frequency of his use has varied over the years. He has gone alone, accompanied by his wife and/or daughter, and accompanied by friends. He has also taken small groups of students through the area on two occasions as part of an “urban geology” field trip.
- 3.132. From 1989 to 2003 Mr Sykens regularly ran home from work at Mackworth College as part of his fitness training for rugby, and sometimes took a route through the application land. On numerous occasions between 1989 and 2007 he had walked through the fields alone or with friends at the start or end of

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<sup>9</sup> A186

walks into the countryside via Markeaton Park. He had collected blackberries with his wife and daughter from the hedgerows, and dandelions from the fields (for making wine). Whilst on these visits he had observed birds, invertebrates and freshwater organisms in the streams, and had made diversions to do so on occasion. He had also used the application land as a short cut (weather permitting) between home and local pubs (the Traveller's Rest on Ashbourne Road, the Victoria on Cowley Street and the Jonty Farmer on Kedleston Road, when the Victoria was open and before the surgery was built). He did not seek permission to use the land (and would have had no idea who to ask). He was never questioned about his use of the land or his presence on it. He was unaware of any notices prohibiting access.

- 3.133. Whilst on the land, Mr Sykens had observed many other people, both adults and children, pursuing their own activities: walking (often with dogs), running, playing, football, tree climbing, fruit picking, collecting, stream dipping, kite flying, sitting on the grass. He hardly recalled being the sole user of the fields at any time.
- 3.134. Mr Sykens stated that he had accessed the land from all sides for the activities he referred to: from Kedleston Road via the former entrance to Markeaton School playing field; across the stream where the Brook medical centre now stands; from Watson Street, directly over the stream, and via the bridge to the Scout Hut; from Mackworth Road via the path from the Mundy Pleasure Ground; from Markeaton Street through a gate at the end of the pond; and, occasionally, through a small gate direct from the A38 near the other end of the pond. He said that he remembered seeing an old map which showed a public right of way adjacent to the last house near the Brook medical centre running down to the stream, although the path is not shown as a public right of way on recent OS maps.
- 3.135. Mr Sykens stated that he had used the application as he had used other community amenities since moving to his present address in 1989, including the shops on Kedleston Road, those there now (particularly the Post Office, the Fish and Chip shop and Sainsbury's Local), and the former shops (particularly the general store and butchers). His newsagent is Markeaton News on Bromley Street. His daughter attended Central Nursery and Markeaton School. Mr Sykens visits the local pubs: the Victoria when it was a tenanted pub, the Horse and Groom for live music, the Jonty Farmer for televised sport, and the Traveller's Rest, which is a good local which organises events for its customers. He is registered at the Brook Medical Centre. He attends local events, such as the fireworks at the Scout Hut on Watson Street, and the annual concert in the park at Darley Park. The main reason why he remains at his current address is because of the easy access to open spaces such as the application land, Markeaton Park and Darley Park, and the access this gives to walking in the surrounding countryside.
- 3.136. In his evidence questionnaire Mr Sykens stated that he had used the application land from 1989 to date several times a year as a route to Ashbourne Road and Markeaton Park, and for picking wild fruit. His immediate family used the land for the same activities.

- 3.137. In oral evidence Mr Sykens was asked about his answer to question 10 in his evidence questionnaire where he had stated that he gained access to the land through gates on Kedleston Road, the now A38, behind the Deaf School, and from the fields behind the Scout Hut across the stream: the gates on Kedleston Road is access 3, the now A38 is access 2, and behind the Deaf School is access 1. From the fields behind the Scout Hut across the stream is access point 6, which he reaches either by going across the bridge from Watson Street, or coming along the brook from Mundy Pleasure ground.
- 3.138. Mr Sykens was asked to describe access point 3 in the time he has known the land. He said that originally there was a wooden fence down there. It was used by Markeaton School, which his daughter attended from 1991-1998, although the field was not used by the School all the time. He thought there was a gap by the side of the gate through which access could be gained. He would not have climbed over the gate or the fence. Access is now restricted because a metal fence has been built across. Previously either the gate was open or there was a gap by the side of it to walk through.
- 3.139. He was asked to describe access point 2 from 1989 onwards. He said that the gate itself has not changed: it is an old rusty one. It has been open every time he has tried to use it. There have been times when it has been difficult to move. It is not an entrance he has used very much at all. The field tends to get boggy at that end, and he does not like running through mud. He could not remember a time when he had been up there and the gate had been locked, but said that he would only notice if he was trying to go through it.
- 3.140. In relation to access 1, when he originally started going through there was disintegrated fencing at that point. Then a gate was put up, but as far as he was aware it was always open. He does not use the area regularly on a weekly or daily basis, it has been as and when, particularly during better weather, because he does not like tramping through mud. He did not remember the date when the gate was put up, but thought it was mid-late 1990s, possibly even later.
- 3.141. At point 6, when he first came, he could go over the bridge and turn right into the fields. He could not remember a time when that access point was not available.
- 3.142. Mr Sykens had not seen organised sports taking place on the land, in the sense of sports organised by schools or universities, although he had seen people playing football with jumpers for goalposts. He had never been asked to leave the land and had never seen anyone there who did not appear to be using the field for leisure purposes.
- 3.143. In cross-examination Mr Sykens agreed that his use of the site was irregular, as and when, for convenience and for collecting fruits, mainly in the better weather. He was asked whether for the most part he followed paths. He said not always: sometimes he would cut straight across, and sometimes he would use the bank for extra fitness training. The route he took depended on what he

was doing. He never used the old iron bridge; he used to walk to the side of the path and cross the stream.

- 3.144. He used the site for walking with groups of friends, usually starting from Watson Street, through the application land from access 6 and out of access 1, sometimes along the watercourse, and sometimes along the middle. There were paths, but they were not that well established. Field C was not that regularly cut. With his daughter he would go all over the place, looking for wildlife. Playing field A was where he picked the dandelions, because that was cut. He did not remember the school on field B. He agreed his recollection of the land dates from after the school was demolished. He did not remember the buildings at all.
- 3.145. He was asked about access 3: he did not specifically remember the gate there being locked. He never had any problem getting in there: either the gate was open, or he went by the side of it through the gap. He was asked whether he remembered signs there. He did not recall them. He was asked whether he remembered a gate at access point 1 which was locked in the early days: he did not. He remembered a gate being put there, several years later (mid-late 1990s) but did not remember it being locked. He had never crossed the field and found he had had to turn around and go back. He did not ever remember there being a fence and gate restricting access at point 6.
- 3.146. I asked Mr Sykens to describe access point 6 as it was at the time of the inquiry. He said it was open. I asked him if there is a gate there now. He said he has not been there for a while. He had been there in 2007, but did not remember any problems getting through there. If there was a gate there and it was open he would go straight through it.
- 3.147. Dr Choongh, for the Objector, asked about access point 2. Mr Sykens said that he only went there a couple of times, and when he went there it was open. He went there this morning and it was open. He agreed that there was a gate there, but said that the couple of times he tried to use it, there was no problem getting through.

**(10) Michael Brian Lomas**

75 Park Grove DE22 1HG

- 3.148. Mr Lomas provided a written witness statement dated 14<sup>th</sup> February 2010 and an evidence questionnaire dated 25<sup>th</sup> November 2007.<sup>10</sup> Mr Lomas has lived at his present address since 1971. His address is within the claimed neighbourhood.
- 3.149. Mr Lomas stated that he has two children, Katherine, born in 1980, and Thomas, born in 1983. Both children attended Markeaton Primary School until the age of 11. Thomas has been using the application land since he was about 10, initially for den building with his friends, and later to play football. He still plays football occasionally, usually with his friends from St Alkmund's church, which he attends once or twice a week.

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<sup>10</sup> A116

- 3.150. Mr Lomas himself uses the fields occasionally for cycling and for exercising his neighbour's dog when she is away (he explained in oral evidence that his neighbour is Danish and has relatives in Denmark). The dog loves playing in the undergrowth and streams. Mr Lomas stated that whenever he uses the land or passes it, he usually sees someone using it. It is common in summer to see a group of children or young people playing cricket, and in the winter he sees a casual game of football from time to time. He has also seen boys doing stunts on BMX bikes.
- 3.151. Mr Lomas said that neither he nor his son, nor anyone else so far as he knew, had been discouraged from using the application land, until fencing was erected in 2007. Until that time, he thought that most people had thought that the land was "waste land" which belonged in some way to Sturgess School. Mr Lomas recalled an occasion in June 2006, when he was passing the fields on Kedleston Road and heard music coming from there. He found a group of young people playing various musical instruments and juggling. They had a generator and lights and invited him to stay and watch. They told him that some of them lived locally, and some did not, but most of them knew each other because they worked at the same place.
- 3.152. Mrs Lomas taught at Markeaton Primary School between 1989 and 2007, and at the time Mr Lomas wrote his statement, was working part-time at one of the local nursery schools: as a result most of the people who were children in the area during that period have been taught by her, and she knows their parents as well. Mr Lomas also knows them because he has helped with summer fairs and sports days. The parents have got to know each other through attending these and other school events.
- 3.153. Mr Lomas stated that he uses all the local shops, except the dry cleaners, including the barber's, the chip shop, the post office, and Sainsbury's Local (formerly Jacksons, and before that Scattergood's the butcher) and the Jonty Farmer pub. He used the Victoria pub until it closed. He often meets people he knows walking to and from these places, and the staff know him as a regular. Mr Lomas said that the area has a strong sense of community, in part because it is quite small, just a few streets: mainly Longford, Sherwin, Cedar, Bromley, White, Cowley, Watson and Redshaw Streets, Woodlands Road, Park Grove, and part of Kedleston Road. He said that the area those streets cover he thinks is less than the area covered by an average country village.
- 3.154. Mr Lomas acknowledged that it was not just people from the local area who used the fields: the musicians and jugglers lived in Normanton, on the other side of Derby. He also knows of people who live on Ashbourne Road and on the Mackworth and Allestree Estates who use the land. Mr Lomas said that in addition to the people who had come forward to support the application, there were many other people who use the fields or have used them in the past, but who cannot be found, or who are not prepared to offend the University, or who have died or moved out of the area.



- 3.155. In his evidence questionnaire Mr Lomas stated that he had known the land since 1971 and had used it from 2001 to date once a month for walking, because it is a peaceful place. His immediate family used the land for football. Fencing had been erected to discourage use of the land in August 2007.
- 3.156. In oral evidence Mr Lomas was referred to his answer to question 13 in the questionnaire, where he said that he gained access to the land in various ways, and was asked to elaborate. He said that he usually used access point 3, and occasionally accesses 1 and 6.
- 3.157. Mr Lomas was asked to describe point 3 from his earliest recollection. He said that there was a wooden fence across that section at the bottom of the ramp from Kedleston Road, and, he thinks, a stile. The fence became damaged or fell down, and, later, a gate was put up, but next to the gate there was a gap of a bit less than a metre, presumably for people to walk through, and then the wooden fence continued up the hill. He never noticed whether the gate was locked, because he did not need to use it, because of the availability of the open gap next to it. He was asked whether that access was obstructed at any time. He said that in the summer of 2007 a rather unsightly galvanised steel fence was erected there.
- 3.158. Mr Lomas described access 1: He said that he is fuzzy about what was there before the current fence. His best recollection is that there was a barrier across the road, but an open gate or a gap next to the obstruction across the road section of the access. He suspects it was a Victorian old-fashioned steel gate, but said that it was always open.
- 3.159. Mr Lomas described access 6, next to the Scout Hut. His earliest recollection was it was an open pathway, the continuation of Markeaton brook walkway. Then at some time he noticed that a fence was erected with a gate in it, but the gate was open. He did not remember a time when it was not possible to get access at point 6.
- 3.160. Mr Lomas was asked whether he remembered any of the fields being used for organised games or sports. He said that he recalled once there seemed to be a game going on with the full number of required players. This was not usually the case: he only remembered seeing that the once. It was football and was on field A. That was within the last 5 years.
- 3.161. Mr Lomas has never been asked to leave the fields.
- 3.162. In cross-examination Mr Lomas agreed that his use of the fields has been occasional. He was asked whether when exercising the dog he stuck to the streams and undergrowth and he said he did not: the dog also loves catching a ball, which he does in the open areas. Mr Lomas was asked about access 1: he agreed there was a gate or barrier across the road section. He did not know whether it was locked or not: he never needed to open it. The gate or gap next to it was open. He agreed he did not go there at night, but said that he did not think there was a lock on it. He did not think that it could be locked: by the general state of the gate, he would not have said it was lockable. He

remembered the gate at 6 being erected around about 1995, but did not remember it ever being locked.

**(11) Peter J Sainty**

62 Ashbourne Rd DE22 3AF

- 3.163. Mr Sainty provided a written witness statement dated 4<sup>th</sup> February 2010 and an evidence questionnaire dated 22<sup>nd</sup> September 2008.<sup>11</sup> He has lived at his present address since October 1987. His address is within the claimed neighbourhood.
- 3.164. Mr Sainty said that within a few months of moving to his present address the application land became part of his usual route for dog walking, and it provided excellent space for exercise. His elder sons were 8 and 6 when he moved, and when they came to stay at weekends, they accompanied Mr Sainty and the dog on these walks, and watched with interest and glee as the old Sturgess School was demolished. Mr Sainty said that his usual entrance at that time was, and remains, by Markeaton Street. He would frequently walk through the woods to the bridge which then existed, over the path which emerges by the Scout Hut on Watson Street, and back via Mackworth Road. Sometimes he reversed the route, and sometimes he simply walked around the application land and emerged either through the gate onto Queensway or back out by the entrance on Markeaton Street. The boys regarded the application land, with its trees and water, as a grand adventure playground. In the summer, they occasionally played tennis on the hard court on the other side of the brook, until it became too overgrown, or used the hard surface to run radio-controlled cars. In the autumn the wooded area was a fertile hunting-ground for conkers. The field itself was used for aerial toys: Mr Sainty said he could not remember whether his sons flew their own kites there, but he certainly saw other families flying kites.
- 3.165. When the bridge was removed, the round trip became more difficult, but was still possible by jumping across the brook. The north eastern field was another good area for running off steam, although there were frequently others playing games there, and his boys had to be careful to avoid interfering with play.
- 3.166. Mr Sainty's youngest son was born in 1991, and was taken to the application land in his pushchair. He too has enjoyed the woods, the water and the conkers, as well as the field itself. The original dog has died, but his replacement is equally fond of the open space afforded by the field, as well as the lure of the trees. Mr Sainty's round trip has become curtailed as he has lost his agility, and it is more usual now for him simply to walk around the application land, perhaps going through the wooded area, and come back the way he came in.
- 3.167. Mr Sainty stated that he had witnessed many other dog walkers using the land. There was a period when the field was popular for mountain bikes. Mr Sainty restricted his use of the field, by choice, when travellers set up camp there: at that time he tended to use the "back entrance" to access the woods only.

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<sup>11</sup> A163

Throughout the last 25 years fishermen have been in evidence, using the Sturgess Field bank as well as the Markeaton side. Mr Sainty had seen individuals enjoying the wildlife, with binoculars for bird watching. He said that it is still unusual to be alone in walking the dog on the application land.

- 3.168. Mr Sainty has not been prevented from using Sturgess Field, nor has he ever been challenged whilst using it. He regarded it, and believed that it was common for others to regard it, as public ground.
- 3.169. Mr Sainty stated that his youngest son had been a member of the Cubs and Scouts at the Watson Street Scout Hut, and his wife is ADC Beavers, Derby North. The family is registered with Brook Medical Practice. They have occasionally used the Ashbourne Road pubs, although their visits have diminished as they are less able to get out and most of them have either changed hands or closed.
- 3.170. In his evidence questionnaire Mr Sainty stated that he had known and used the land from 1987 to date several times a week for dog walking, nature trails with children and family games. His immediate family used the land for the same activities.
- 3.171. In oral evidence Mr Sainty was asked about his usual entry and route as described into his statement. The entrance was point 1. There used to be a bridge across the brook between the fields, he was not entirely sure where now, then he would walk either along the southern side of the brook, crossing over by the bridge at the end of Mundy Pleasure Ground, or would cross to the northern side of the brook and walk along Watson Street.
- 3.172. The bridge at access point 9 to the best of his recollection was steel and concrete, but was pretty rusty when they were using it. He said that it has been gone a long time and his memory going back that far is not that good. He could not put a year to when it went. After the bridge went, you could still get across the brook to field C at various places where it is not too deep or the banks are quite shallow: various people have put planks across to assist. Then you come back out onto the same path by the Watson Street Scout Hut.
- 3.173. Mr Sainty described access 1 in 1987: there were steel gates, he thought, usually open, a pedestrian gate and a vehicular gate, both of which matched the railings around the brook, he thought, but said that he would not swear to it, as it was going back a bit. The pedestrian gate was always open. He thought there were times when the steel gates were closed or half closed, but he always used the pedestrian gate anyway. He thought there were intervals when the vehicular access was stopped or attempted to be stopped. In particular when the travellers took up residence, there was a bit of an outcry, because that was their way of getting in. He was not sure when the travellers came, and said he was not good at going back that far, he thought it was 1991 or 1992. They were not there for very long, for one summer, he thought, but he could not be sure of the exact year. The gates he had described did not change until the new steel gates went up recently. The old gates were by that time getting pretty broken

down, like the rest of the fence, but other than that, he did not think it had changed much. He thought the new gates were put in a year or two back.

- 3.174. Mr Sainty was asked whether he had seen organised games or sports on the fields. He had seen organised games on the playing fields, just occasionally. He thought he first saw that soon after he moved to his present address in 1987 or 1988, and then there was a period, when he did not remember seeing anyone there for a while, (although he said that of course he was not on the land permanently), then quite recently, over the last couple of years, there have been people playing organised games again, either football or rugby, although he was not sure which.
- 3.175. In cross-examination Mr Sainty was asked about access 1: his recollection was that most of the time the vehicular gates were open, not locked. He used the pedestrian access during daytime hours. Mr Sainty remembered the school being there. He did not remember it anything other than vacant. He was asked whether he had walked around the vacant school. He said although the route he had described was his usual route, he did take other paths, including one out to the Queensway. He could not remember exactly what he did in relation to the buildings. He thought he did remember the boys wandering around the buildings on one occasion. The gate onto Queensway had been open at times. The regular route was as he had described, because the boys liked the wood, but with his dogs he went other ways. There were times when the Queensway gate was locked but times when it was open. He was asked whether what he referred to as a gate was in fact a gap in the fence. He said might have gone through a gap in the fence rather than through the gate, he could not swear.
- 3.176. Mr Sainty agreed that the car park was used as a compound. He did not remember not being able to get onto it. It was put to him that it would not have been possible to get onto the site when the school was being demolished in 1989. He said that he did not recall: he was keeping the boys away anyway, because it was obviously a dangerous place to be. He did not remember any physical barrier. He remembered the contractors leaving a massive bonfire, and being concerned about it, because of the danger, but he did not remember a barrier preventing him approaching it, although he said that memory can play tricks, and he could not be sure.
- 3.177. He was asked again about the compound on the car park between 2005-2007. He said that he did not remember that.
- 3.178. Mr Sainty was asked whether he remembered access 6 being blocked by a fence and gate in 1995, and the controversy surrounding it. He said that he remembered a controversy about the whole thing for some period for time. He did not remember the access being blocked by a gate, but it may have been, he did not know.
- 3.179. He was asked about the bridge, he agreed that they walked across the brook after that, sometimes across bits of planking. They still used the woods, but could not cross the brook at the northern end. They would sometimes do the walk in reverse.

- 3.180. In re-examination Mr Sainty was asked about access 2: he said that he cannot now remember whether he went through the gate or a gap in the fencing next to it. He had thought he remembered going through the gate, but there are a lot of gaps in the fence, and it could have been a gap that he used. He was asked whether there was ever a time that he could not get out that way, and he said not that he could remember.

**(12) Kim Yeoman**

7 Walter Street DE1 3PR

- 3.181. Ms Yeoman provided a written witness statement dated 10<sup>th</sup> February 2010 and an evidence questionnaire of the same date.<sup>12</sup> She has lived at her present address since she was born in 1982. Her address is within the claimed neighbourhood.
- 3.182. Ms Yeoman stated that she has had her current dog since 2000, and her family have always kept dogs. She has been a childminder since 2004 and has worked for the local nursery and pub. She has one child, who was born in 2008. Ms Yeoman has used the application land since she was a young child, on a daily basis. The Sturgess field and the two adjacent fields were the closest green area to the family house when she was growing up, and were the main areas where Ms Yeoman, her brothers and friends, played, in part because of the many activities they could undertake on the land. They commonly used the field behind the Jonty Farmer for sporting activities such as football, cricket, rounders and golf, as there were goal posts up all year round, and it provided plenty of flat, open space. Ms Yeoman said that she remembered her brothers competing in football games playing for Markeaton Primary School on this field. At the time of writing her statement it was common to see groups of people enjoying football and rugby games in the field. As children, they also used the land for games of hide and seek, as there are many natural hiding places. In the woods there were natural dips which acted as ramps for biking, and they had races around assault courses they had created from wood, stones and branches. They made dens and tree houses out of the natural materials available. There were always many rope swings over the brook, which they played on for hours on end. They found stones and bricks to create stepping stones over the brook. They commonly fished in the brook with nets, and created little dams to catch fish.
- 3.183. When Ms Yeoman was a child there were two bridges that they used for access over the brook: an iron bridge from the wood to Watson Street, and a wooden ramp bridge from next to the tennis courts to the woods. Neither bridge exists any more: the iron bridge was fenced off and eventually removed, and the wooden bridge was washed away in bad weather and never replaced. Ms Yeoman said members of the community had consistently secured pieces of wood and used them to provide access over the brook from one field to the next. At the time of writing her statement a member of the community had placed a plank of wood over the brook at the top of the field next to the allotments, and it was being used by everyone. The bridge provides access to

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<sup>12</sup> A214

and from the fields, and is used for a short cut to Markeaton Park, the University, the Scout Hut and the local pub.

- 3.184. Ms Yeoman said that she had always felt safe using the area, because of the volume of people using the fields, and the community spirit. She had used the land openly and frequently, and had never sought permission nor been stopped.
- 3.185. Ms Yeoman stated that at the time of writing her statement she was using all three fields twice daily, regardless of the weather, for a long walk with her dog. She enjoys passing the time of day with other dog walkers and members of the community. Ms Yeoman said that she had made many friends through the shared use of the area and common interests. She uses the land with her daughter. The area is extremely popular with dog walkers, and, as most people are familiar with each other, there is a real sense of community spirit around the field. The area is used by people of a variety of ages: children and teenagers through to older members of the community. Children ride bikes and play games, families picnic, students play football and sunbathe, adults walk with or without dogs, and, during the blackberry season, endless people pick the fruit. The area has also been used for organised community picnics and nature walks. Ms Yeoman said that she had always used the local amenities: she attended the local nursery (Whitecross), and Markeaton Primary School. She used the recreation ground as a child, and now takes her own child and the children she childminds there on a daily basis. She uses the local shops, hairdressers, post office and pharmacy frequently. She stated that the area has a great community spirit.
- 3.186. In her evidence questionnaire Ms Yeoman stated that she had known and used the land from 1982 to date 2-3 times a day for dog walking (twice daily), to take her child for walks, for picnics and for blackberrying. She had also taken part in sports – golf, rounders and cycling. Her immediate family use the land for the same activities.
- 3.187. In oral evidence Ms Yeoman was asked about her statement that there were two bridges over the brook when she was a child. The iron bridge was at access number 8 going across the brook, and the wooden bridge was at 9. The iron bridge was removed within the last 10 years, while she has had her present dog. It was gated off and then removed. The wooden bridge went a long time before that date, while she was still a child.
- 3.188. Ms Yeoman was asked about the accesses she had stated she used in answer to question 10 of her evidence questionnaire: via brook walk, via bridge by Scout Hut, via entrance on Kedleston Road, via back of Markeaton Park. She said that the most common one was along the Markeaton Brook walk, or over the bridge at Access 6 from Watson Street, and onto the land there. There were stepping stones made out of rocks between bridges 6 and 8, and as a child she would often go over there and onto Field C. Kedleston Road way was in at access 3. Along Markeaton Street was going in at access 1.
- 3.189. Ms Yeoman was asked whether access 6 has ever been different to the way it is now. She said she can only remember it as it is now, and with a wooden

fence, with three posts and two going across. Ms Yeoman described access 3 as it is now: she said that it is now iron. It used to be wood, and there was a stile thing next to it, which they always used to go through.

- 3.190. Access 1 was big aluminium space (a gate) for a vehicle to go through over the road way, and a blue iron door or gate next to it. It changed to the way it is now in 2007. Before 2007, she went through the blue iron gate, which was always open. There was no reason to go through the vehicular gate. She was asked whether she could remember the state of the fencing: she said it was a turquoise coloured fence.
- 3.191. Ms Yeoman had seen organised sports on field A only within the last 5 years, on very few occasions, organised games of rugby. Prior to that she had seen the land being used by Markeaton School competing against other schools. Her brothers were both at Markeaton School in the juniors, and she is five years older than the older one, so that would have been in 1987. She does not know when it stopped. Once her brothers left in 1990, she no longer went to watch the games, and she does not know when Markeaton School stopped using the field.
- 3.192. Ms Yeoman was never asked to leave the field.
- 3.193. In cross-examination Ms Yeoman was asked when she started to use the land. She thought from when she was 5 or 6, while her brothers were still at Markeaton Primary School, so in 1987 or 1988. She was asked whether she remembered entrance 6 being blocked in 1995 by the University. She said that she was aware of the gate going up. She was always able to get through. The gate was not locked.
- 3.194. Ms Yeoman was asked about access 3: it was put to her that the stile was put in after 1993. She said that she did not remember using it before 1993, but it was not her main way into the land.
- 3.195. In answer to my questions Ms Yeoman said that she understands that her mother would have pushed her around the field when she was under 5, and that is why she said that she had used the land since 1982 in her questionnaire, but she does not remember that herself.

**(13) Joanna Jennens**

107 Watson Street

- 3.196. Ms Jennens provided a written witness statement dated 17<sup>th</sup> February 2010 and an evidence questionnaire dated 10<sup>th</sup> September 2008.<sup>13</sup>
- 3.197. Ms Jennens stated that she moved to the area when she was 18 months old and was 27 at the time of writing her statement. The application land had been an important part both of her childhood and of her adult life. Much of Ms Jennens' childhood was spent playing with friends and family on the application land, learning about the local wildlife, including bird and butterfly

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<sup>13</sup> A101

spotting with Phillips guides, bat watching, insect hunts with her parents, playing with the family dog, and learning to “monkey” across the bridge over the brook with her friends. As an adult the application land remains an integral part of her life: she and her partner regularly walk their dogs in the area. She stated that the community cherishes the area and the chance to interact with others from the community who use the area. It is important to the local people and also to the people of Derby as a whole. She stated that she wanted the application land to be saved, so that she and her partner could continue to use it regularly.

- 3.198. In her evidence questionnaire Ms Jennens stated that she had known and used the land from 1986 to date for dog walking and playing as a child, at least 4 times a week. She takes part in walking, nature watching and dog training. Her immediate family use the land for the same purposes.
- 3.199. In oral evidence Ms Jennens was asked how she gained access to the application land: she said that when she was a child she lived in West Bank Avenue and used access 3. Now she uses access 1 and accesses 6, 5, 4 and 2, because her sister’s friend used to live in one of the houses on Queensway. She thinks that 8 is what she knows as the monkey puzzle bridge, which she knows by that name because she could get underneath and swing across.
- 3.200. Access 3 was originally a wooden farm gate, which vehicles could access, and a stile to walk through, small enough to stop motorbikes, but big enough for a person. She never found any obstruction to getting onto the fields at access 6. Access 1 originally was metal gates to stop vehicles, and a pedestrian gate which was always open. The pedestrian gate was old and rusty, and was part of the same fencing as goes around the Mill dam pond and all the way down to Mill Dam. The vehicular gate was the same. Those gates are no longer there. Now there is silver fencing with spikes on top. That fencing went in soon after she moved into Watson Street in February 2007, some time in the summer of that year.
- 3.201. Ms Jennens described access 2: there is a gate there, and there were gaps in the fence as well. She certainly remembered going through the gate to her friend Jenny’s house. There were odd occasions when the gate would be locked, but the other gates were open, so she would go through the gap in the fence at that point instead. They would have come in another way. If the gate was locked they would go through the gap in the fence, but most of the time it was open.
- 3.202. Ms Jennens described access 4, the bridge by the medical centre and the pub. There is vehicular and pedestrian access there. The majority of the time she could access the pedestrian gate. She said that there were occasions when both gates were closed.
- 3.203. Ms Jennens said the only organised sport she had seen was on field A, and she thought since she had moved to Watson Street, within the last couple of years. She said that there was a period of time when it was more frequent, perhaps 2 years ago, and then said that perhaps that was the last time she had seen people using it in an organised way.



- 3.204. She had never been asked to leave the fields.
- 3.205. In cross-examination Ms Jennens was asked about the accesses in the early years: she agreed that in about 1988 and 1989 she was not using access 1. She did not remember seeing Sturgess School matches on the field; she would have been very young at that time. She was asked whether she remembered the mid 1990s. She did, but she did not remember the entrance at 6 being closed for a number of months then. She was asked about her use of access 2: she said they definitely were able to go through the gate on a number of occasions, although she did not know whether it was meant to be locked or not.
- 3.206. Ms Jennens was asked about access 8: it was put to her that the bridge was there until 1995: she agreed, and said that that is the monkey bridge. She was asked about point 4, and it was put to her that that access there has only been possible since 2007. She said that she remembered when living at White Street they walked the dog down and over that bridge. It was not the vehicular access they went through, it was the pedestrian gate. It was definitely before she moved to Watson Street in February 2007.

**(14) Melissa Smith**

9 Tivoli Gardens DE1 3SQ

- 3.207. Ms Smith provided a written witness statement dated 16<sup>th</sup> February 2010 and an evidence questionnaire dated 15<sup>th</sup> February 2010.<sup>14</sup> Ms Smith has lived at her present address since she was born in 1974. She and her partner bought the property from her parents 15 years ago, when her son was very young. They used the fields daily to feed the ducks and walk the dogs, which she continues to do. Ms Smith stated that she had used the fields for as long as she could remember, as far back as when Sturgess School was there. She and her siblings used to attend the holiday club at Sturgess School, and played in the tennis courts, the long jump pits and climbed trees. They used to run around the woods and fish for Crayfish.
- 3.208. Ms Smith's son, Callum, was born in 1992. He has used the fields whilst growing up, to play football and rugby, to ride his bike and go fishing in the brook. Callum was a Cub and Scout at the Scout hut next to the fields. Ms Smith said that she knew Callum was safe playing on the fields, as many people in the area had grown older with her and Callum.
- 3.209. At the time of writing, Ms Smith used the fields with her dogs after work to exercise the dogs and herself. She walks and chats to other dog owners, and has met many new friends that way. She is able to let her dogs run free, safe from traffic, and they enjoy playing fetch with their balls on the fields. She also picks the blackberries and collects conkers there. Ms Smith said that in her opinion the application land should be kept for the community, so that the people of the area can enjoy it for many years to come.

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<sup>14</sup> A178

- 3.210. In her evidence questionnaire, Ms Smith stated that she had known and used the land from 1974 to date daily for walking, picking berries, and playing when she was a child. Her immediate family uses the land, her son for walking and playing football and rugby, and her partner for walking their pets. In summer 2007 fencing was put up and someone locked the gates.
- 3.211. In oral evidence Ms Smith was asked about the Sturgess School holiday club. The tennis courts she referred to are the ones on the northern part of field C. When she first played there, they were well-maintained by Woodlands School. You could play there during the week and at weekends: the school left the tennis nets there all the time. The courts have fallen into disrepair in the last few years, since the school closed. The long jump pits and high jump pits used to be next to the tennis courts. The field also had a running track on it. They have since been filled in, she thought not long after the school closed. After the school closed, it was just left. She thought the school had closed by the time she went to secondary school in 1985.
- 3.212. Ms Smith was asked about her evidence that she gained access to the land from Watson Street: one access was over the bridge: it was fenced off but they used to slide in the gap between the bridge and the fence. The other access, further along on Watson Street, was open all the time. As the years went by they made a gap between the fencing and the bridge, and allowed public access. She thought too many children had got spiked on the railings. That was when she was a child. The monkey bridge started collapsing in the 1990s, when her son was 2 or 3, in 1994 or 1995, and they closed it off.
- 3.213. She also used other accesses. She used an access between the Jonty Farmer and the end house. There used to be a jitty between the white house where the Jonty Farmer is now, and the end house and there was access there. That came from Kedleston Road into the wooded area. The jitty went onto the metal bridge which was closed off. Further along the field, there was a ramblers step, a wooden step you could climb over. That was beyond the Jonty Farmer on the northern boundary. There was a driveway on a ramp which went down to it. That was changed later on, to two fences which you had to squeeze between and a farmer's gate. It was a walkway: you could walk between the two fences. That fell down, and then metal fencing went up in 2007.
- 3.214. There is an access onto Queensway (access 2), which was locked after the school was closed, but there were gaps in the fences. The one on Mill Hill Dam (access 1) was always open until the University put the new fences up. The old fencing was green and rusty. Then a big blue metal gate was put there: the pedestrian access was always open, but the vehicular access was closed. That was erected in about 1996 or 1997. After that the silver fence which is there now was erected in 2007. In about 1996 or 1997, there was the blue metal gate across the driveway, and there was a public gate next to it. The pedestrian gate had an aluminium sheet on it which was blue as well, but it was always open.
- 3.215. Ms Smith was asked whether there was ever a time when she found the accesses closed. She said that she had found them closed recently, when the

University closed for the Christmas holidays. Only one access was left open, and they had locked all the others. Ms Smith had not only accessed the site during daylight. She also uses it New Year's eve, usually at 2 or 3 a.m., to walk her dogs. She uses the access next to the Scout Hut for those walks. She had never found that locked at that time. That was the access she had referred to as having been left open when the others were locked.

- 3.216. Ms Smith had seen the fields being used for organised sports. Her son used to play for Derby rugby club, and they used field A. She had seen football. She had also seen local dog training classes taking place on the land. Markeaton School used to use it, but she had not seen any children there during the day of late, although she said that she is always at work during the day. She said that she could not remember when she last saw Markeaton School using the field, and again said that she is at work during the day. Her son used the field with the rugby club in 2006, when the club's ground was flooded. She had also seen American football on the land, on Sundays, and recently, when she was off work in the week. She did not know when that started. She could not say when the organised football had been, and said that she just noticed them in passing.
- 3.217. She had never been asked to leave the land.
- 3.218. In cross-examination Ms Smith was asked what parts of the field she used when she attended the Sturgess School holiday club: she indicated areas in field C. That was when she was about 6, in about 1980. She has lived in her house all her life and has always walked dogs on the field. She came off Watson Street and did a circuit around C, across the brook, around the perimeter of B, crossing the bridge by stepping stones, or a little bridge, and around the perimeter of A.
- 3.219. The New Year's Eve walks have been in the past 8 years. She was able to say that because that was the period for which she has had her current dog. She had done a New Year's Eve walk the last year as well. She has gone to the same friends those years. The gates at 6 have never been locked when she has done that: the others have, but those have not.
- 3.220. The gap between the fence and the bridge was there when she was 5 or 6, in about 1979-1980. After that an open access was created, she could not say exactly when. She was asked whether she remembered access 6 being closed off in 1995. She did not, and said she had always used that access. The jitty was at number 7, and used to go down all the way to the school at one time, from Kedleston Road.
- 3.221. Ms Smith remembered the old school being demolished, but did not remember what year that was. She still used that part of the site: the area was fenced off, with the big containers. The field where the school was had fencing round it, and builders' containers inside, but you could still use the field. The fencing was around the southern part of field B.

**(15) Richard Rogers**

10 Woodland Road DE22 1GF

- 3.222. Mr Rogers provided a written witness statement dated 17<sup>th</sup> February 2010 and an evidence questionnaire dated 10<sup>th</sup> November 2008.<sup>15</sup> Mr Rogers has lived at his current address since 1990. From 1984 to 1990 he lived at 8 Twyford Street, outside the claimed neighbourhood, to the south of the city centre. He was born in Derby, and said that he remembered the closure of Sturgess School. From that time, he was never aware of any building or other occupancy of the application land.
- 3.223. Mr Rogers stated that when he first moved to Woodland Road, he used the fields on an occasion basis, approximately weekly, for running. He went from Kedleston Road, at the bottom of Cedar Street, onto the land, and continued either into Markeaton Park via the walkway, or out onto Markeaton Street.
- 3.224. When Mr Rogers' children were young (in about 1998) they attended Markeaton Primary School. The school used the application land for an annual early morning bird-watching field trip. The Rogers family attended one year, and after that were much more aware of the birds when they used the fields. The central field was particularly good for bird watching, as was the small lake at the southern end.
- 3.225. The Rogers family used the fields as somewhere the children could explore, particularly the wooded areas, where other people had set up ramps and mounds of earth for BMX-style cycling. They enjoyed working their way through to the field at the back of the allotments by negotiating the stream, or finding a way through to the old path which connected the back of the old school with Watson Street and Kedleston Road. Within the woods they kept to the numerous paths, but in the open field in summer, they left the paths. They regularly saw dog walkers taking the outer encircling paths around the fields. They also often saw other people using the area, sometimes playing football or kite flying. Occasionally there would be an organised rugby game on the field closest to Kedleston Road, but more often there would be a small group playing kickabout football.
- 3.226. In the early 2000s, the Rogers family attended a couple of community picnics in the field at the back of the allotments. These were attended by many people, and there were many activities taking place, from football and rounders to juggling and drawing.
- 3.227. Mr Rogers stated that neither he nor his family had ever been challenged when using the fields, or in any way prevented from using them, either by notice, personal challenge or fencing, prior to the fencing being put up at the Kedleston Road end in about 2007.
- 3.228. In his evidence questionnaire Mr Rogers stated that he had known the land from 1980 to date, and had used it from 1990 to date weekly for running, playing with children (including hide and seek), nature bird watching and

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<sup>15</sup> A158

community picnics. His immediate family used the land for running and recreation.

- 3.229. In oral evidence Mr Rogers was asked to identify the accesses referred to in answer to question 10 in his questionnaire where he had stated that he gained access to the land across Kedleston Road at the bottom of Broadway and via Markeaton Street: they were accesses 3 and 1.
- 3.230. Mr Rogers was asked to describe access 3: he thought there was something there before the stile, but was not sure what. He remembered using the stile mainly, then it changed at some point, so there was something like a sheep gate in the countryside, an overlapping fence, which you walked round. He never had any problem gaining access there.
- 3.231. At access 1, he used to go through an open gate, which was rarely closed and never locked. He was not able to describe the gate: typically he was running, and looking where his feet were going, rather than at the gate.
- 3.232. More recently, in the 2000s, he had seen a rugby game in A, when driving past, but he had never seen games on the field when he was running through.
- 3.233. In cross-examination Mr Rogers was asked which open fields he meant: he said all three, including B. They played on C, and played football on A as well. C was better for flying kites. B was better for bird watching. They would position themselves anywhere in the field for bird watching. They used the fields every other week. He ran regularly across the fields.

**(16) John Smart**

15 Bromley Street DE22 1HL

- 3.234. Mr Smart provided a written witness statement dated 3<sup>rd</sup> February 2010 and an evidence questionnaire dated 12<sup>th</sup> October 2008.<sup>16</sup> Mr Smart has lived at his present address for more than 20 years. His address is within the claimed neighbourhood.
- 3.235. Mr Smart stated that he has been an allotment holder in the allotments adjacent to the application land since he first came to live in the area. His plot was beside the Mill Dam. He walked his golden retriever, Julie, for the 15 years of her life in the allotments and on the application land, as well as in Markeaton and Darley Abbey Parks. He was able to let the dog off her lead. She sometimes immersed herself in the brook, or ran off into the trees. He enjoyed observing the wildlife whilst dog walking. Sometimes on a summer's evening, a few people with their dogs would gather and await the flight of a large flock of Canadian Geese which flew between Kedleston Hall Lakes and the waters of the Derwent in the city riverside gardens every day. Sometimes when it was a good year for blackberries, he picked some from the application land, and also picked the occasional raspberry from the raspberry canes growing wild there.

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<sup>16</sup> A174

- 3.236. Mr Smart's nephews, when visiting, would accompany him to the allotments, and play in the vicinity, including sometimes walking through the application land. The boys were fascinated by the flowing water of the brooks, the fishes in them, and by the wild and unspoilt habitat of old trees and fauna.
- 3.237. Mr Smart saw other local people living in the immediate neighbourhood walking with their dog, on their own or with friends. He often had impromptu conversations, imparting local news, with such people. One autumn an artist spent a week painting with an easel sited among the trees. Mr Smart observed his work and spoke to him each day, whilst dog walking.
- 3.238. The accesses Mr Smart used were from the end of the cul-de-sac in Whitecross Gardens and over a bridge, through an open gate on the side running parallel with the outer ring road and through the old school entrance, where the waters flowed through from the mill dam. There were never any restrictions to access or any sense of being a trespasser: the land seemed to be part of the "common good" for the local people, who used it as a precious part of their recreational outlet. He wished for that to continue.
- 3.239. In his evidence questionnaire Mr Smart stated that he had used the land between 1985 and 2000, daily, for dog walking and for blackberry picking.
- 3.240. In oral evidence Mr Smart was asked to describe his route to the allotments from home: he went via Cowley Road and Mackworth Road and along the drive to the allotments off Mackworth Road. He has not accessed Sturgess Fields directly from the allotments. The allotments form a contained site.
- 3.241. Mr Smart was asked to clarify the accesses he referred to: the end of the cul-de-sac in Whitecross Gardens and over a bridge referred to the bridge which leads to the Scout Hut, access point 6. When he was using the land, there was a bridge over the brook, which he can remember being washed away, which he would sometimes cross to get into field A. Sometimes he would jump over the brook instead. He thought that the bridge was washed away in the early to middle 1990s, but he was not sure.
- 3.242. Mr Smart was asked about the open gate on the side running parallel with the outer ring road. He said that the description in his statement was slightly inaccurate. There was a gate, which was locked when he was dog walking, but at the side, the metal fencing was pulled apart, so that people could gain access through there. He does not know whether the gate is now unlocked or not. That would be access point 2.
- 3.243. The third access he identified was the old school entrance, access point 1. He was asked to describe that entrance as it was in 1985: he said it was difficult to be absolutely precise. He has been to look at it as it is now. There was some sort of structure there, a gate or something, but it was open. There was nothing to climb over, and no indication that anyone had broken down fencing or anything like that: there was a thoroughfare through. He was asked whether the entrance changed. He said that he could not remember that it did.

- 3.244. Mr Smart was asked whether access at point 6 was ever obstructed. He said that it was not. At point 2, access to the side of the gate was never obstructed. Access at point 1 was never obstructed either.
- 3.245. Mr Smart did not remember having seen any organised sports or games on the fields during the time he used the land. He had never been asked to leave the fields.
- 3.246. In cross-examination Mr Smart was asked to describe his path across the land, accepting that he did not use the same route every time: he said that he came along Watson Street, then across the bridge by the Scout Hut, but occasionally he would come via the Mundy Pleasure Ground. Having crossed the bridge, he turned right and walked by the side of the brook, and over the bridge which was washed away (that was his favourite route), he would then turn left into the heavily treed area, and then keep around the perimeter of the playing fields, because that is where the wildlife was. He would not generally not go anywhere near where the old school had been because that was just a derelict area. Sometimes he would come out the way he had come in, because that was the quickest route home, but sometimes he would come out onto the A38 at access 2, or at access 1, and walk along Markeaton Street, and home via Mackworth Road.
- 3.247. Mr Smart was asked whether he remembered that in about 1995, for a few months in the middle of 1995, a fence was erected and a gate put up, and people could not get access: he did not remember that. Access 1 is the entrance that he meant by “the old school entrance”. He was asked whether he remembered the school being demolished in 1989. He did not. He was asked whether he remembered a construction compound being built on the school site between 2005-2007. He did not, but said that he was no longer accessing the land very often at that time: occasionally he would walk around, but his association with the land was much diminished after 2000.
- 3.248. Mr Smart was asked whether he remembered the area around access 1 being waterlogged in about 1995. He said he could not remember specifically, although he knows that the drainage around that area generally is not good.

**(17) Lyn Yeoman**

7 Walter Street DE1 3PR

- 3.249. Mrs Yeoman provided a written witness statement dated 10<sup>th</sup> February 2010 and an evidence questionnaire dated 9<sup>th</sup> October 2007.<sup>17</sup> Mrs Yeoman is Ms Kim Yeoman’s mother. She has lived at her present address, within the claimed neighbourhood, since 1975.
- 3.250. Mrs Yeoman has two sons, born in 1977 and 1979, and a daughter, Ms Kim Yeoman, who was born in 1982. Her grandchild (Kim’s child) was born in 2008. She has been a foster-carer since 2000, and a childminder since 2004. She has owned dogs since 1985, and has had her current dog since 2000.

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<sup>17</sup> A215

- 3.251. Mrs Yeoman stated that she used the land on a daily basis, walking the dog twice daily. Her children played on the land when at school, including the woods, cycle paths and field. She regularly took the children blackberrying and walking, and pointed out animals of interest. The children collected sticks, leaves and flowers. Her sons regularly played football and golf on the field and used the tennis courts in the 1980s. The land is a wonderful natural adventure playground for children. They used footpaths and bridges which gave access across the brook, and used the whole of the fields for recreation and exercise.
- 3.252. Mrs Yeoman sees many other people every day walking their dogs. She said that she believed Markeaton School used to use part of the land for football matches and P.E. lessons.
- 3.253. Mrs Yeoman worked in both the local pub and the pet/greengrocer shop before it closed. Her children attended the local primary school. Mrs Yeoman's sons were involved in the local Beavers, Cubs and Scouts, whose property was close to the land. They all use the local facilities including shops, hairdressers, and recreation parks with the childminded and foster children. There is a local post office, chemist, dentist, doctor's surgery and Women's Institute, where they hold children's parties. Mrs Yeoman said that she has lived and worked in the area for 35 years and would not consider moving: the area is alive and flourishing and has a community spirit.
- 3.254. In her evidence questionnaire Mrs Yeoman stated that she had known the land from 1984 to date, and her children had played football and tennis on the land from 1984 to 1989. She had used the land between 1996 and 2007. She had used the land daily for walking the dog and for leisure.
- 3.255. In oral evidence Mrs Yeoman was asked to clarify her statement that Markeaton School used the land for football matches and PE lessons by indicating which area the school used: it was area A. She knows that the school used that land from 1986 to 1989 or 1990. Her two sons were at the school until then: she thinks the school used it for a few years after that, but she knows for sure that they used it when her sons were at the school.
- 3.256. Mrs Yeoman was asked about her statement that her sons played football and golf on the field and used the tennis courts. She remembered that the tennis courts were maintained, but did not know by whom they were maintained. They were being maintained when her children used them. She did not seek permission to use them: they used them in the evenings, weekends and school holidays with their friends.
- 3.257. Mrs Yeoman was asked to clarify her answer to question 13, where she stated that she used the bridge over Watson Street and onto Markeaton Brook Walk to access the land: that was access 6. Once she had crossed the bridge, by the side of the Scout hut, or sometimes crossing via the brook itself, then they would walk through where the tennis courts were onto field C, round that field, crossing the brook, which they used to do via the bridge near the wooded area. She did not remember when the bridge was washed away. After the bridge



had been washed away, they just went through the brook. On occasions she did use other access points: she used an access near the A38 as an exit which was a bridge with a stile, more on the Kedleston Road side than the Queensway side. She did not remember access via either of those access points ever being obstructed.

- 3.258. Mrs Yeoman was asked whether she remembered the fields being used for organised sports and games: she did not, other than the use by her children from school. The fields had always been used for sport, but she did not know whether it was just local friends putting a team together or what.
- 3.259. She had never been asked to leave the fields.
- 3.260. In cross-examination Mrs Yeoman was asked whether she remembered the University putting a sign up near the stile in about 1995. She said that she did not, but said that her recollection of using that access was from the 1980s, with her own children. She did not remember a fence and gate being put up at access 6 which blocked access for a few months either.

**(18) Michael J Rennie**

3 Wheeldon Manor, Woodland Road DE22 1HX

- 3.261. Professor Rennie provided a written statement dated 17<sup>th</sup> February 2010 and an evidence questionnaire dated 5<sup>th</sup> November 2008.<sup>18</sup> Professor Rennie has lived at his present address since 1<sup>st</sup> October 2003. He previously lived in Dundee.
- 3.262. Professor Rennie stated that he uses the application land for leisure walks, often with binoculars, at various times of the year, and for jogging. His route depends on the weather and the time of year, but he often runs through Markeaton Park, back to the A38, and enters the application land either from the path leading to the Art College buildings, or crosses the brook where he can and exits over the bridge by the Jonty Farmer, or back onto the path beside the A38 where the railings were breached. He runs through the grass if it is not too wet, and, if it is, he runs on paths left by others. He goes walking at the weekend usually in the late afternoon with his binoculars. Professor Rennie had a fall in late October 2009, as a result of which the frequency of his use was severely curtailed. At the time of writing his statement he had resumed his jogging in the early morning (06:00-06:30), two to four times a week. He uses the fields for a leisure walk maybe twice a week, with increasing frequency as spring approaches.
- 3.263. Professor Rennie has three grandchildren, whom he has taken to the application land when they have visited in the spring and the summer.
- 3.264. Professor Rennie often sees other using the application land including fishermen by the extension of the lake and the brook, and many dog walkers.

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<sup>18</sup> A153

- 3.265. He has never been challenged when using the land, not even when squeezing through gaps in railings or edging along the (closed) gated bridge leading to Kedleston Road.
- 3.266. Professor Rennie uses the local amenities in the area, including the post office, the dry cleaners, the pharmacy, Sainsbury's mini supermarket, the barber on Kedleston Road and buys his paper from the shop of Statham Street whenever possible. He is registered at the Brook Medical Centre. He works close by and is able to cycle to the Hospital and medical school. He stated that he hoped that the application would be successful.
- 3.267. In his evidence questionnaire Professor Rennie stated that he had known and used the land from October 2003 to date for running, walking and bird watching between once and three times a week.
- 3.268. In oral evidence Professor Rennie was asked to clarify the access points mentioned in his statement: he said that, as he remembers it, it is possible to jump the brook to the south of the land, at different times of the year: somewhere along the path to the south of the land there was an access point that he was able to get in through. Alternatively he would get in through the bent railings along Queensway, although he understands there is a gate there now. It was also possible to climb over a gate off the Kedleston Road at one time, but now the height of the gate has been increased, and he can no longer do that. He could not remember when the height of the gate was increased: he thought about 3 years ago. The access from the south was more difficult when there were building works going on, although there were usually ways to get round without trespassing too heavily. The access point through the railings seemed to be quite well used: there was a path leading to it.
- 3.269. The bridge by the Jonty Farmer was locked last time he used it, but he edged along the outside of the bridge, and jumped over the railings at the end of the bridge.
- 3.270. Professor Rennie had not seen organised sports or games taking place, but said he usually goes for a jog early in the morning, and his walks would be late afternoons. He had occasionally seen University American football games going on in field A, but had not seen any other organised games, and thought they would take place mid-morning or early afternoon. He had never been asked to leave the fields.
- 3.271. In cross-examination Professor Rennie was asked about access 1: he said that he thought he had been through there. He thought he had also got in through 11. It was put to him that 11 was a gate which was kept locked, and he said that it would not therefore be the case that he had been in through there. Most of the time he went through 2. He was asked whether he remembered 1 being subject to flooding: he said it often seemed flooded, but it did not worry him: he could get through the brook without getting too wet: it was shallow and he would jump from stone to stone. He remembered there being a construction compound there between 2005-2007. It was not possible to get access to the compound.

- 3.272. In re-examination Professor Rennie was asked whether the works compound was fenced off. He said he thought it was, and it would be crazy not to fence it off.

**(19) Michael Browning**

34 Quarn Gardens DE1 3HJ

- 3.273. Mr Browning provided a written witness statement dated 15<sup>th</sup> February 2010 and an evidence questionnaire dated 27<sup>th</sup> September 2008.<sup>19</sup> He moved with his family to 70 Parker Street in 1996. In June 2004 they moved to 5 Bath Street. In May 2007 they moved to 34 Quarn Gardens, his present address. Bath Street is outside the claimed neighbourhood, on the other side of Duffield Road. Parker Street and Quarn Gardens are both within the claimed neighbourhood.
- 3.274. Mr Browning stated that since moving to Parker Street in 1996 he has used the application land pretty continuously, both for walking his two dogs (which he acquired in 1998), and for nature walks with his wife and daughter (who was born in 1992) and her friends. Until the University started cutting the grass and cutting the trees down the area attracted a wonderful amount and variety of wildlife, including at least three small colonies of fish living in the brook. They have also used the fields for collecting blackberries and raspberries. His daughter still uses the land for walks with dogs and with her boyfriend, and as a short cut either to Markeaton Park or to visit friends houses.
- 3.275. Mr Browning has become acquainted with a great number of people using the fields for dog walking, sport, bird watching and fish spotting. A lot of people use the fields as a short cut.
- 3.276. Until the previous year, he had assumed that the application land was a public right of way: there had never been any fences, gates or notices to say otherwise. Many other people and groups appeared to be using the land without hindrance. The Friends of Markeaton Brook came around every so often and cut back the undergrowth and erected temporary bridges over the brook in various places.
- 3.277. In his questionnaire Mr Browning stated that he had known the land since 1992 and used it from 1996 to date. He used the land every day for dog walking. His immediate family used it for dog walking and for blackberry and raspberry picking.
- 3.278. Mr Browning was asked to clarify his answer to question 10 of his questionnaire where he said that he accessed the land via Watson Street, by the Scout Hut, Markeaton Street, and the bridge of the Kedleston Road (by the Jonty Farmer pub): the first access referred to is the concrete bridge which gives access to the Scout Hut. He either comes via Watson Street, or via the brook and gets access to the land by the old tennis courts, at access 6. The Markeaton Street entrance is the old entrance to the school, access 1. The

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<sup>19</sup> A030

bridge by the Jonty Farmer pub is access 4: he uses that way when the gate is open, which it seems to be most of the time.

- 3.279. Mr Browning was asked to describe access 1 when he first became familiar with the land: he said that as far as he remembers there was some kind of old gate, but there was a big gap at one side of it. There was a run-off from the pond to one of the brooks, and there was a concrete gully, a couple of feet wide, which you could jump across, or sometimes there was a plank across it. That changed when the new art school on Piper Street was built. The firm set up a compound on the old school playing field, and turned it basically into a proper roadway entrance. Since then, a gate and fencing has been erected by the University, and, if it is locked, you cannot get through there. It is only occasionally locked, like at Christmas. He found it locked at Christmas 2009, through until the day or two after New Year's day. It was not locked at Christmas 2008, so far as he remembered. That was the first time he had ever found any of the gates locked, apart from the Jonty Farmer one, which he has found locked more often, although only 3 or 4 times over the last couple of years, not more than half a dozen times; occasionally he would find it locked and have to climb round, or go up to the A38 side.
- 3.280. Mr Browning was asked about access 6: he had found that gate locked once. That had seemed to be in the morning only, when he went back later the same day, dinnertime-ish, it was open. He did not know why it was locked, he had asked around, and was told by someone that it was locked and had had to be opened because it was a right of way. He said it was about 2 years ago, such a long time ago that he could not remember the date or day, but he thought after August 2007.
- 3.281. Mr Browning confirmed that he walks his dogs on the land every day. Mr Browning has seen organised games on the fields: at least two American football matches on field C, the field with the tennis courts on it. He had also seen what looked like training on playing field A (he did not know whether that was for American or ordinary football), two or three times at most. He first saw the American football last year for the first time. He has seen various groups of people, some of whom he assumed to be students, on field A, training from about 4 or 5 years ago.
- 3.282. He had never been asked to leave the fields.
- 3.283. There was no cross-examination.

**(20) Roger Baker**

39 Longford Street DE22 1GJ

- 3.284. Mr Baker provided a written witness statement dated 14<sup>th</sup> February 2010 and an evidence questionnaire dated 22<sup>nd</sup> September 2008.<sup>20</sup> Mr Baker has lived at his present address since 1991, and before that lived from 1987-1991 at 26 Cedar Street. Both addresses are within the claimed neighbourhood.

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<sup>20</sup> A014

- 3.285. Mr Baker has three children: Hannah born in 1990, James in 1993 and Grace in 1998. All three attended Markeaton Primary School. Mr Baker said that his family had used the application land a good deal in the time the children were growing up. They went sledging and igloo building there. All three children trained there for school cross country races, and, later, for the Race for Life. He had played numerous games of football on the land with James, and, at the time of writing, played with Grace, who is a member of Woodlands FC girls' team. The family also used the land for cricket practice, pond dipping with the school and with Broadway Baptist Cub groups. James played football and cricket there with friends. Broadway Baptist Cricket Club often have practice sessions on the land, and the Baker family organises inter-family rounders matches there with their friends from Woodland Road and White Street. These activities took place on an almost weekly basis in the late 1990s-early 2000s. In addition Mr Baker had also used the land himself to run and more latterly for tree identification and flower spotting, and as a cut-through towards Ashbourne Road, at least once every two months recently.
- 3.286. He saw many others using the land for dog walking, kite flying, strolling and blackberry picking.
- 3.287. Before the fence was erected, Mr Baker never had any problem getting onto the land: he went down the slip road from Kedleston Road. No one ever challenged his family's presence on the land.
- 3.288. Mr Baker uses the local chemist, post office, barbers and grocery stores. The area is very much a local community. It is rare that he makes a journey locally without having contact with friends or nodding acquaintances.
- 3.289. In his questionnaire Mr Baker stated that he had used the application land from April 1991 to date for running, playing football and cricket with the children, blackberrying and strolling, daily at certain points in time, and, at the time of completing the questionnaire, at least monthly.
- 3.290. In oral evidence Mr Baker was asked which part of the field he used for sledging: it was the bank at the top end of field A. His daughter Grace uses the field to play football with Mr Baker, her brother and friends, not as part of her formal training with the girls' team.
- 3.291. Mr Baker said that he did use the field before 1991, but had tied his use to when the children were born in 1991, because that was when his significant use had started.
- 3.292. The slip road from Kedleston Road is access 3. The access point at 3, when he first knew it, was down the slip-road: there was a fence and stile which you climbed over. There were two metal posts latterly, he thought because the stile had collapsed, but he could not remember when that would have been. It seemed like an open invitation to go in. There was never any obstruction to access at that point. The fence he referred to in his statement was put up a couple of years ago.

- 3.293. Before 2007 he had used other accesses, but mostly used access 3. He thought he had been through all the access points mentioned, 3, 2, 1, 10, 11, 9 and 4.
- 3.294. He was asked to describe access 2: it was a gap in the railings, either a missing railing or the railings had been pulled away. There was no time when he was not able to get access at that point.
- 3.295. Access 1 when he first knew it, he thought, was a continuation of the bent railings, with an obvious space to get through, but he said it was quite a long time ago. He was asked whether there was a gate there. He thought there probably was. He was asked whether the position at access 1 has changed. He said that he had always been able to get access there, but he had not gone through it regularly, as he had with access 3.
- 3.296. Mr Baker was asked to describe access 10: he said that was a long time ago, and it was tricky: it was the gate into the old jitty. He had never been through 7 because it had always been overgrown, he thought. He was asked whether he remembered the bridge at point 8: he was not sure whether he did. He said that some of his excursions had been a bit of a commando exercise.
- 3.297. He was asked about point 9: he thought that was just a board or stones across the brook. He said that he had not been there in recent times, and it was a bit hazy.
- 3.298. He was asked about access point 11, from the allotments to C: he said actually he had not been through there.
- 3.299. Mr Baker said in relation to access 4, the bridge by the Jonty Farmer pub that the bridge gate is locked quite often, and you have to do a manoeuvre around the side of it.
- 3.300. Mr Baker was asked about organised games and sports. He has seen the University playing American football for a number of years. They swapped the layout of pitches a couple of years ago. They play on a Wednesday afternoon. This academic year it has been women's football on a Wednesday afternoon. Previously there were two pitches laid out on field A, then, after they created the compound for the goals, they laid out just one pitch, the other way around. He thought they had been making more of an effort in laying out the pitch in the last couple of years. The football use began a couple of years ago. Prior to that it was the American football, which he described as having been on more of a casual basis. The pitch was marked, but not used as frequently as it is at the moment. The American football started 5 or 6 years ago: the posts have been there for quite a time. They were not getting as much use, because there was a point at which the posts, American football or rugby posts, were damaged.
- 3.301. Mr Baker has never been asked to leave the field.
- 3.302. In cross-examination Mr Baker agreed that his use increased after 1991. He was asked about access 3 and whether he remembered signs being put up in

1995 or 1996 by the University. He said that he thought he remembered a sign saying you go there at your own risk, but not saying you cannot use it: he thought it was a health and safety sign: use it at your own risk.

- 3.303. Mr Baker said that he could not remember whether or not the access at 1 was locked. He was not aware of that because there was a clear space to get through as a pedestrian, and there was easy access.

**(21) P A (Tricia) Webber**

38 Wheeldon Avenue DE22 1HN

- 3.304. Mrs Webber provided a written witness statement dated 12<sup>th</sup> February 2010 and an evidence questionnaire dated 10<sup>th</sup> November 2008.<sup>21</sup> Mrs Webber has lived at her present address, within the claimed neighbourhood, since 1986. When the family moved there, their two children were 12 and 17, and they had two dogs. They used the fields to exercise the dogs. Their younger daughter played in the fields with her friends, and their elder daughter occasionally “hung out” there with her friends.
- 3.305. Mrs Webber’s eldest granddaughter was born in 1995, and she and her mother moved back to live with Mr and Mrs Webber between 1996-2000. Within a year she had become a frequent visitor to the fields, dog walking and nature spotting.
- 3.306. In recent years Mrs Webber has continued to visit the fields with her younger grandchildren.
- 3.307. Mrs Webber saw the fields being used by children as an adventure playground: building dens, tree climbing and paddling in the stream. In the summer children “hung out” there. She saw informal games of football, cricket and Frisbee. There were always dog walkers there. She did not know the names of the other dog walkers, but they all knew the names of each others’ dogs. She once spoke to a man who had cycled there with his two children because he wanted to show them the site where his school had been.
- 3.308. Mrs Webber stated that for some years (although she could not date when), rugby posts were erected in the field behind where the Jonty Farmer is now, although she never saw a formal rugby game there.
- 3.309. Mrs Webber gained access to the fields through the gated path that was the school access in between the last house on that section of Kedleston Road and the doctor’s surgery. The gate is now locked and the bridge missing. Alternatively she gained access via the five bar gate, north west of the Jonty Farmer, which has since been replaced with a high metal fence. She had on occasions used other access points at Watson Street, Markeaton Street and Queensway.
- 3.310. No-one in Mrs Webber’s family had ever been approached by anyone in relation to their right of access to the land.

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<sup>21</sup> A200

- 3.311. Mrs Webber stated that the area has a very vibrant community spirit. What began as the Wheeldon Avenue Group has recently expanded to become the Six Street Group. The Group has annual Christmas parties at the Women's Institute hall on Sherwin Street, and beach parties each summer at the Watson Street Scout hut. They have book groups and theatre visits, a local history group and a walking group. The local shops are well-supported by the local community. There is a local primary school, post office, doctor's surgery, veterinary practice, church and two recreation grounds, excluding Markeaton Park. The area is a village within a city.
- 3.312. In her questionnaire Mrs Webber stated that she had known the land between 1986 and 2008 and used it between 1986 and 2006 daily for 10 years, and then on and off for dog walking, walking children and as a short cut to Markeaton Street from Kedleston Road. Her immediate family used the land for playing.
- 3.313. In oral evidence Mrs Webber was asked about the Six Street Group: the streets within the Group are White Street, Bromley Street, Wheeldon Avenue, Statham Street, Park Grove and Parkfields Drive.
- 3.314. Mrs Webber was asked to identify the school access which she referred to in her statement: she was referring to the path at 7. There is now no bridge there. She cannot remember when the bridge went: she said that she cannot put a year on it. The five bar gate, north west of the Jonty Farmer, has now been replaced by a metal fence. Next to metal fence is a wooden fence that you can climb through anyway, but it is quite intimidating. She could not remember when the metal fence appeared; she thought after the doctor's surgery was happening. It does not secure the land, because of the wooden fence. There was a stile beside the five bar gate, or if you went up to the gate there was a gap at the side, where you could get through. Nothing has ever really been done to secure the site, to stop people getting in. The stile was a makeshift sort of stile, not one like the local authority might put in anywhere. She was asked whether the stile was there until it was replaced by the metal fence. She said she did not know, because they were dogless at that period, and she was not frequenting the land daily at that point.
- 3.315. Mrs Webber has never been asked to leave the fields.
- 3.316. There was no cross-examination.

**(22) John Roberts**

26 Parkfields Drive DE22 1HH

- 3.317. Mr Roberts provided a written witness statement dated 5<sup>th</sup> February 2010 and an evidence questionnaire dated 17<sup>th</sup> September 2008.<sup>22</sup> Mr Roberts has lived at his present address, within the claimed neighbourhood, since 1991.
- 3.318. Mr Roberts has two stepsons who were born in 1982 and 1984, and who moved with him and his wife to 26 Parkfields Drive in 1991. Mr Roberts

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<sup>22</sup> A156



started using the application land with them straight away. He took them onto the tennis courts to play tennis (the courts were in a better condition then, and even had net posts). They picked blackberries (and still do). From 1995 the family kept dogs, and, at first, used to walk them on the application land a lot. At the time of writing they used Darley Park more, but Mr Roberts still walks the dog on the fields every Sunday.

- 3.319. The boys went to Cubs in the Watson Street Scout hut. In 1996 Mr Roberts helped as a volunteer with the Scouts for about a year. He took the Cubs on a number of occasions onto the fields to do their sporting skills badges. They used the field behind the Jonty Farmer, as it was less rough.
- 3.320. From about 1998-2001 Mr Roberts worked with the Educational Support Unit based in Newtons Walk, working with youngsters who had been excluded from school. He used to take them onto the fields for activities such as pond dipping, wildlife investigation and other nature-based activities.
- 3.321. Mr Roberts has often seen and met other people on the fields, most commonly dog walking. People pick blackberries and come there with binoculars to do bird watching. Sometimes he has seen children camping in the woods or in the fields, or BMXing in the woods, where they have made little burns or ramps. The field behind the Jonty Farmer used to be a regular meeting place for teenagers. Although Mr Roberts had observed that the north eastern field had always been made up with short grass like a playing field, he had never seen any organised sport taking place on that field.
- 3.322. Mr Roberts generally enters the land at the Watson Street entrance, and often used to exit by the Kedleston Road entrance (the corner of the north eastern field at the corner of Kedleston Road and the A38 sliproad) until that entrance was blocked off with fencing in 2007. He stated that all parts of the land had always been easily accessible to the general public until the fencing went up in 2007. There is a stream which one has to cross to get between the two parts of the fields, but there was for a long time a fallen tree which he used to walk across, and there have also been stepping stones and planks at different times.
- 3.323. Mr Roberts had never been prevented from using the fields or challenged by anyone or anything. He had never sought permission to go there, and had not been given permission. Only recently, in 2007, notices went up, granting permission. Until then, there were no notices about permission.
- 3.324. Mr Roberts' sons went to Markeaton Primary School. Sometimes they went on the fields as part of activities organised by teachers. Mr Roberts uses the local pubs, the Jonty Farmer and the Victoria (recently closed). He has always used the local shops on Kedleston Road, including the post office, the hairdressers on the corner of Cowley Street and Kedleston Road, the chip shop, the chemist. He also used to use Scattergood's butchers and the two greengrocers which have since closed. He used to use the dentist. He had been to jumble sales a number of times at St Anne's Church, and attended events on the Recreation Ground adjacent to Cowley Street, which he described as like west end community events: the Friends of Markeaton Brook had stalls there.

- 3.325. In his questionnaire Mr Roberts stated that he had known the land since September 1991 and had used it from Spring 1992 to date to take children to play tennis, for bird watching, pond dipping, nature walks, dog walking and for access to Markeaton Street, at least twice a week. His immediate family used the land for tennis and dog walking. He had also used the land for sporting activities for Cubs/Scouts.
- 3.326. In oral evidence Mr Roberts confirmed that the entrances he referred to were access 6 and access 3. He was asked how access 6 appeared in 1991. He said it was no problem: that was where he took the boys to Cubs and Scouts, and he never experienced any problem entering the field there. He was asked whether the fence and gate there now is the same fence as was there then. He said that it is not: it is now a monstrous stalag fence now. He did not remember any particular prevention of access fencing there before; there may have been a chain link fence, but he was not sure.
- 3.327. At access 3 there is a small driveway coming down to that point. Up until the recent fence was erected, he used to leave the field there. There was a makeshift access with a broken down fence, which he could get out of. There was a five bar gate, with a space, 2-3 person's width to the side, which you could get through. Everyone went through there, which made it muddy. He did not remember there ever being a stile there.
- 3.328. There was no cross-examination.

**(23) John A Cooper**

48 Redshaw Street DE1 3SG

- 3.329. Mr Cooper provided a written witness statement dated 17<sup>th</sup> February 2010 and an evidence questionnaire dated 8<sup>th</sup> October 2008.<sup>23</sup> Mr Cooper moved to his present address 1986, and lived nearby, but not in the area, before that. His present address is in the claimed neighbourhood.
- 3.330. Mr and Mrs Cooper have two children, now in their twenties. Mr Cooper stated that the family's main reason for moving to their present address was that the area appeared to be a nice community with good local facilities, including the application land and the local parks. Mr Cooper said that at around the time the Coopers moved the fields were included in a long-term plan by the City Council for maintaining "breathing places" around the city, described as "green wedges".
- 3.331. Both children used the fields regularly between 1990 and 2007, along with Mr and Mrs Cooper. The fields were very well used, particularly in the summer months. The land provided a safe area for youngsters to ride bikes.
- 3.332. Mr Cooper was never challenged by any landowner, and said that in fact he had no idea who actually owned the land. He did not observe any attempt to stop access until a notice appeared in 2007.

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<sup>23</sup> A042

- 3.333. Mr Cooper's son was a member of the Cubs and Scouts, and his daughter was in the Brownies and Guides. The family always uses all the local facilities and shops wherever possible. They feel that the application land is an important local feature. Mr Cooper said that the old community feeling was much diluted from the late 1980s: many of the residents in his street had fled in the face of the increasing student population. He said it was difficult to bring up a young family in the area now, because of the anti-social activities of many students, but hoped that the preservation of the application land might help in restoring the old spirit.
- 3.334. In his questionnaire Mr Cooper stated that he had known the land since 1962 and had used it from 1970 to date quite regularly for leisure and walking with children. His family used the land for walking, wildlife observation and general leisure activities.
- 3.335. Mr Cooper was asked to clarify his response to question 10 on his questionnaire where he had said that he gained access to the land at Watson Street and Queensway: he said that he tended to use the Watson Street entrance, access 6, mostly, but you could always get out onto Queensway to Markeaton Park, at the other end.
- 3.336. There was a gate at the Watson Street entrance, but he did not remember it ever being closed. It was a metal gate, a metal framed gate with chain link fencing. That was a long time ago, in the 1980s, before the school disappeared. There was a fence put up a few years ago, but he did not think it was locked much. It did not seem to last long. He thought it might have been locked for a short period, weeks, rather than longer. It is always open now. There are loads of other places you can gain access.
- 3.337. At point 2, the access onto Queensway, there was the original school fence, which was much damaged: there were missing bits and it was bent. You could see where people had walked in from the pathway. There was certainly one gap you could push a bike through. That arrangement continued during the time he used the land. He had never tried to get out of the field at that point and found that he could not.
- 3.338. Mr Cooper had seen people playing games, groups of friends, but could not really remember seeing anything more formal.
- 3.339. There was no cross-examination.

**(24) William Cash**

33 White Street, DE22 1HB

- 3.340. Mr Cash provided a written statement dated 3<sup>rd</sup> February 2010, an additional statement dated 2<sup>nd</sup> March 2010 and an evidence questionnaire dated 25<sup>th</sup> September 2007. He also provided four photographs, which he dated as having been taken in the mid 1990s. Mr Cash has lived at his present address, which is within the claimed neighbourhood, since 1963, when he got married. He was born in the old "west end" in 1942, and lived on Back Parker Street as

a child. His grandmother lived in Watson Street, near St Anne's church. He remembered "helping" on the family allotment which was on land which was compulsorily purchased to form the school playing fields after 1962. He played on the land before Sturgess School was built, and fished in the brooks and tributaries into his teens.

- 3.341. Mr and Mrs Cash have two sons, born in 1965 and 1968. The elder child attended Sturgess School, before moving to Woodlands School. After Sturgess School was demolished, the Cash boys and their friends played tennis on the abandoned tennis court. The family used the fields and woods for dog walking. The children looked for different birds, and collected feathers, stones and leaves. They were often accompanied by friends, neighbours' children, fellow dog-owners and visiting relations. He always met local residents or met and greeted other parents or dog owners. A lot of people bring binoculars on their walks to see the wide variety of birds.
- 3.342. Mr Cash now uses the land in the same way with his two grandsons.
- 3.343. Mr Cash obtained access to the land adjacent to the Scout hut, footpath or bridge against the Jonty Farmer pub. When the Markeaton Brook footpath was installed, the old plank bridge was replaced with a modern wooden bridge and the site was open for everyone to enjoy. There were no restrictions to access to the woods and adjacent fields. Mr Cash was not denied access at any time.
- 3.344. In his statement Mr Cash said that he believed that the land had been donated by the Mundy family for the good of the community, but in oral evidence he said that this was possibly not true.
- 3.345. Mr Cash's additional statement took the form of a letter to Penny D'Abru. Mr Cash wrote that he had been most surprised by Ms D'Abru's statement during a recent conversation that Sturgess School was demolished in 1989. He said that this showed that you could not rely on memory alone. He said it remained a fact that people had used the land for recreational purposes before this date. His sons attended Woodlands School Annexe (Sturgess), the last until 1979-1980. They had both told him that Sturgess School was closed shortly after that. The boys both used to play tennis (without nets) on the existing courts together with friends from the local area when they were about 15 (1980), and used the fields and woods as their playground. They gained access to the site via a gate at the end of Watson Street, across the iron bridge (now gone) and across a plank bridge (now gone) onto the site. Mr and Mrs Cash often walked onto the area with the dog to check that the boys were not up to any mischief, and continued their walk through to the open gate at Mill Dam on Markeaton Street, the gate/stile on Kedleston Road, or through the gate in the fence on Queensway near to where the derelict school was situated. Vandals smashed the windows of the school and rubbish was strewn all over, so they tended not to use the route very often in case the dog was injured. Once the school was demolished and removed there was no problem. Other people were using the land as they were. Anglers used to fish the Mill Dam on both sides. One side is now denied.

- 3.346. Mr Cash stated that during the early 1990s (he said in oral evidence he now understood this was in 1989), the Markeaton Brook footpath was constructed by the City Council from near the City Centre to the Sturgess Fields site. The path was sign posted all the way along its route. There are two cast iron finger posts in the vicinity of the site: one on Mackworth Road and the other adjacent to the Scout hut on Watson Street. Mr Cash said that the City Council thus encouraged people who were not locals to the site for recreational purposes. There were no boundaries to the path, and its name suggested that walkers should follow the brook. Mr Cash suggested that by constructing the path, the Council had acknowledged the public's right to go onto the land. Mr Cash said that after rumours that the University had acquired the land, some direction fingers were taken off the posts. He said that he was often approached by strangers who had followed signs but had become lost when the signs ended in the field.
- 3.347. In his evidence questionnaire Mr Cash stated that he had known the land since 1947 and had used it daily from 1984 to date for dog walking, taking children and grandchildren to play and for exercise.
- 3.348. In oral evidence Mr Cash said in connection with his additional statement that he did not believe that the school was pulled down in 1989 when he was told, but after discussing the matter with his sons, he accepted that it was correct. He had thought his memory was good, but now had to accept that it was not.
- 3.349. Mr Cash was asked where the allotments were which were compulsorily purchased. It was the whole of field C. Mr Cash senior died in 1962, and the family gave up the allotment. It was acquired some time after that.
- 3.350. Mr Cash was asked where the photographs were taken. The photographs showing the two dogs, the bottom one he was clear was taken in field C: the trees run alongside the tributary which is an overflow off the dam. The top picture he thought was taken on field C, but when I pointed out the railings, he said that he was not sure where it was taken: they could be the railings along the side of the allotments, but he thought also on field C. He thought that the sign was the sign on the gate to the allotments.
- 3.351. The photographs of the woman and the two dogs separately were taken in field B, quite close to where the plank bridge is across the tributary. He did not know whether they were taken on the same day as the other two photographs. The dogs are the same dogs.
- 3.352. Mr Cash was referred to his answer to question 13 on his questionnaire, where he had stated that he gained access to the land via the entrance by the Scout hut, which he agreed was access 6. He was asked to describe that access over the years. He said that the Scouts had bought a section of land off the allotment association to establish the Scout hut, when his boys were young, in the 1970s. At that time the access to the land was very difficult for adults. Children could slip through between the fence and the bridge side: his son had told him that he got onto the site that way. In any event, it was possible to walk down the brook and walk over stepping stones. He did not think anyone

used the land in the 1970s, because the school was up and running. He never went there then. The bridge gave access to the Scout hut alone.

- 3.353. Prior to 1980 the access was difficult for adults, because it would have been necessary to climb over a fence, climb over the supports, or squeeze through a very narrow gap. The fence butted onto the bridge.
- 3.354. When the Markeaton Brook footpath was constructed, the site was opened, and everyone could walk through. They must have moved the Scout boundary in towards the Scout hut and created a footpath. Prior to that Markeaton Brook was the boundary of the Scout's land. He thought that the footpath was constructed in the early 1990s, but he had no reason to disbelieve the evidence before the inquiry that it was constructed in 1989. He had not been able to pinpoint a date, other than by reference to his boys' ages.
- 3.355. Mr Cash was asked when the footpath was created, what happened to the fence which had been there. He said he thought they just cut the fence and put an end-post in and said that that would have been normal procedure. There was certainly no gate there. The footpath was constructed in brendon amber gravel, maybe 12 foot wide, and went up to the tarmac of the Scout hut, then continued to the rear of the tennis courts to the new bridge.
- 3.356. The position then altered when the rumour came that the university had bought the land. There was no official notices anywhere that he can remember, and he cannot remember it being reported in the local paper: it was just rumour. It did not affect the access at point 6, initially, but later without any notification or signing to say a gate was going to be erected, a gate was erected. It was a 2.4 metre round steel gateway, and galvanised, the same as other gates which have been put on. He did not see the gate himself: his wife told him about it. She told him that a gate had been erected, and that there was a very quick meeting with residents on the allotment site, and some man who seemed very knowledgeable said that the gate did not have planning permission and it was 2.4 metres high. By the weekend when he walked the dog, the gate had disappeared altogether, (although he was not sure whether the posts were still there), but he was not denied access from the one weekend to the other. His wife walked the dog at 9 a.m. for an hour or more, dependent on the dog, and in the afternoon at 2 p.m. Mr Cash tended to walk the dog at night, mainly in the summer. In the cold months he did not walk the dog at night, other than very quickly on occasion on the Rec. Mrs Cash walked the dog 5 days a week, morning and afternoon, Mr Cash walked the dog Saturdays and Sundays. Their eldest son sometimes used to walk the dog if Mr and Mrs Cash could not do it on Saturdays or Sundays. The gate appeared and disappeared while Mr Cash was at work: he did not see it locked. He understands that it was taken down in a matter of a day. From the dog walking point of view it was not a problem, because you just had to walk across the brook, or take another access. Mr Cash does not think that he saw the gate at all, but his wife said it was there.
- 3.357. Mr Cash was asked about the Markeaton Brook walk: the new bridge was virtually identical to the one at the end of Markeaton Rec, constructed by the

same company, maybe not the same length or width, but the same construction. The new bridge was approximately at point 9. Mr Cash agreed that the bridge in the photograph on A/1/91 is the bridge from the Recreation ground. He said that the new bridge was an identical construction, he thought made and erected by the same company. This one had better foundations. This bridge replaced an earlier bridge, which had been a thick plank bridge, the planks of which were up to 3 inches thick, roughly painted blue-grey, with a metal handrail, he thought on one side only. He thought that the earlier bridge was put in when the tennis courts were constructed, to enable the children to come out of the school on field B and up to the tennis courts. He assumed it would have been put in some time after 1962, but he did not know. At that time he did not go there: it was only in the 1970s or 1980s that he went back to have a look at the old allotment, and could not get there because the fence had been constructed. He would not have known whether there was a bridge there when the family had the allotment, because it was at the other end of the field.

- 3.358. Mr Cash was taken to O160: he said that that is the old bridge on the footpath from Sturgess School to Kedleston Road. It was taken down about 6 years ago. It was made from iron and concrete. That bridge provided access to Sturgess Fields. While the bridge was in place there was no physical barrier impeding access, other than when the bridge became dangerous. However, Markeaton Brook path was always there, so he never used the path from Kedleston Road. He would sometimes use the bridge as an exit, coming out onto the path at Watson Street, where there is a gateway in the fence which leads onto the footpath, which was always open. One of the dogs, the Collie cross, would not use the bridge, and used to go straight across the brook. He never found that exit impeded. He said he cannot say whether there was ever a lock on it, but he never found a problem, ever.
- 3.359. It was also possible to cross Markeaton Brook between the bridge and the Scout bridge: there were always stepping stones put in, and you could use the bridge as a high handrail.
- 3.360. Mr Cash said that he knows there is a bridge at point 4: when it was first constructed Heras fencing was put up, and was often knocked down by children. He never used it at that time. He has used it since the University put a proper gate on, and a proper side gate. That bridge was built in the 1980s or 1990s. He did not think it replaced an earlier bridge, although he said that there might have been stepping stones there. He never went into the land at that point, other than as a child.
- 3.361. Mr Cash said there was a sloping path at point 3, which he could not remember changing. The gates may have altered, but he had not noticed. Prior to the new fence going up there was a five bar gate of metal construction. He did not know whether it was locked or not: he never tried to get through it. There was always a gap between 2 posts which you could get through quite comfortably: he thought you could even get a pushchair through that. He thought the sloping path was put in when the A38 was built. Originally there was just a gate in the fence. The configuration has altered a few times: it was just a flat field before the embankment was built to construct the road. Before the embankment was

built there was a gate in the corner. It was similar to the gate at point 2. Area A has always been a playing field, ever since he was a child. It was used for archery when he was a child, he thought by one of the colleges. No-one ever went on it then, other than the people who were entitled to. He always used the woods at the side, from the Jonty Farmer up, which have now gone, as his stamping ground as a child.

- 3.362. The access at point 2 is a gate in the fenceline of Queensway, a pedestrian gate. He did not want to go out through there many times. He said that he thought the gate was always seized up: there was a gap in the railings which all the paths led to, and a gap where the fence was long gone, by Mill Dam Pond. His wife had said they went through a gate, but he could not remember that.
- 3.363. Mr Cash was asked about point 1: he said it was the old entrance to Sturgess School. There was a gate wide enough for vehicles, and at the side, he thought on a brick pillar, was a pedestrian gate. Both were open originally, but were panelled and made more secure after the new age travellers entered the site. The travellers was one guy in a converted ambulance, with children running about: they were there in the mid-late 1980s. It was only the one van. When they were evicted, he thought by the Council, because he believed that they still owned the land at that time, a channel was dug between the two ponds, by a JCB or similar, joining the two watercourses. The channel was probably 4 feet wide, but you could step over it at one point where it was two foot wide, next to the concrete end wall to the dam. This was like a moat effect to stop people getting back onto the site. He remembered the gap because the dog quite often fell into it. It remained like that until he heard that the university had taken over, and then he thought it had been filled in and tarmaced over, so there was access to the site. He thought the gate remained the same, the vehicular gate was unwelded (he did not think it had been locked) and opened up, but kept secure, but the side gate was always open.
- 3.364. When they built the new art school, the vehicular gate was opened and shut to allow the contractors in. They had a compound on the old car park of Sturgess School, but there was never any restriction on access: Mr Cash used to say hello to the workmen, and they were all dog lovers as far as he could see. Their compound was gated off and shut with Heras fencing chained together. The compound did not affect his access: he would not walk over tarmac rather than over the field anyway.
- 3.365. Mr Cash was asked about the use of the fields for organised games and sports: he said that he did not see them perform, but he knew that the young Rams had used the field for about a season, possibly two, but probably less, and he noted that the grass had been mown. Mr Cash has never seen American football being played. He said that the pitch is marked out for rugby. He has seen litter left behind by supporters. He said that some of the fields were heavily mown, sown, sanded and improved after the application went in for the road and the changing rooms, within the last 3-4 years. They have made a first class job on field C this year and last year.



- 3.366. Mr Cash had never been asked to leave the fields. Only in recent times had he seen the University's staff on the site, litter-picking, but had never been asked to leave then or in earlier times. His wife had never told him that she had been asked to leave either.
- 3.367. In cross-examination Mr Cash was asked about the gate at access 6: the 2.4 metre fence and gate. It was put to him that the gate was up for months. He said it was never ever months. There was never a lock on the gate which stopped him getting access there. His wife had said there was, but it was only there for a matter of a day or days.
- 3.368. Mr Cash was asked about Sturgess School, and his statement that the school was vandalised. That was during the period after the school was closed down. He never went on the ground when the school was open. He went there after the school was shut down, just for a look-see, but never went into the school. He had thought it was earlier than 1989 that it was demolished. He said from memory there was a barricade around it to stop people going in, prior to demolition. He would go in front of the school, and use the field to the north, and the side going up to Queensway, but not on a daily basis. He could remember seeing the school and thinking why did they not pull it down.
- 3.369. In re-examination Mr Cash was asked whether he used the northern part of field B when the school was barricaded off: he said that he went into field B at that time but kept away from the school.

**(25) Julie Jennens**

11 Marcus Street, DE1 3SE

- 3.370. Ms Jennens provided a written witness statement dated 16<sup>th</sup> February 2010 and an evidence questionnaire dated 1<sup>st</sup> October 2008.<sup>24</sup> Ms Julie Jennens is Ms Joanna Jennens' sister. Ms Jennens' present address is not within the claimed neighbourhood, but is to the east of Duffield Road. She lived at 26 White Street DE22 1HA between 2002 and 2008. She lived at 31 West Bank Avenue between 1984 and 2002. Ms Jennens was born in 1979.
- 3.371. Ms Jennens said that growing up in the area, she had regularly frequented Sturgess Field with both friends and family. She remembered clearly walking with her parents and sister as a child there, and playing in the brook in hot weather. She often also played rounders and football with groups of friends from school, or met up for picnics in warm weather.
- 3.372. Although she now lives in the Chester Green area of Derby, Ms Jennens continues to visit Sturgess Field on at least a weekly basis, to walk with friends and family and their dogs, and to observe the wildlife. The land also provides a convenient running route, over the summer. She meets friends and their children there to continue the activities she enjoyed in her childhood: playing rounders and having picnic lunches.

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<sup>24</sup> A102

- 3.373. In her questionnaire Ms Jennens said that she had known and used the land from 1984 to date weekly to play with children, walk dogs and for general walking. She also took part in rounders, ball games and picnics. Her immediate family used the land for the same activities.
- 3.374. In oral evidence Ms Jennens was referred to her answer to question 10 in her questionnaire where she had said that she used to walk through to gain access to the land from either Kedleston Road or via Watson Street: she said that at the back of the Jonty Farmer there used to be a stile, where they would go into field A. She thought it was a wooden stile, part of the fence which was there. Her access there was restricted when they put the metal fence up, when she was 16 or 17, in about 1998, but they would walk a bit further up and go over the wooden fence.
- 3.375. At Watson Street, when she was younger, they went straight across the brook, or round the edges of the rickety bridge. She has not noticed whether the bridge is still there, and said she has not really paid attention to it. She now goes through the bit near the Scout hut. Her access through by the Scout hut has never been restricted.
- 3.376. There was no cross-examination.

**(26) Brian Warren**

207 Watson Street DE1 3SP

- 3.377. Mr Warren provided an undated written witness statement and an evidence questionnaire dated 4<sup>th</sup> October 2008.<sup>25</sup> Mr Warren lived at Mundy Close between 1982 and 1998, and has lived at his present address since 1998. Prior to 1982 he lived in Leaper Street from 1967. All these addresses are within the claimed neighbourhood.
- 3.378. Mr Warren and his family have used the fields daily. His children have played football, cricket and other various sporting activities, and have fished and camped out. They would have picnics with lots of families from the area. Mr Warren and his children have collected conkers and blackberries, and he now did this with his grandchildren. They have also walked the dog on the land. They used the various entrances from Markeaton Rec, the bridge from Watson Street and the Markeaton Street entrance.
- 3.379. Mr Warren was concerned that the environment of the area would be changed by its being privately owned, and said that it had already lost a lot of its character and the wildlife had diminished. He would like it to remain largely unchanged into the future.
- 3.380. In his questionnaire Mr Warren stated that he had known the land since 1967 and had used it from 1971 to date at weekends and in evenings, depending on the weather, for dog walking, and for playing football with sons and now grandchildren. His family used the land for the same purposes.

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<sup>25</sup> A195

- 3.381. In oral evidence Mr Warren said that he should have given his addresses in Watson Street and Leaper Street as well in his questionnaire, in response to the question as to his address when he used the land.
- 3.382. Mr Warren's sons were born in 1969 and 1972. His grandchildren were born in 2001 and 2003 or 2004.
- 3.383. Mr Warren was asked about his answer to question 10 in his questionnaire where he had said he gained access to the land from the bridge across Markeaton Brook. He said that later on, when he moved to Watson Street he used the bridge by the Scout hut, and then turned right onto the land. In earlier times he used to go from Leaper Street and Mundy Close, over the bridge between Markeaton Rec behind the Scout hut on Watson Street. He would go across the Rec and Mackworth Road, and across the brook, where the modern bridge was later built when the Markeaton Brook path was later built, on stepping stones, or when the brook was shallow in the summer. They used the area before the path was built, but when it was built they used the bridge. They got onto the land more or less where the Scout hut bridge is now, in the corner, near where the tennis courts are now. The Scout hut was built at around that time. He understands from his friend across the road, that the Scouts bought the land from the allotment association. He said the path, before it was made up, was not too different to what it is now. He was younger, and used to rough it. Where the path is now, alongside the allotments, before the path was formally made, as far as he remembered there was just a rough path, muddy when wet, with brambles in the summer. He was asked whether he was able to get onto field C from where he was on the edge of the allotments. He said yes, it was no problem. He was asked whether at any time when he used that way he experienced any obstruction to getting onto field C. He said not that he can remember.
- 3.384. He was asked whether after the Markeaton Brook path was formally put in, he used that path. He said occasionally, but it was more convenient from where he lived to use the path he had described. He was still living at Mundy Close when the Brook path was put in, and used the same route, but did not have to go through the brook. After he moved to Watson Street, he used the bridge by the Scout hut. He used three routes over time: crossing the brook then along the bank of the brook, then via the bridge along the Markeaton brook path after the bridge was put in, and latterly via the Scout hut bridge.
- 3.385. Mr Warren was asked whether he remembered the old iron bridge at point 8. He did remember it: there was an alleyway between the houses from Kedleston Road, and a rickety bridge. He said it was not long gone. He used it once or twice in all the years, only a handful of times at most. He occasionally came onto the field from Queensway, and from Markeaton Street, but not very often. He never experienced any obstruction or difficulty accessing at those points that he could remember.
- 3.386. Mr Warren remembered having seen Derby County youth football using the land (he indicated on field C) for a short period, possibly one season, maybe two, but he thought one. That was 5-7 years ago. On A they still have rugby or

American football occasionally, not so much as they did. When his sons were at Markeaton juniors their school football used to be played there. His younger son left Markeaton juniors in 1983. He did not remember when the American football started. He thought it was the students playing, (although he was not sure), if their pitches on Kedleston Road were occupied, using the pitch as overspill. It was not used frequently, just occasionally.

- 3.387. Mr Warren had never been asked to leave the fields.
- 3.388. In cross-examination, Mr Warren was asked about entrance 6: he was asked to clarify his route before he moved to Watson Street: he walked across Markeaton Rec, across the road, over the other side of the Rec, and crossed the brook via stepping stones, depending on the weather, and round more or less the existing route now, before the path had been laid. He was asked whether there was a makeshift bridge: he said occasionally there was rough boards put across the brook by children, which disappeared and came back again.
- 3.389. I asked Mr Warren about the evidence of other witnesses that there had been a fence butting up to the bridge. He said he could remember the bars being bent or missing. He said he was a bit slimmer then and could get through smaller gaps. He did remember a fence, vaguely, but he could not say where it stopped.

**(27) Jo Cotton**

74 Kedleston Road DE22 1GW

- 3.390. Mrs Cotton provided an undated and unsigned written witness statement and an evidence questionnaire dated 20<sup>th</sup> September 2008.<sup>26</sup> She has lived at her present address, within the claimed neighbourhood, since 1999. Prior to 1999 she lived in Allestree.
- 3.391. Mrs Cotton stated that she knew the land when she lived in Allestree, but mainly used it after moving to Kedleston Road. She has kept dogs for the last 15 years and mainly uses the fields for dog walking. She walks the dog every morning and always goes to the land. She picks blackberries in the autumn. She looks after her grandson, Richard, who was born in 2000, during the school holidays and takes him to the land. He likes to play in the stream.
- 3.392. Whilst on the fields Mrs Cotton had seen others using the fields for picnics, ball games, football, reading, taking children, walking or just lying around (teenagers). Mrs Cotton's son was already at secondary school when the family moved to Kedleston Road, and she mainly got to know people through dog walking on the fields. She often arranges to walk with friends there.
- 3.393. Mrs Cotton stated that she had always used the fields openly and had never sought nor been given permission. Her use had never been prevented or discouraged by anyone. All parts of the fields have always been accessible: no part has been too overgrown to go on. There have been different ways of getting across the stream: sometimes she just wades across in her wellies. The north eastern field by the Jonty Farmer is a playing field, but she had only seen

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<sup>26</sup> A046

organised teams playing there on a couple of occasions. She said that she thought there used to be a Saturday morning club playing football there some time ago, and they used to come in by the corner of the field.

- 3.394. The entrance at Watson Street was closed for a short time, but it was possible to get in from Kedleston Road on the corner near the A38.
- 3.395. Mrs Cotton stated that she uses the local facilities: the Victoria Arms on Cowley Street (now closed), Jacksons (Sainsbury's Local), the post office, the chemist, the chip shop and the dry cleaners on Kedleston Road. The family is registered at Brook Medical Practice, and her son uses the Cowley Street barber.
- 3.396. In oral evidence Mrs Cotton was asked about her statement that the entrance at Watson Street was closed for a short time, and when that was. She said it was a while ago. She was with Mrs Cash. They walked along and there was a gate there that they had not seen before. Either a day or two days after, the gate was open, and, as far as she knows, it has never been closed again. She thought it was when the fences first started to go up. She thought it was when the University first started to put fencing in, probably 2 or 3 years ago, possibly a bit longer than that. She was shown the photograph of the gate on A93, and said that that was the gate she was referring to.
- 3.397. In cross-examination it was put to Mrs Cotton that the incident she referred to when the Watson Street entrance was blocked took place in 1995. She said she honestly could not remember when it was. It was put to her that the access was shut for a considerably longer period than a day or two. She said that that was not her recollection at all.
- 3.398. Having regard to Mrs Cotton's evidence about when she began to use the land, and her confirmation that the gate she was referring to as having been locked was the gate visible in the photograph on A93, which is the gate which was on the land at Access 6 at the time of the site inspection, I think it extremely unlikely that the locking incident that Mrs Cotton referred to happened in 1995, and think it much more likely that it happened, as she said, two or three years before the Inquiry, after the erection in 2007 of a new gate at Access 6.

**(28) Mark Wroe**

39 Bromley Street DE22 1HL

- 3.399. Mr Wroe provided a written statement dated 12<sup>th</sup> February 2010 and an evidence questionnaire dated 7<sup>th</sup> October 2008.<sup>27</sup> Mr Wroe has lived at his present address since February 2010. He lived at 32 Statham Street from 2005 to February 2010, Sherwin Street between 2000 and 2005, and Longford Street between 1991 and 2000.
- 3.400. Mr Wroe stated that he first knew the application land when he was living in halls of residence on Uttoxeter New Road in 1989. He was going out with a girl who lived in Allestree, and would walk between the two places via the

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<sup>27</sup> A213

application land, through the site of Friar Gate station, through the west end estate and Sturgess School, coming out onto Kedleston Road by the Jonty Farmer, and then through the university to Allestree. Mr Wroe said that he was never stopped from going that way. His girlfriend said that the area had been used as open community land for as long as she could remember. Mr Wroe has continued to use the land to date. He has never been denied access or been made aware that access was restricted in any way. He has lived in the immediate area since 1991. Over that time he has used the site as a place to relax. He has collected fruit every year since 1989 from the raspberry and blackberry bushes, as well as rose hips, elderberry, greengage and damsons. Between 1992 and 1996 he had two dogs which he walked on the site every day.

- 3.401. Mr Wroe's two children were born in 2002 and 2007. Both children have made frequent use of the site. It has been a frequent route between home and Markeaton Park, via the footbridge over the A38. The children have collected fruit and played in the brooks and streams.
- 3.402. Mr Wroe remembered that in around 1997 a substantial bridge was built between the tennis courts and the playing field by Kedleston Road, and signage was erected by the Scout hut, and footpath improvements were done, so that access to the site was eased.
- 3.403. Mr Wroe attended community events such as litter picks and picnics on the site. He had always been aware of other users of the site for as long as he can remember: other dog walkers, footballers, people practising golf, BMX riders and walkers on guided walks by Friends of Markeaton Brook (these walks used to be advertised in the post office on Kedleston Road).
- 3.404. In his questionnaire Mr Wroe stated that he had known and used the land from 1989 to date throughout the year, every year, for recreation and fruit picking. He and his family walked dogs, picked fruit and observed wildlife on the land.
- 3.405. In oral evidence Mr Wroe explained the route he took when he first knew the site: his two points of access were Markeaton Street (access 1) and Watson Street (access 6). Access 6 was the bridge to the Scout hut, then either he turned right and followed the edge of the tennis court to where the brooks meet and crossed there, or wandered over field C to the exit onto Markeaton Street. Within the site it was a case of jumping over the various brooks connecting the fields. He sometimes left the site by the gate by the Jonty Farmer and went up Broadway towards the university. The exit there was a five bar gate, with a gap of several feet to its side before the fencing started. It was to the west of the Jonty Farmer, where there is a roadway marked on the map.
- 3.406. At access 1, when he first knew it, there were still railings there, and a gate which was open. There was the driveway to the old school, with an access gate which tended to be locked, and a pedestrian side gate, providing a footpath entrance. The pedestrian access was open. At the far side at the corner of fields B and C there was a dam wall and there were gaps in the fence or the hedge there where access could be obtained. The only change he could

remember was when the University erected new fencing in 2004 or 2005, around that time.

- 3.407. The access at Access 6 was never impeded. He said that he was aware that a gate was put there by the university, but he was never prevented from getting access to the site. Someone mentioned that there was a gate there, but when he visited the site it was not there.
- 3.408. His access at Access 3, where there was a five bar gate and a gap, had only been impeded in recent times when the University had fenced the area off completely. He had always managed to get onto the site at access 1.
- 3.409. At Watson Street whilst there is the bridge to get access, he and his children have also waded across the brook in the summer. That is not a formal access, but it is quite nice.
- 3.410. Mr Wroe had seen organised games and sports on the field over the years. There has always been games in field A. It was used by the school at the end of the 1980s or into the 1990s, during term times. In recent times, within the last 5 years, the university had used the land as well.
- 3.411. Mr Wroe has never been asked to leave the fields.
- 3.412. In cross-examination Mr Wroe was asked to give his recollections of the school in about 1989. He said that 50% of the time he entered the site by the old school entrance. He did not come to Derby until September 1989, so the school had already been demolished. The footprint was there when he arrived. Mr Wroe was asked to clarify his evidence about the gate and the gaps. He said he remembered the pillars for the vehicular access, but he was sure he could get down the side as well. He was asked why that was necessary, if the side gate was always open: he said he went that way because it gave access to field C, rather than to field B.

**(29) Rebekah Hyde**

137 Kedleston Road DE22 1FT

- 3.413. Mrs Hyde provided a written witness statement dated 10<sup>th</sup> February 2010 and an evidence questionnaire dated 21<sup>st</sup> September 2008.<sup>28</sup> She also provided four photographs which she said had been taken on 2<sup>nd</sup> May 2009.
- 3.414. Mrs Hyde lived at 52 Longford Street between January 1991 and 1995, at 21 Park Grove between 1995 and 2003, and at her present address since 2003. All of these addresses are within the claimed locality. For a few months in 1995, between house moves, the family lived on Belper Road. She has three children, born in 1995, 1997 and 2001.
- 3.415. Mrs Hyde stated that she has used the land as if it were a town green since moving to Derby in 1991. She has taken the children there, together with friends and visiting relatives, to go for local walks, play Frisbee and balls

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<sup>28</sup> A097

games about 3-4 times a year. As the children have got older they have gone to the land by themselves with friends to play stream damming and BMXing. Mrs Hyde said that she and other parents she knows regard the land as a good safe place for children to gain their first taste of independence. The family has also used the application land as part of larger community groups for events such as community picnics. She has seen other local residents dog walking, blackberrying, playing football, running, kite flying, and she has seen evidence of den-making. In the past she has walked a family member's dog on the land. They have used the whole of the land, and have not just kept to the informal paths. The previous year they had been on the land with friends and enjoyed trying to cross the stream using an abandoned picnic table left midstream. (The photographs were of this visit).

- 3.416. Mrs Hyde has gained access to the land via the field to the side of the Jonty Farmer pub, via the path to the side of the Scout hut on Watson Street, and via the path near the pedestrian bridge over the A38. She said that she had used the land openly, without seeking permission, and had never been prevented from using it or seen anyone else being questioned as to their usage of the land.
- 3.417. Mrs Hyde stated that she enjoys living in the area because of the strong community she has found there. She is a member of the local church, St Alkmund's. She makes use of local shops, including, over the years, the local supermarket, butcher's, sandwich shop, hairdressers, barbers, pet food shop, dry cleaners, post office, bakery, grocery shop, pharmacist and veterinary surgery. Her children have attended the local nursery and primary school, and she took them to local toddler and playgroups when they were of pre-school age. The children have also attended local Brownie, Cub and Scout groups. The family had been to various parties celebrating various occasions at the West End Community Centre. They have drunk at the Victoria in the past, and at the Jonty Farmer.
- 3.418. In her questionnaire Mrs Hyde stated that she had known and used the land from 1991 to date, 3-4 times a year, for recreational activities.
- 3.419. In oral evidence Mrs Hyde was asked where the West End Community centre is: she said that it is just off Mackworth Road to the side of the track down to the allotments.
- 3.420. Mrs Hyde said that the photographs were taken outside the relevant period, but said that the fields are such a local place that you do not take a camera there. She said that the photographs just show examples of what the family has done on the land over the years.
- 3.421. Mrs Hyde was asked whether in May 2009 field C was cut. She said that it does not appear to be mown in the photograph, and she does not remember any of the rest of it being mown. She did not remember there being any lines there.
- 3.422. Mrs Hyde was asked about the accesses she mentioned in her statement: the access to the side of the Jonty Farmer pub referred to the track off the Kedleston Road. They used that access more when they lived in Longford



Street. There was a gate there, and a stile to the side of it, which you went over into field A. Access there was never impeded.

- 3.423. Mrs Hyde was asked about the path to the side of the Scout hut: she said that there is a bridge to the Scout hut. To the right of the Scout hut enclosure, there is a path, and once you have gone down that path you can go either side of the tennis courts. It was a continuation of the path from the play area, down the side of the allotments, past the Scout hut, and along there. Access at that point was never impeded or made difficult.
- 3.424. Mrs Hyde was asked about the path near the pedestrian bridge over the A38: that was access 1. She could not remember there being any kind of gate there: you could just get in. There were some large tree stumps on the other side of the lake into which her children could disappear. Her access at that point was never impeded.
- 3.425. Mrs Hyde went to a community picnic at which there were organised games. She had also, when she was walking along Kedleston Road, seen games taking place in field A, just occasionally. She was not sure what the games were. That was probably in the last 10-15 years, not in the early 1990s, but from the late 1990s onwards.
- 3.426. Mrs Hyde had never been asked to leave the field
- 3.427. There was no cross-examination.

**(30) David Clasby**

26 Cowley Street DE1 3SN

- 3.428. Mr Clasby provided a written witness statement dated 8<sup>th</sup> February 2010 and an evidence questionnaire dated 19<sup>th</sup> November 2007.<sup>29</sup> He also brought along to the inquiry a poster advertising a field day held on 10<sup>th</sup> July 2004.
- 3.429. Mr Clasby has lived at his present address since 1987. When he moved in, his eldest daughter was 1 (she was born in 1987). His second daughter was born in 1991. He first knew the land from about June 1985, when he started visiting a friend on Radbourne Street.
- 3.430. Mr Clasby used the land for recreation, for walking and for running. He has always used the fields for picking blackberries. When he used the fields he normally kept to the well-defined tracks which had been worn in by constant use, but he did go into the middle sometimes, for instance when going there for a picnic. All parts of the fields have always been accessible, except the edges where there are brambles. Both his daughters learned to ride their bikes there at about the age of 5, (1992 and 1996 respectively) and they often used the abandoned tennis courts for this purpose. When the girls were younger the family used Markeaton Rec and Markeaton Park a lot, and the natural route between the two was via Sturgess Fields.

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<sup>29</sup> A039

- 3.431. Mr Clasby said that the long south eastern field (field C) with the tennis courts in it was originally the sports field for the school which was demolished. He remembered that there used to be a long jump in it: the sand was still there. Early on in his use of the fields he sometimes saw primary school children there with teachers. Most of the time the field has been a rough area, mowed occasionally but not made up as a playing field. There have not been any posts or similar equipment until very recently (2008). The north eastern field (A) has always been a playing field. The old school field (B) has always been very rough, although accessible, with tufty grass.
- 3.432. Mr Clasby has seen other people on the land, dog walking or walking. People have used the wooded part for BMXing: there have been ramps in the woods for as long as he has used the fields, which are freshly dug, and never weed over. He has occasionally seen organised sports being played on the land, on the north eastern field.
- 3.433. Mr Clasby said that there had been little change to the access to the land over the years, at least until 2007. There used to be a little wooden footbridge by the corner of the tennis court which allowed one to cross from there into the wooded area on the other side, which Mr Clasby thought had been built at the same time as the wooden bridge at the corner of Markeaton Rec which leads to the path by the Scout hut. He thought that both bridges were built by the Council after he first knew the land. The Markeaton Rec bridge is still there, but the other wooden bridge got washed away at some time, he was not sure when. People now cross that stream in a variety of ways. It used to be possible to access the land via the path between the health centre and Watson Street, but that path is now closed and overgrown and the metal bridge is no longer there. He said that he thought many years ago, there was briefly a gate at the entrance to the fields in Watson Street, which was taken away after a few days because it did not have planning permission and was too high. All the other entrances remained open at that time, so it was still possible to access the fields.
- 3.434. Mr Clasby had never asked to use the fields, and had never been prevented or discouraged from using them. He had always used them openly.
- 3.435. In July 2004 Mr Clasby organised a "Field Day". He produced the leaflet for the Field Day. His idea was to start a community group, and he thought it would be nice to meet on the land. He put the leaflets and posters in local shops. About 50 people came, and there were a couple of gazebos and picnics. People played football, badminton and other games, and there were musical instruments. Children from the local school came with their families. The event took place on field C. This event was the first of a series of events Mr Clasby has organised at the West End community centre since 2004. There have been one or two events a year, usually in winter, known as winter warmers. These are free community events: there is food and games and local bands play. Around 200 people usually attend. He has also used West End community centre for Derby Cycling Group meetings. Many other locals use the Centre for events.

- 3.436. Mr Clasby uses the shops on Kedleston Road, although he used to use them more before Jimmy's, the greengrocer, closed in 2005. He now uses Jacksons (Sainsbury's Local) and the post office. He used to drink quite often at the Victoria (which closed in 2007), and he also goes to the Jonty Farmer, the Horse and Groom on Parker Street, and he used to go to Sobers, on the corner of Cedar Street (which closed in about 2003).
- 3.437. In oral evidence Mr Clasby was asked about the use of the fields for organised games and sports. When cycling up and down Kedleston Road, and walking around the fields, he had seen groups of people playing American football. It could have been a group of friends: he was not sure. They were dressed in kit, but there was not anyone coaching them. He thought that had not taken place in the first 10 years he knew the fields, but it had taken place in the last 12 years.
- 3.438. He had never been asked to leave the fields and had never seen anyone on the fields in any sort of official capacity. He had never been told of anyone being asked to leave.
- 3.439. In cross-examination Mr Clasby said he also accessed the field from Markeaton Street, from the brow of the hill on Queensway, and from almost every other access to the fields. He was asked about the Watson Street access: it was put to him that it was difficult to get access there until 1989, because there was a fence there, and although there were gaps which children could squeeze through, it was not until the walkway was put in that it was easy to get through. Mr Clasby said there might have been something by where the bridge was, but was not sure whether he was imagining it. He said he would struggled to be able to remember. As far as he could remember he could always get onto the land at that point.
- 3.440. Mr Clasby was asked about his statement that there was briefly a gate at access 6. He said it was there on one occasion, and the next time he came a few days later it had gone. The fencing was still there, and he thinks that the fencing there now is still the same fencing. He was not definite as to whether the gate had been taken off, or had been opened. He was surprised and annoyed to find the gate there, and then the next time it was open and he could get access again. It was suggested that it was longer than a few days before the gate was opened. He said it was possible he had gone towards the end of the period of the gate being up. He said that he was pretty upset about the gate being put up, and would have gone back again within a reasonably short period of time.

**(31) Tim Mackervoy**

15 Woodland Road DE22 1GF

- 3.441. Mr Mackervoy provided a written witness statement dated 9<sup>th</sup> February 2010 and an evidence questionnaire dated 7<sup>th</sup> October 2008, signed by Mr and Mrs Mackervoy.<sup>30</sup> Mr Mackervoy lived at 137 Kedleston Road between 1974 and 1986, then moved to 18 Cedar Street, where he lived until 1998, when he moved to his present address.

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<sup>30</sup> A118

- 3.442. Mr Mackervoy stated that through his own teenage years he played with a group of friends in the area regularly, playing football and cricket, biking, making dens and tree houses, and camping out in the summer holidays. This was before the beginning of the relevant period, but he felt it illustrated the use made of the fields before the school closed.
- 3.443. Mr and Mrs Mackervoy have two children, who were born in 1990 and 1992. During the period 1987-2007, as well as before and after, the Mackervoy family has used the application land extensively for recreation. They had two different dogs (in oral evidence he said that there was a 2-3 year gap between the two dogs) during the period and used the land for dog walking. They sledged down the slope of the main field adjacent to Kedleston Road, played football and cricket, as a family and with groups of friends (both Mr Mackervoy and later his son), cycled, especially in the woods (Mr Mackervoy used to take the children there when they were younger on BMX bikes), practised golf shots, and walked and cycled through as a short cut to Ashbourne Road, and as a more scenic route to Markeaton Park. They also used the land for running and fitness training: Mr Mackervoy had used all the fields as part of running/jogging routes and had used the hill for training purposes. They used the land for general play as a family: kite flying, ball games, picnics, Frisbee and collecting conkers.
- 3.444. Mr Mackervoy's parents continued to live at 137 Kedleston Road until 2003 and also used the fields for walking and playing with their grandchildren. They had a dog between 1987 and 1996 and used the fields for walking it. Mrs Mackervoy senior collected blackberries from alongside the brook.
- 3.445. Mr Mackervoy has seen other people using the land for the same and similar purposes as his family. Dog walking, cycling (before the fences were put up), various sports and children playing had been the main activities. He had seen many group games not involving his family. The Jonty Farmer and Sobers football teams had both trained on the fields at various times over the years.
- 3.446. Mr Mackervoy said that the University had used some of the land for football and American football training (he assumed that the people he saw were university teams, although he said they may not have been).
- 3.447. Mr Mackervoy remembered that in about 1988 or 1989 the Council published a "Green Wedge Policy". He received a leaflet through the door about it. The policy involved the area from the town centre bounded by the Kedleston and Ashbourne Roads to the A38 and included all of the green spaces, including the application land around the old Sturgess school, and stated that these were designated open spaces owned by and for the recreational use of the people of the City. The policy described the access rights and plans for footpaths alongside the Markeaton Brook. Mr Mackervoy said that he understood that the University now wished to build a road through the land to shorten bus times. He feared that the road would be a precursor to further development, and he objected to the land being developed. He wished to preserve access for all to the land.

- 3.448. Mr Mackervoy said that it was possible to access the land from Watson Street, Kedleston Road (both behind the Jonty Farmer and to the left of the pub), from Mill Dam, and from the area adjacent to the A38 opposite Markeaton Park. There was never any question of access not being available, until the fences were erected recently. People could be seen using the three fields from each direction and entrance to them.
- 3.449. In his evidence questionnaire Mr Mackervoy stated that he had known and used the land since 1970, except that the school was on part of the land until the mid 1980s.
- 3.450. In oral evidence Mr Mackervoy was asked to describe the various accesses he mentioned in his statement in more detail. He had not used the access from Watson Street, which he used to use in the 1970s and early 1980s, when he lived in Kedleston Road, a great deal since 1987. At that time they went over the bridge, climbed over the side of the bridge down to the side of the brook, and accessed the land there. There was also a gate into the fenced walkway at the end of Watson Street which was sometimes locked shut and sometimes was not. If it was locked, he would climb along the outside of the metal bridge which was there then. This was during his school days, prior to 1987.
- 3.451. The entrances from Kedleston Road were the ones he used mostly, and in particular access 3. Before the fence went up there was a gate there, and an open space to the right hand side of it which you could walk through. He thought there may have been a stile there going back further, also to the right of the gate.
- 3.452. The access at the Mill Dam is the access at 1. There was a bit of an overflow, and it used to get wet there. He did not think that vehicles could access the site there, although he said if the gate was not there, you could get a car in. Before the beginning of the relevant period, the school was open, and Mr Mackervoy said there must have been school gates there. The school closed in the mid 1980s, he thought 1985, 1986 or maybe 1987. It was derelict for a while before it got knocked down. He used that access after the school had closed and when the school was derelict. He could not remember whether the arrangements changed. He said he could always get through. He inherited a dog in 1988, and walked the dog extensively. He could always get through at access 1. He said he thought there were gates at various times, but he could always get through. It was a long time ago. He was asked whether it was always the same set of gates, or whether there was a change. He said there may have been a change, but he could not pin it down, and say what happened.
- 3.453. Mr Mackervoy was asked when the American football started: he thought it had started about 10 years ago. He said it was not there for that long: he had not seen it for quite a while, but maybe he had not noticed it.
- 3.454. Mr Mackervoy has never been asked to leave the fields.

- 3.455. In cross-examination Mr Mackervoy was asked about his evidence about climbing over the side of the bridge and down to the brook. That was in the 1970s. He was asked when there came a time that that changed. He said he did not know. He was grown up in 1981, and stopped playing in that way. There was a metal bridge with corrugated sheeting on the side when he was a child. That was the way to get into the land at the time off Watson Street. He did not know when that changed.

**(32) Ondine Shardlow**

4 Tivoli Gardens, Derby

- 3.456. Ms Shardlow provided a written statement dated 17<sup>th</sup> February 2010 and an evidence questionnaire dated 10<sup>th</sup> November 2008.<sup>31</sup> Ms Shardlow moved to 13 Redshaw Street in 2002, with her then partner and their eldest daughter, who was born in 2001. Their second daughter was born there in 2003, and she also has a son, who was born in 2007. When she wrote her statement in February 2010, she had been living at Tivoli Gardens for 8 months.
- 3.457. Ms Shardlow stated that she and her family had used the fields continuously since moving to Derby in 2002, as a place to walk and exercise, to pick flowers, blackberries and raspberries, to run, play and climb and generally to have fun. In the winter months they watch birds, walk friends' dogs, play football and look for fungi in the wooded area. They use the land almost daily in spring and summer. They go pond dipping and paddling in the brook, make camps in the woods, fly kites, ride bikes and scooters, play rounders and tennis, picnic, collect sticks, plants and flowers. They lie in the sun and take muddy walks in the rain. They also use the fields as a cut through from home to Markeaton Park.
- 3.458. Ms Shardlow stated that she regularly bumps into friends, relatives and neighbours when using the land. They use the land for similar activities. Neither she nor anyone she has spoken to locally has been hindered in any way from using the land for such activities.
- 3.459. Ms Shardlow's family has attended social functions on the fields organised by members of the local community, and nature walks and talks given by the Friends of Markeaton Brook.
- 3.460. Ms Shardlow considers herself a member of the West End community and uses or has used all the local shops, including the corner shop on Cowley Street/Watson Street, Jacksons (Sainsbury's), the baker's and butcher's (now closed), Kedleston Fish Bar, the dry cleaners and the post office. She has also frequented the local pubs: the Victoria (now closed), the Jonty Farmer and the Horse and Groom. They have used the West End Community Centre for parties and social functions and evening classes. Her children have used the Scout hut on Watson Street for dance classes and they regularly attend fairs and functions there.

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<sup>31</sup> A168

- 3.461. In her questionnaire Ms Shardlow stated that she had used the application land from March 2002 to date 2-3 times weekly for dog walking, walking with children, pond dipping, bird watching and as a cut through.
- 3.462. In oral evidence Ms Shardlow was referred to her answer to question 10 in the questionnaire, where she had said she gains access to the field through public footpaths at the following sites: Watson Street (Markeaton Brook walkway), Kedleston Road, Millpond Entrance, and was asked to elaborate on those accesses. The Markeaton Brook walkway is next to the Scout hut (access 6), the Kedleston Road entrance is access 4 between the doctor's surgery and the Jonty Farmer, the Millpond entrance is access 1. Her access at point 6 has never been obstructed or impeded, neither has her access at point 4, or at point 1.
- 3.463. Ms Shardlow knew that the fields had been used for organised games or sports. Her children are all under 10, but when they were pre-school, Ms Shardlow and quite a few of the parents used to do football or rounders. That was organised by the parents and they would meet there. She knows that there have been fun days there, and they have been to quite a few of them. She had not been to all of them. They had been in the field adjacent to the Scout hut. She was asked whether she was aware of the University's use of the land: she said that when they were building the new building there were prefabs and equipment stored in the field next to the Mill pond, but otherwise she had not seen any use by the University.
- 3.464. She had never been asked to leave the fields.
- 3.465. In cross-examination Ms Shardlow was asked about access 4: it was put to her that there was no access there until 2007: there was a bridge there from 1995, but the access was kept locked. She said there has always been a way through. She had used the access intermittently. She knows there is a gate there, but thought it was to get lawnmowers on, and it was locked to stop travellers getting onto the site. From when she first moved to Derby until 2008 she used that gate. It was put to her that the gate has been open since 2007, but it was not open before 2007. She said at times it had been open. She thought that there was a way in, a gate or something. She was asked whether it was a gate or a gap in the fence or whether she had gone across the stream. She said as far as she could remember she was going across the bridge. She does not often use it now, but used it before 2007.
- 3.466. The gate she referred to using as the exit on the cut-through is the gate at access 1.
- 3.467. There was no re-examination.

**(33) Laura Burnett**  
24 Wheeldon Avenue DE22 1HN

- 3.468. Ms Burnett provided a written witness statement dated 4<sup>th</sup> February 2010 and an evidence questionnaire dated 12<sup>th</sup> October 2008.<sup>32</sup> Ms Burnett has lived at her present address since 1986. Ms Burnett's daughter was 3 when they moved.
- 3.469. Ms Burnett took her daughter on walks through the application land and her daughter played hide and seek in the wooded areas and ran in the open areas. They listened for bats on the application land. In later years they have sat on the application land and watched water voles, and fish. Ms Burnett has also picked blackberries and watched birds. She taught her daughter to ride her bike on the old tennis court. She has also used the area as a cut through from Sainsbury's. More recently she has exercised neighbours' dogs on the land and walked puppies for Guide Dogs. The puppies are taken on a "free run" three times a week, and when they are little, the field is a good quiet safe place for them.
- 3.470. Over the years Ms Burnett has seen much evidence of children playing including den-making and campfires.
- 3.471. Ms Burnett has gained access to the land through at least four openings. She said that dog walkers appreciate the little hand made bridges and repairs after bad weather. Someone also filled a deep hole on one of the fields.
- 3.472. Ms Burnett stated that there is a pretty good range of facilities in the area which keeps the community together, and said that there seems to be a communal feeling about the area. There is the primary school, and also many sheltered housing areas for the elderly, who seem to support and look out for each other. She has neighbourhood watch in her street.
- 3.473. In oral evidence Ms Burnett said that in the late 1990s/ early 2000s, she had some minor health problems, and went down to the fields to wander around. She began, initially as a kind of therapy, to make handmade cards using materials from the fields and from her garden, which she sold, and continues to sell. She brought some materials and some examples of her cards to the inquiry.
- 3.474. Ms Burnett was asked how she gained access to the site: she was asked to explain the four openings she referred to in her statement. She said that she used access 3 most, 4 occasionally, and access 6 and access 2, and sometimes exited through access 1. In the earlier days there was not the bridge across the stream at 5 that there is now, and she used to just jump across the brook. She thought that the brook did not used to be as full before as it is now. She remembered the iron bridge at 8, but did not really trust it, so did not use it.
- 3.475. Access 3, when she first knew it, was very muddy: it was almost like a stile, and there was just enough space to squeeze through sideways, and for a dog to get through, then at some stage it got slightly wider: some of the fence was taken away, she thought. It was usually very muddy. That was how it was for

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<sup>32</sup> A033



most of the time she was using it. Her access there had only been impeded when the big steel fence went up.

- 3.476. Access 4 is the bridge between the Jonty Farmer and the Brook medical centre. She uses that access quite often. She did not remember when the bridge was put in, relatively recently, but she could not give a date. That access has been padlocked on a few occasions, specifically last Christmas (2009), and also one or two other times in the past, which she could not put a date on. She did not think it was locked at Christmas 2008. She does normally walk her dog at Christmas.
- 3.477. Ms Burnett said that she gained access at Access 6 straight over the bridge next to the Scout hut, and then straight through the gateway, either round the back of the tennis courts, or straight down the side of the tennis courts, or through the tennis courts. She does not remember that gate being locked, and says that it was the only one she could get through when all the others were locked, at Christmas 2009, which is the only time she remembers all the gates being locked. She did a whole perimeter walk on that occasion: she had assumed that the other gates would be open, but they were not. Only the Watson Street one was open.
- 3.478. When she first used Access 1 there were two accesses there: the one that is there now, the gate, and also you could scramble down through the brambles and up again, there was a pathway worn through which is now overgrown. She remembered it as an open area leading out onto the track down to the side of the lake. Access 1 has been obstructed recently, at Christmas 2009, but not on any other occasion that she could think of. Going further back in time, she thought they might have blocked it slightly when they were doing building work, putting the fence up, or if it was not blocked she would have deemed it too dangerous to go near, because there were too many earth moving machines around. This was in the last 2 or 3 years, when they were building the steel fence.
- 3.479. Ms Burnett said that in the past she thought she had seen some children from the school down Kedleston Road, Emmanuel School, using the field, way back in the past, but not so much recently. She had seen groups of children running around the woods but not on an organised run. She knew there had been organised trips from Markeaton Primary School to the fields. She has only seen the University use it recently, for a ladies' football match. She had also seen what she thought was training for American football.
- 3.480. She has never been asked to leave the fields.
- 3.481. Ms Burnett was asked whether she remembered the fields when the school was still there: she said very vaguely. She did not remember the fields when the school was open: she had driven past them, but did not live in the area then. Her memory was of when the school was physically there, but was closed. Ms Burnett was asked about the part of field B which was not occupied by the building: whether it was used by local people for recreation. She said it was

used for dog walking, and once the school was empty, children would go there and play about.

- 3.482. In cross-examination Ms Burnett was asked about access 3: she said she was not clear at what point the fencing was taken away, or even at what point it was put back. She remembered at one point having to squeeze through a tight area, then at other times it was not so tight. She was not clear whether it got wider and narrower, or narrower and wider. She remembered at some point having to squeeze through sideways. She was not sure when that was. She said it remained more or less the same for a long time. There was never a problem getting access because she could squeeze through.
- 3.483. She was next asked about access 4: she remembered the building work to create the bridge, and she agreed there was no access there until the bridge was put in. It was put to her that the gate was kept locked until recently. She said there was a while when it was just a bridge, the gate went in later. There was a time when you could just go over and get access. For a period the gate was locked, but it has been unlocked since. She agreed that it was probably unlocked for the last 3 years since about 2007. She said that ever since she has been walking Guide Dogs she has used that gate, and that has been for about that period.
- 3.484. Ms Burnett was asked whether she remembered access 1 in the mid 1990s and whether she remembered a fence being put up and a gate being constructed there. She only remembered the 2007 fence. She certainly did not remember anything before that, certainly not anything blocking her way. She was asked about the access through the brambles: she said children on their bikes came out that way from field C. It was quite tricky, but fun to use sometimes. She never used it to get in, but used it to get out, and go off the fields in a different way, instead of going round and via field B. That way she could come out from field C, rather than going via field B. It used to come out almost at the same place as the exit from field B.

**(34) Peter Williamson**

50 Cedar Street DE22 1GE

- 3.485. Mr Williamson provided a written witness statement dated 2<sup>nd</sup> February 2010 and an evidence questionnaire dated 12<sup>th</sup> November 2008.<sup>33</sup> He has lived at his present address since 1984, and in the West End area for 40 years. His father was from the area, and lived as a boy on Kedleston Road.
- 3.486. Mr Williamson stated that for as long as he could remember his family (he has two brothers and a sister) has used Sturgess Fields and the surrounding paths and walks, especially after the schools were abandoned in the 1960s.
- 3.487. Mr Williamson's own children are now 39 and 37. When they were children he took them onto the fields and woods for walks, to play games, collect blackberries and view the wildlife. From when he moved to Cedar Street until 10 years ago he owned two dogs, which he walked at least once a day around

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<sup>33</sup> A204

the application land. When he did this he met up with other neighbours enjoying the fields. Often on a Saturday afternoon the Williamsons walked through the parks from Brook Street onto Sturgess fields, and through onto Markeaton Park and back by Mill Dam.

- 3.488. Mr Williamson now has two grandchildren (aged 16 and 14 at the date of his statement), and they have enjoyed walks, football and blackberrying on the fields. His brothers and sisters all continue to live within 5 minutes of the fields, and still enjoy using the fields.
- 3.489. Mr Williamson said that access to the application land was always easy up until a few years ago. He used various entrances such as Kedleston Road, Watson Street, Markeaton Street, and via the bridge from Watson Street, and in later years, via the bridge from Markeaton Rec (which he thought had been installed by the Council in the early 1970s. There used to be a bridge across the brook connecting the two sides of the fields. He thought that this had been removed by the Council in the late 1980s or early 1990s.
- 3.490. Mr Williamson has never been challenged nor had to ask for permission to use the fields.
- 3.491. In his evidence questionnaire Mr Williamson stated that he had known the land from 1975 to date and used it from 1975 to 2007 at least 4-5 times per week, for walking his pet, and for taking his children and grandchildren walking, and playing sports with them.
- 3.492. In oral evidence Mr Williamson was asked to clarify the accesses he used. Kedleston Road is access 3. Watson Street is access 6. Markeaton Street is access 1, and the access via the bridge from Markeaton Rec (Mundy Pleasure Ground) takes you up to the bridge by the Scout Hut, and in at access 6.
- 3.493. Access 3 when he first knew it was a five bar wooden gate. To the side of the gate was a gap. It was either at one stage a very small stile, or a gap big enough to take his two dogs through. It varied sometimes, it was either bigger, or at one stage there was a signpost in front of it. It was his main access because it was at the bottom of his street: he either went that way or came back that way. He did not remember squeezing through, and said with two dogs it is difficult to squeeze. He was asked about the sign: he said it was in front of the gap, the gap was still behind it with access available. It was not there for long. He cannot remember what was on the sign. His access at 3 was not obstructed until the big fence went up in later years.
- 3.494. He gained access at Access 6: his mother lived at that end, so if he went for a walk from her house, he would use that access. At the entrance to the site, there was a proper path, with no gates or anything. He thought it remained the same until the recent fencing. His access at 6 was never obstructed that he could remember.
- 3.495. When the bridge at 9 was there, he used that, because it was a through route providing access. It was signed as Markeaton Brook walk. After the bridge at

9 disappeared, he mainly walked on A and B, unless he decided to go round and onto C. There was always access to C, but as his dogs got older, they could not get across the small brook so easily.

- 3.496. He used access 1 sometimes, walking back that way, using 1 as an exit. When he first started using it, there was quite a reasonable path, because the tarmac to the old school buildings was still there. He was asked whether there was a gate there. He said there were gates, but he thought the fence had been removed alongside the Mill Dam. He could not remember the gates being locked: there was always access out or in. He uses 1 intermittently, but could not remember his access ever being obstructed there.
- 3.497. Mr Williamson had not seen the fields being used for sports that he knew were organised: he had seen groups of children playing sport. He was only aware of use by the University in the last very few years, and then only occasionally. He had never been asked to leave the fields.
- 3.498. Mr Williamson remembered the Sturgess School when the school buildings were in use, but only when he was a child, walking past with his parents or grandparents. He said that it was only open for a short time before it was closed. He knew someone who was at school there in the 1960s. It was in the early 1960s that the school was open. He remembered the school buildings when the school was closed. He was asked whether at that time, the remainder of field B was used by local people for recreation. He said it was definitely used while the school was closed, right until the school became derelict.
- 3.499. In cross-examination Mr Williamson was asked about access 6: he was asked whether he remembered a formal access being put in there in 1989. He agreed that the bridge from the Mundy Pleasure Ground was put in about then. He could not remember any access being put in at the end of the bridge onto Watson Street. Before 1989 he would have come onto the field access 3, unless he was visiting his mother, in which case he would have come via Watson Street. He got out over the bridge. He did not remember there being any fencing there.
- 3.500. There was no re-examination.

**(35) Ms Ruth Strange**

26 Cowley Street DE1 3SN

- 3.501. Ms Strange provided a written statement dated 14<sup>th</sup> February 2010 and an evidence questionnaire dated 22<sup>nd</sup> September 2008.<sup>34</sup> Ms Strange has lived in Derby and has lived at her present address between July 2003 and November 2004 and since November 2008. Between November 2004 and November 2008 she lived at each of the following addresses for periods of about a year: 1 North Parade, 99 Macklin Street, 75 Kedleston Road and 12 St Cuthbert's Road. Of the addresses at which Ms Strange has lived the following are within the claimed neighbourhood: 26 Cowley Street and 75 Kedleston Road. The others are outside the claimed neighbourhood. North Parade is to the east of

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<sup>34</sup> A181

the claimed neighbourhood. Macklin Street is to the east of Abbey Street. St Cuthbert's Road is quite a distance away.

- 3.502. Whilst living at Kedleston Road Ms Strange helped to look after a dog, which she sometimes walked on the fields. She has also used the fields for walking, alone or with friends, along paths and across the whole fields. She likes to walk in the woods and along the brook, and to cross the bridge which keeps changing. She has paddled across the brook and had jumping competitions across it. She used the land for a birthday picnic in about 2003 (with about 10 people), for picking blackberries and collecting nettles for compost making. She attended a party by the brook once. She attended the Field Day in July 2004, and the Community Picnic in July 2007. She also uses the land to get to and from Markeaton Park.
- 3.503. Ms Strange has seen other people picnicking, dog walking and picking blackberries. She has seen bike tracks and humps made in the woods. She has often seen people fishing or chatting by the pond on the A38 side.
- 3.504. Ms Strange has gained access to the fields either from the A38, or from Markeaton Street, or from the path from Markeaton Rec, or from the bridge from Watson Street or from the Jonty Farmer.
- 3.505. She has never been stopped from using the fields or seen anyone who seemed to own them. She had never sought permission to use them.
- 3.506. Ms Strange used to have an allotment in the allotments adjacent to the fields. She has used the West End Community Centre to put on community events with others and made a film for a Winter Warmer event in 2004. She uses the newsagent on Cowley Street, the post office and the chip shop on Kedleston Road. The post office has a notice board for publicising community events. She also used Jimmy's when it was there. She has been to the Britannia Mill site for art shows and to put up posters for community activities and has used Markeaton Rec.
- 3.507. In her questionnaire Ms Strange stated that she had known the land from 2003 and had used it between 2003 and 2005 and then from 2006 to 2007 for leisure, every day for two weeks when she was walking a dog, and at other times at intervals for events, or for walking and playing. She had picked blackberries, held a birthday picnic, attended a community Field Day picnic/games day in July 2004 and a Community Picnic in July 2007 there, played Frisbee, and walked her friend's dog there.
- 3.508. Ms Strange produced a flyer for the Field Day to the inquiry. The flyer invited people to field C for a Field Day from 12-3 p.m. on 10<sup>th</sup> July, including fun and games and a community action ideas stall. They were invited to bring a picnic. There was to be an evening session at the West End Community Centre, to which people were invited to bring food and drink, from 6-11 p.m.. Anyone who wished to help was invited to contact David, and a telephone number was given.

- 3.509. In oral evidence Ms Strange was asked to clarify the accesses to the land which she mentioned in her statement. By the A38 entrance, she thought she meant coming via the footbridge, and coming back via the Mill Dam pond, and entering the land at access 1. She also comes the other way along Markeaton Street and uses that access. The path from Markeaton Rec leads to access 6. The bridge from Watson Street is the bridge which goes to the Scout Hut, and she accesses the land from there via access 6. The access at the Jonty Farmer is the one between the pub and the medical centre, access 4, but she has hardly used that one.
- 3.510. Ms Strange has never found her access at Access 1 obstructed. She remembered the metal fence going up, but did not remember it being shut.
- 3.511. She has never found the access at Access 6 obstructed: that has always been a path. She thought she may have used Access 4 but only once.
- 3.512. Ms Strange was not sure whether she had seen the fields being used for organised sports. She said there is a rugby goal on one of the fields. She may have seen people practising, but did not think that she had ever seen a game. She had never been asked to leave the fields.
- 3.513. There was no cross-examination.

**(36) Mr Patrick Browne**

71 Kensington Road, Manchester

- 3.514. Mr Browne is the applicant. He provided an evidence questionnaire dated 22<sup>nd</sup> November 2007. Mr Browne was also the author of the document headed “Statement of Case” at A1/12, other than the legal sections, which Mr Petchey had emailed to him and suggested that he should insert, and of the document headed “Comments on Objector’s Witness Statements by the Applicant” at A1/23A. Mr Browne stated that the factual assertions in those documents were in part information he had obtained from others, and in part, where indicated, information from his own experience.
- 3.515. Mr Browne formally produced the photographs at A1/89-A1/125. He took the photographs numbered S4, S5 and S6 in September 2007. Roger Lawson, a friend of Mr Browne’s who did not give evidence to the inquiry, took the other photographs, and Mr Browne said that he understands that they were taken on 12<sup>th</sup> September 2009. Mr Browne was not with Mr Lawson when the photographs were taken. Mr Browne drew up the note at A1/84 and the plan showing the location from which the photographs had been taken at A1/88 from his own knowledge of the land. The photographs at A/23I Mr Browne took on 19<sup>th</sup> May 2008.
- 3.516. Mr Browne lived at 6 Walter Street between 2004 and 2006, at 75 Kedleston Road DE22 1FR between 2004 and April 2009. By the time of the inquiry he had moved out of the area, to Manchester. In oral evidence he stated that in 2004 before he moved to 6 Walter Street, he visited his now wife who was living in Bromley Street. All these addresses are within the claimed neighbourhood.

- 3.517. In his evidence questionnaire Mr Browne stated that he had known and used the land most days between 2004 and 2007 for dog walking, playing with his son, and to be somewhere green and beautiful. He took part in Frisbee, walking, blackberry picking, picnics, community parties and tennis. His wife and son used the land for dog walking, picnics, bird watching, playing tennis and picking blackberries. In oral evidence Mr Browne confirmed that he walked the dog himself as well. No attempt was made by notice or fencing or other means to prevent or discourage the use being made of the land by local inhabitants until August 2007, when signs were put up stating that access was permitted under certain conditions. In August 2007 the University erected metal fencing all around the fields, installed gates at various entrances and erected signs. The signs said that anyone entering the fields was doing so with the owner's permission. A photograph of one of the signs was in the Applicant's bundle at A93.
- 3.518. In his statement of case Mr Browne set out his understanding of the history of the application land. He stated that it seemed likely that the land was at one time owned by the Mundy family, who had a country estate centred on what is now Markeaton Park. At some time it became the property of Derbyshire County Council. Sturgess Boys School, named after Alderman Sturgess, was built on Field B and was opened in 1948. The school closed in 1973, but the buildings were used for some time as an annex of Woodlands School, Allestree. The foundations of the building were unsound, and the building was gradually sinking. At the time he wrote his statement of case Mr Browne had understood that the buildings were demolished in 1984, but in oral evidence he said that he now knows that the buildings were demolished in 1989. He had found a report in the Derbyshire Evening Telegraph in the Local Studies Library, and is satisfied that the 1989 date is accurate. As far as Mr Browne was aware all the buildings were demolished at one time. The 1984 date had come from asking people. His understanding from the Derby Trader article published on 16<sup>th</sup> October 1985 is that the use of the old Sturgess School buildings by Woodlands School ceased in July 1986. After that date Willmorton College used the course for a painting and decorating course, it seems from the minutes of the College's governing body<sup>35</sup>, from January 1987- Easter 1987.
- 3.519. Field A was used as a playing field by Sturgess School. Historically that land had been Copes Farm, and the farmhouse stood where the Jonty Farmer pub now is. Markeaton Primary School also used Field A for sports, because that school did not at the time have its own field. The footbridge between Fields B and A enabled the pupils to reach the playing field. The old metal fencing around the site dates from this time.
- 3.520. Field C was used for allotments until it was compulsorily purchased by the Council in 1962 for use as an additional playing field for Sturgess School. There are two tennis courts in the north east corner of Field C. There used to

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<sup>35</sup> A23K

be a long jump pit here, and there used to be a bridge connecting Fields A and C.

- 3.521. In 1989 the application land was included in the “Green Wedge”. Mr Browne included a copy of the City of Derby Local Plan Review: Public Local Inquiry: Green Wedge Topic Paper dated July 2003 in his bundle<sup>36</sup>.
- 3.522. In the early 1990s the land was bought by the University of Derby.
- 3.523. Since that time Field A has been made up as a playing field. In 2004 when Mr Browne got to know the land there were posts in the field which he thought were rugby posts, but they could have been American football posts. The University hardly ever seemed to use the field: it was very rare to see student teams there. He said that anyone spending time there would have been more likely to see locals practising golf, playing Frisbee or hitting balls for dogs. Many witnesses reported seeing American football being played, but only occasionally. Mr Browne himself, although he walked his dog on the land almost every day for five years, saw university rugby players on Field A only a handful of times. The two football pitches on Field A were created in autumn 2008 when the rugby/American football pitch was relocated to Field C. The north western corner of Field A is an embankment sloping down from the A38. This area consists of rough grass and small bushes. There are paths worn in the area, and a number of witnesses refer to using the slope for sledging.
- 3.524. During the 20 year period, Field B has always been rough land, with long grass for much of the year. Mr Browne said that many witnesses recalled using the fields for recreation during the time that the school was still open and both before and after demolition they continued to use that part of Field B to the north of the school, as well as parts of the footprint of the school site, which comprised a car park and two playgrounds. He produced a map showing the layout of the buildings<sup>37</sup>. Mr Browne accepted that people could not physically use that part of Field B which was built upon during the time that the buildings were in place.
- 3.525. Field C has also mostly been rough land. Mr Browne said that from his own knowledge between 2004 and 2007 it was mainly rough grass, and in summer was a lush meadow. He attached two photographs taken on 19<sup>th</sup> May 2008 shortly before the University started to prepare Field C as a pitch<sup>38</sup>. From 2008, the University started to cut the grass in Field C very short, and eventually made it up into another playing field. He understood from others that the usage of the field was the same during the period 1987-2004.
- 3.526. Mr Browne said that there was a widespread local belief that the application land was gifted by the Mundy family to the people of Derby. Mr Browne said that it appeared that the Council originally intended to construct a continuous walkway along Markeaton Brook, although this plan was never completed. They did get as far as putting up a signpost. The signpost points away from the

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<sup>36</sup>

<sup>37</sup> A23L

<sup>38</sup> A23I



application land, but is located within the boundary of the land. Mr Browne said that the Green Wedge Policy and the Markeaton Brook Walk plan gave significant publicity and encouragement to local people to continue to consider that the land was available for the public to enjoy. In oral evidence Mr Browne said that the witnesses in support of the application seemed to say that the bridge at point 9 was put in by the Council and Mr Cash had said that it was identical to the bridge put in at the end of Mundy Pleasure Ground, which is part of the Markeaton Brook Walk. The bridge at 9 is beyond Watson Street, and therefore is not specifically referred to in the emails from the Council's officers. Mr Browne said that he understood from his witnesses that the path was made up in the same way all the way to the bridge at point 9. He was not sure where it went after that, and said that it might have joined with the old path to the school.

- 3.527. Mr Browne said that Mr Williamson and Mr Cash had mentioned that Field C was used at one time by Derby County Football Team for practice, but he thought this was only for one season. He did not know when this was, but it was within the relevant 20 year period. None of the witnesses said that this significantly affected their use of the land at that time. Mr Browne said that the 1999 aerial photographs<sup>39</sup> seemed to show short cut grass on Field C, but no evidence of any goalposts.
- 3.528. Mr Browne thought that when Mr Durham referred to Field C having been "mainly used for sport" he must mean in the very recent past, since 2008. Mr Browne said that even since 2008 it has been very unusual to see any University sport players on Field C: he had seen people playing American football there once. He had seen spectators present at a University match only once, in 2008 on Field C. There was also an ambulance there. All the other times he had not seen any spectators or ambulances. When Mr Durham referred to access being restricted during play, he said that if Mr Durham meant that the gates were locked, this was not correct, although Mr Browne said that when he was walking past players he kept his dog on the lead to stop him trying to get the ball.
- 3.529. Mr Browne said that he had on one occasion in about 2008 met some students doing some kind of surveying work, but at the same time he had seen hundreds of local people engaging in all sorts of activities.
- 3.530. Mr Browne accepted that Markeaton Primary School used the fields between 1989 and 1993, but said that he had not been able to establish how often or on what basis. The school has continued to use the fields for various activities. Mr Browne had spoken to Mr Otterwell at the school who had said that he sometimes sought permission via the council, and sometimes did not, when taking children onto the fields. Another teacher, Emma Edge, who was a witness for the Applicant, had stated that she takes children onto the fields and does not seek permission.

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<sup>39</sup> A35 and 36

- 3.531. Mr Browne said that he knew of no other instances of people seeking permission, including for any of the activities of the Scouts, Cubs or Brownies who use the field.
- 3.532. Mr Browne acknowledged that the Friends of Markeaton Brook had used the fields a few times a year with the University's permission. He did not know when the first occasion might have been, but said that the Friends had been formed in 2005. He said that the Friends was not exactly a local organisation, as its activities extend to the part of the Brook in Kedleston Hall Park, several miles from the application site, but acknowledged that local people had attended events organised by the Friends on the fields.
- 3.533. Mr Browne said that he was not aware of Groundwork having used the fields. He knew nothing about Environment Day, and had never heard of the Fun Day. He pointed out that dates were not supplied, and said that he did not think the events, if they happened during the relevant period, impinged on the use by local people of the land in any significant way. The Breathing Spaces application appeared to date from the beginning of 2008.
- 3.534. In relation to the evidence contained in Mr Willgoose's statement as to the activities permitted by the University since purchasing the land: access across the site to Markeaton Park, access for walking around the perimeter of the site for pleasure and access for a number of organised public events, including Walkabout lunch, Dawn Chorus, free breakfast at the University's main site, Bat Walks, and many Wild and Fun days, student brook cleaning days and students entertaining school parties on nature trips around the site, Mr Browne said that all the activities referred to after 2007. The only group which used the land with permission of the University before 2007 was the Friends of Markeaton Brook. The first Bat Walk was in 2009. He was not sure whether the gates were being locked as Mr Willgoose stated between the hours of 23:00 and 06:00 or thereabouts, and over any formal University closure periods (Christmas), but accepted that witnesses had encountered locked gates since the installation of the new fencing in the summer of 2007.
- 3.535. Mr Browne said that, contrary to Mr Durham's evidence, the situation when he knew the land before 2007 was one of benign neglect. From 2007, in preparation for a proposal to build a road across the site, the University started cutting back the undergrowth, and in 2008 cutting the grass on Field C to prepare it for becoming a playing field. The University had also cut down many trees. He noted that the Environmental Management Plan produced by the University was dated April 2009, and that there did not appear to be an earlier version: the plan therefore post-dates the relevant period. He was not sure what works of improvement were done to Field A or to Field C before 2008, when it was improved. He pointed out that Sturgess School had used both fields as playing fields until 1986.
- 3.536. Mr Browne took issue with Mr Durham's description of the University's security regime in relation to the access points to the site. He said that it may be a description of the regime at the time of Mr Durham's statement, but that regime had not applied during the relevant period up to 2007. He himself had

walked the dog on the land in the middle of the night, and also on Christmas day in 2004, 2005 and 2006. He definitely walked through access 6 at Christmas 2004, 2005 and 2006, but was not sure which other accesses he used on those occasions. His daughter was born in September 2006, and he has taken her (in a carry pouch) from about the age of 6 months early in the morning, at about 05:00, to walk the dog.

- 3.537. Mr Browne said until the new fencing was put up in the summer of 2007, the fields were porous.
- 3.538. Access 6, the Watson Street entrance, has almost always been open. A few witnesses had reported that there was a locked gate there in the mid 1990s (although estimates differed as to the exact date). However the locked gate appeared to have been removed within a matter of days – a week or so. The vast majority of witnesses, even those who regularly used the entrance, were not aware of the incident. There were in any event many other accesses onto the land which were available at this time, so no-one was prevented from entering the land. Mr Browne said in oral evidence that at Watson Street there had been no gate to lock at access 6 until 2007. Mr Browne said when Mr Durham referred to the gate being reinstated in 2006/2007, he knew that it was reinstated in the summer of 2007, because he saw it for the first time when he came back from his 2007 summer holiday.
- 3.539. Access 1, the Markeaton Street entrance, had always been open. No-one recorded any closure of this access at any time. Mr Browne said that it was possible that Mr Durham was talking about the very recent past as if the situation described had subsisted over the whole period, although his statement does not read this way.
- 3.540. Access was always possible at access 2: for some time there was a rusty locked gate at this point, but there was a large gap in the fencing next to it and a well-worn path through. In oral evidence Mr Browne said that his memory was that if you were coming from within field B, the gate was closed, but to the right hand side of the gate there were missing railings. To the left hand side of the gate, there was undergrowth, which you could easily walk through, and there was no fence there, or at least the fence if it existed it was on the ground. There was a culvert there, there was a gap between the edge of culvert and the post of the shut gate, which was wide enough to walk along with no difficulty, about a couple of feet wide. Now the palisade fencing extends across this point. That whole area was like a play area for children, because there were fallen willow trees which children liked to climb on. He used to go there with his stepson, who was born in 1997. It was open between Mill Dam and field B, apart from the undergrowth.
- 3.541. Access 3 was open throughout the 20 year period. No-one reported a closure. Mr Williamson and Mr Baker referred to signs being erected at this point. Mr Browne agreed that new fencing was erected in 2007 and extended towards the end of 2007 and cut through further along the boundary in 2008.

- 3.542. Access 4, Mr Browne accepted, was built in 1995. The gate was open at the time he wrote his statement of case, but he said that he believed that it had been gated at some points in the past. He thought that the bridge was locked when it was built by the University. In oral evidence Mr Browne said in his own experience the gate at access 4 was always locked, although he did not try it very often. He had known it to be locked. Mr Browne was asked to elaborate on the access construction at access 4. He said that what is in the text represents his understanding on the basis of information provided by others. He was not in the area at the time. He stated that the photographs provided at O157ff were very recent: none of the signage shown was there before the summer of 2007.
- 3.543. There used to be an entrance at access 8 from Kedleston Road, approached by a path starting at Kedleston Road. There was a metal bridge over Markeaton Brook at point 8. The bridge became unsafe and the path over it was closed before the bridge was removed. Mr Browne said that he had not been able to establish when the path was closed, but various witnesses had said that it was open in the early part of the 20 year period.
- 3.544. Mr Browne said that there were also makeshift entrances to the land over Markeaton Brook from Kedleston Road into Field A consisting of stepping stones, planks, and at the time he wrote his statement, pub tables.
- 3.545. In oral evidence Mr Browne was asked which accesses he used. He mainly used access 6, because he lived on that side of the land. He did also use Access 1, because he often walked through Sturgess Fields into Markeaton Park with the dog and with his son.
- 3.546. Mr Browne said that, contrary to what Mr Durham said in his witness statement, Field C is not landlocked, because apart from the make-shift bridges which provide access, including a fallen willow which he used for a long time, and the possibility of jumping the brook, there is a path in the south western corner of the field which gives access.
- 3.547. In relation to Mr Durham's evidence that the University had erected and replaced signs, Mr Browne said that it is true that the first sign was made out of cardboard and was ripped down and had to be replaced, but that sign was attached to the new fencing, so only dated from the summer of 2007. In relation to Mr Durham's evidence about other control measures which it had put in place on the site, Mr Browne said that most of the matters mentioned had been very recent, from 2008 onwards. The dog waste bins date from 2009, and the designated routes had only been maintained since about 2009: the University mows a path in Field B where the grass is long. He accepted that the University may have removed obstacles from the watercourses. The secure compound for football posts was installed in 2007 or 2008: before this there were fixed American football posts in the field. The 2000 temporary compound had not been mentioned by any of the Applicant's witnesses.
- 3.548. Mr Browne took issue with Mr Durham's statement that the tennis courts had been protected for a period up to 2005 by a secure fence, and said that the

courts had always been easy to get onto, as the two gates were open. No-one had reported them being closed. He said that the aerial photographs all show a worn diagonal path across the courts.

- 3.549. Mr Browne commented that there were no internal restrictions within the site, and therefore if people got onto the site, there was no way of preventing them from getting onto field A when sports were being played. He had walked past people playing American football, keeping his dog out of the way. Access was still possible and the fields were used during these times.
- 3.550. In relation to the other restrictions to access mentioned in Mr Durham's statement, Mr Browne said in oral evidence that he had asked people specifically about the IT ducting, and Mr Cash and Mr Topley remembered it, but said that there was no problem obtaining access at that time. They had not been asked about this when they gave evidence to the inquiry. The compound constructed in connection with the works in 2005-2007 had very bright lights which were on all night, and meant that if you were walking at night you got dazzled, so he remembered that clearly. There was a fence around the car park, because there were some portacabins on the car park, so you could not get into the car park, but the rest of the field was open, day and night. Mr Browne had no personal knowledge of the 1995 watercourse works, although he had asked people whether they remembered flooding, and they said that there had been flooding at times.
- 3.551. Mr Browne said that he thought it would be fantastic if the University withdrew from the site and it was managed by a coalition of local users and environmentalists, but he did not see any reason why the University's sporting use should not co-exist with the use of the land by local residents, as it had done since 1993, and before that with the use by the schools.
- 3.552. Mr Browne also gave evidence in relation to the claimed locality or neighbourhood within a locality. He said that the area shown on A25 corresponds to polling districts 2 and 3 of Darley Ward. It is a distinct area known as the West End. The term "West End" is used by the police to describe Beat 513, which, from their beat reports, appears to correspond to the polling districts. Even if the area is not a locality, it is a neighbourhood. Alternatively Mr Browne said that the part of the area which is to the south-east of Cowley Street and Mackworth Road is an area which is often referred to as the Old West End. It used to consist of poor back-to-back houses. These houses were demolished and the area redeveloped, he thought in the 1960s. This area forms an alternative neighbourhood within the City of Derby. Both the West End and the Old West end satisfy the cohesiveness test. Mr Browne listed the local amenities in an appendix to his statement<sup>40</sup>. West End Community Centre is located at the centre of the claimed neighbourhood on Mackworth Road, as is West End Bowling Green. A community party was held in White Street to celebrate the centenary of the street. Free community parties (the Winter Warmers referred to by Mr Clasby) have been held at the Community Centre starting in 2004, and are well-attended. The Women's Institute on Sherwin

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<sup>40</sup> A20

Street is used for community parties, including community Christmas parties and children's parties.

- 3.553. In cross-examination Mr Browne confirmed that his own personal knowledge related to the period from 2004. All the factual information which related to the period before 2004 was information he had obtained from other people. He had relied on other people for that. There were a few instances in which he had done some research, and had obtained information from documentary sources, which dated from before 2004. He agreed that insofar as his evidence was a picture put together from those documents and information from witnesses, I was in as good a position as he was to do that exercise.

**(37) Elizabeth Heaney**

58 Sherwin Street DE22 1GN

- 3.554. Mrs Heaney provided a written statement dated 5<sup>th</sup> February 2010 and an evidence questionnaire dated 13<sup>th</sup> September 2008.<sup>41</sup> Mrs Heaney lived at 20 Cowley Street DE1 3SN between 2002 and 2009. Both that address and her present address are within the claimed neighbourhood.
- 3.555. Mrs Heaney has two children: her first son was 3 when she moved to Derby in 2002. Her second son was born in 2003. When she first lived at Cowley Street she walked the family dog on the application land, and took her son there. The land appeared to be open and free. She believed it to have no owner and to be unoccupied. There were no restrictions to access. They gained access from Markeaton Street, or from the walkway from Markeaton Rec to the Scout Hut, and round behind the tennis courts. By the time her second son was born the family was using the application land regularly for fruit picking, meeting friends and enjoying the space. By this time the community had begun to have informal picnics and gatherings. She said that she had counted over 30 people at one of the picnics. The picnic was accompanied by activities: art and drumming workshops, games and sports, and an information table to swap ideas and give community news. Mrs Heaney had also used the land for sketching and the family had flown kites many times and gone for butterfly hunts. As the children grew, the activities changed slightly, but the family still used the land for BMXing, football and watching the fishermen, as well as annual fruit-picking and picnicking. Mrs Heaney said that the land now feels much more restricted and she worries about the family getting suddenly locked in. Quite frequently when they go the gates are locked and the fields are inaccessible.
- 3.556. Mrs Heaney stated that as a regular user of the application land she had come to know other people from the community whom she usually only bumps into at the fields. In her opinion there is a community in and because of the application land.
- 3.557. In her evidence questionnaire Mrs Heaney stated that she had known and used the land from 2002 to date for walking, fruit picking, children's nature walks, picnics and for peace and quite, regularly, once or twice a week. She had taken

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<sup>41</sup> A088

part in Community Picnics, and her children meet friends and play there. She stated that the land had always been accessible and open, but the University erected fencing during 2007, and this discouraged her from feeling free to use the land.

- 3.558. In oral evidence Mrs Heaney was asked to describe how the entrance through Markeaton Street was laid out in 2002: she said that it was just an opening that you went through. There wasn't a road over the water. There might have been a bit of iron, but there was not a gate. Fences went up after 2007, and they were lockable. She had known the gates at access 1 to be locked recently.
- 3.559. Mrs Heaney was asked about access 6: she did not know whether that had been locked recently, because she normally uses access 1 now. She could not remember an occasion when access 6 was locked, but said that if access 1 was locked, she would not have gone into the land.
- 3.560. Mrs Heaney did not remember any organised sports taking place on the land before the new fencing was put in, but had seen organised sports since then.
- 3.561. She had never been asked to leave the fields.
- 3.562. In cross-examination Mrs Heaney was asked to describe access 1 between 2002 and 2007: she thought that there might have been the remains of a very old fence there, but not a gate. She remembered ironwork. She said the remains of the old fence are still there. The gap was quite wide. She said it is hard to remember. She just remembers the remains of the ironwork and quite a big gap. She could not remember any changes between 2002 and the fencing going up 2007. There were no works during this period that she could remember.

**(38) Deborah Allitt**

27 Redshaw Street DE1 3SH

- 3.563. Mrs Allitt provided a written statement dated 9<sup>th</sup> February 2010 and an evidence questionnaire dated 15<sup>th</sup> September 2008.<sup>42</sup> Mrs Allitt has lived at her present address, within the claimed neighbourhood, since November 1993.
- 3.564. Mrs Allitt has two children, born in 1986 and 1988. When the children were growing up, the family went to the application land two or three times a week to play games, play tennis, play in the woods, cycle in the woods, play Frisbee, build bridges over the streams and generally enjoy the open space. From 1993 to date Mrs Allitt has walked at the application land on her own and with friends once or twice a week. She also sometimes goes there to paint and draw. The family pick blackberries from the land in the autumn.
- 3.565. Mrs Allitt stated that there are nearly always other people at Sturgess Fields when she goes there, and there have been since 1993: dog walkers, children playing, and people doing interesting things in the woods.

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<sup>42</sup> A004

- 3.566. Mrs Allitt always gains access to the land from the Scout Hut entrance from Watson Street. She has never been stopped from using the land, or been questioned there, or told that she should seek permission.
- 3.567. Mrs Allitt said that Redshaw Street has a good community feel and excellent access to local facilities. She uses the local shops, post office and dentist and visits the local parks and recreation ground. Her children went to Ashgate Primary School and were members of the Woodcraft Folk Group which met at Markeaton Primary School. Her son attended Cubs at Watson Street. Mrs Allitt used to go to keep fit classes at the Community Centre on Markeaton Street, and had also been there for community events.
- 3.568. In oral evidence Mrs Allitt was asked what access 6 looked like in November 1993: she said that at that time the gate was not there, and the tennis courts were a bit more useable. There used to be a bridge over the stream which is not there any more, it was washed away in the floods one year. She thought that the whole area is more used now than it was then, although that is a bit difficult to judge. She also used to walk across the fields and out of the Markeaton Street entrance, although she has not done that more recently. Access 6 at that time was just an open gap. That gap was never obstructed.
- 3.569. Mrs Allitt was asked to describe the Markeaton Street entrance (access 1) before the gate was installed. She said it was difficult to remember. As far as she remembered it had ancient iron railings, so it looked like it was not supposed to be an access, but there was a large gap, either where there used to be a gate, or where people had made their way through the fence over a long time. She was asked if there was a gate there. She said that there was either a gate or railings, but whichever there was, it was not a gate which was in use, people just made their way through a gap. She could not remember whether people had made a gap in the railings or whether the gate was open.
- 3.570. Mrs Allitt remembered seeing organised games on field A: football, which she assumed was being played by university students, but she did not actually know. She was asked whether that had been going on throughout the time she had been using the land. She said she used to see that happening, but hardly ever walks past there any more: she walks on C and B now, so she does not know.
- 3.571. In cross-examination it was put to Mrs Allitt that in about 1995 access 6 was fenced off and it was not possible to get through there: she said that she vaguely remembered that, although she had forgotten all about it. She could not remember for how long she could not get through.
- 3.572. In relation to the Markeaton Street entrance (access 1), she was not sure whether there was a gate or just railings. She was asked whether by the gate not being in use, she meant that it was locked, or whether she meant people went through the gap. She said people walking never went through the gate; people went through the gap. As far as she knew the gate, if there was a gate, was not in use.



### **Written witness evidence on behalf of the Applicant**

- 3.573. The Applicant relied in addition on the evidence contained in witness statements and evidence questionnaires completed by a further 186 individuals and couples. I have summarised this evidence in a table appended to this Report.

### **Documentary evidence relied upon by the Applicant**

- 3.574. I have re-read all the documents in the Applicant's bundle. Some of the documents have already been referred to in the section dealing with the oral evidence given on behalf of the Applicant. I here summarise only those which are most relevant and which have not already been mentioned.
- 3.575. A23J was a copy of the Minutes of a meeting of the Governing Body of Derby College of Further Education held on 13<sup>th</sup> October 1986. Item 2 on A23K was headed Painting and Decorating Courses and recorded (as relevant):

“Following the transfer of the Painting and Decorating courses from the Derbyshire College of Higher Education and the failure to carry out the necessary building modifications to accommodate these courses, the College has been loaned the Sturgess School to provide accommodation on a temporary basis. It was essential for the new unit at Wilmorton to be completed by Easter 1987 and also for a spray booth which was to be located at Normanton Road and which is an essential part of the equipment for this course, to be operational for January 1987.”

- 3.576. A23L was an extract from the April 1965 revision of the Ordnance Survey, showing the site of Sturgess School. More than half of Field B was covered by the school. A path ran from the north western corner of the buildings to the gate at access 2. A path ran from the south eastern corner of the school site to the footbridge over Mackworth Brook. A drive ran from access 1 to the southern part of the school site. The area of hardstanding which remains on the application land appears to have been part of a play area or car park within the school site. Only the northern tip of the field was free from development. Field A is marked with the words “playing field”, although the western part of the field is marked as rough grass and trees.
- 3.577. A59 was a newspaper article from the Derby Evening Telegraph published on 24<sup>th</sup> May 1997. The article relates to the University's application for outline planning permission for an artificial turf area, floodlighting, two storey pavilion and associated car parking. The article was accompanied by a photograph of four local residents on the application land (on the northern part of Field C, by the corner of the tennis courts). Mr Harper's evidence, which I accept, was that the individuals in the photograph were his parents-in-law, Mr and Mrs Landon, his daughter Emily, and a neighbour, Mr Bull. The article states that the land “is a popular spot for dog walkers and for local youngsters to play”. Mr Landon is reported as saying “It's a nice area to walk with the grandchildren and a haven for wildlife. It would be a shame if that changed.” A

comment from a spokesperson on behalf of the University is recorded “We have carried out a survey of our own to determine the effect on local wildlife. We are only providing sufficient parking to meet the needs of those using the pitches and we do not believe floodlighting and noise will be a problem.”

#### **Mr Harper’s 1995 video**

- 3.578. Mr Harper’s video was a short family video, taken on 8<sup>th</sup> April 1995, showing an Mr and Mrs Harper’s daughter, Emily, Mrs Harper, Mrs Harper’s mother, Mr and Mrs Harper’s nephew and his mother on an outing. Mr Harper was the cameraman. The video was taken from Watson Street and from the bridge to the Scout Hut. The northern part of Field C, near Access 6 is visible in the background during some parts of the video. There is a well-made path on the southern bank of Markeaton Brook running between the brook and the tennis courts. There is a clear pathway along the side of the tennis courts. At the opening of the video two cyclists can be seen cycling along the path. Towards the end of the video, a woman is visible, walking by the side of the tennis courts and across the fields. The video also shows a signpost in the position of the signpost near Access 6 with fingers pointing in two directions, both towards Mundy

#### **Aerial photographs**

##### *Set 1*

- 3.579. The photographs at A35 and A36 are marked with an image date of 5<sup>th</sup> March 1999. The remaining aerial photographs, which the Applicant stated had been downloaded from Virtual Earth in January 2010, are undated.
- 3.580. In photographs A35 and A36 both Fields A and C appear to have been recently mown. There are no pitches marked out on either field, and I cannot see anything which might be a goal post. There is a diagonal track worn across the tennis courts from east to west leading to Field C, and running into the woodland to the north of the tennis courts. There is a clear track running down the embankment from the A38 at the western side of Field A. There are other less-well worn tracks on the embankment. There is a track leading from Access 3 and what appears to be a track within the woodland in the north eastern corner of Field A. The grass in the area in Field B where the old school buildings stood is markedly less green than the remainder of the grass in Field B. There are clear tracks worn from Mackworth Brook, about halfway along the boundary between Fields A and B to where the old path from the north western corner of the school buildings started, and from that point towards the hardstanding, effectively around the area where the old school buildings stood. There are also less well-worn tracks across the area formerly occupied by the old school buildings. The hardstanding in Field B appears to be in poor condition, and is becoming overgrown. The bridge at access 4 is visible.

##### *Set 2*

- 3.581. A33, A27, A32 and A31 are not the same photograph, but appear to have been taken at around the same time. Photographs A33 and A27 were clearly not taken in the same fly-over, because the position of the cars in the car park between the medical centre and the Jonty Farmer is not the same in both photographs and there are many more vehicles visible on the hard standing in

Field B in photograph A33 than are present in A27. The position of the vehicles on the hardstanding in photographs A27, A32 and A31 is not identical, and the photographs have been taken from different directions. A32 and A33 although taken from the same direction cannot have been taken on the same fly-over, because there are many more cars on the hardstanding in A33 than there are in A32. However, it seems likely to me that these photographs, and probably also A30, were taken at about the same time, when the University's Britannia Mill buildings were in the course of construction. Mr Durham's unchallenged evidence was that the hardstanding on Field B was used as a construction compound between September 2005 and February 2007. I therefore conclude that it is likely that the photographs were taken between these dates, and, having regard to the fact that in A32 it seems that the builders were in the course of roofing the last of the buildings and to the state of the vegetation, probably in the late spring or summer of 2006.

- 3.582. It is clear from these photographs that the hardstanding had at some time between 5<sup>th</sup> March 1999 and the date of these photographs been resurfaced and extended to incorporate an area to the north which in the 1999 photographs is grassed, and a wide vehicular access to the hardstanding had been created. There are 9 portacabins and 3 or 4 containers lined up along the western edge of the hardstanding. On the southern edge there are a further two portacabins stacked on top of each other. There is another structure which may either be an equipment compound or another portacabin to the north of the portacabins on the southern edge of the hardstanding and to the east of the portacabins on the western edge, and which is positioned north-south rather than east-west, as the remainder of the portacabins are. There are a number of vehicles visible which appear to be parked on the hardstanding, the position and number of which varies from photograph to photograph. Photograph A33 appears to have the most vehicles: perhaps as many as 16.
- 3.583. In photograph A31 there is something visible on the eastern boundary of the hardstanding which might be Heras-type fencing. It is not otherwise possible to see in that photograph or in the others provided by the Applicant whether the compound was fenced, and if so where the fencing ran.
- 3.584. There are rugby-type goal posts visible in Field A, and the grass in that field appears to have been recently cut. The grass in Fields B and C is longer. There are no goal posts of any sort visible in Field C. There are several clear tracks down the embankment from the A38 visible in A27, A33 and A30. There are many tracks in Field B, including a large approximately circular track with spurs leading off it to the north western corner of the field, to the end of the vehicular access track, and towards access 2, as well as other tracks criss-crossing between those tracks. There is also a track leading from the end of the vehicular access towards the footbridge to Field A (part of which forms part of the side of the circular track), which is particularly well-worn towards the footbridge end. It seems as though there is a track around the whole of the edge of Field C: there is a track visible along the edge of the field nearest the boundary with the allotments in A31 which continues around the southern end of the field, and a track along the opposite side, visible in A27 and A33. A track is visible running parallel with the edge of the tennis courts in A33.

There are also less well-marked tracks across the middle of the field. There is a marked area which runs diagonally across the tennis courts, in the same position as the path visible in the 1999 photographs, but wider.

*Set 3*

- 3.585. A34, A28 and A29 appear to be the same photograph, enlarged to different degrees. The University's Britannia Mill buildings have been completed, and the land around the buildings has been planted. These photographs therefore clearly post-date A27, A30, A31, A32 and A33 and, if Mr Durham's evidence as to the dates when the compound was occupied are correct, must have been taken after February 2007.
- 3.586. Two football pitches have been laid out on Field A. The goalposts are visible stacked together on the edge of the woodland to the north of the pitches. The pitches are worn in the goal areas. There are clear paths running down the embankment from the A38 onto Field A. There is something, either a worn area, or possibly the sand referred to by Mr Durham on Field A, near the end of access 4.
- 3.587. The hardstanding in Field B is unoccupied. The position of the paths in Field B has changed somewhat since the last photographs: there are now two circular paths, one providing a larger version of the other. There is a strongly marked path from the end of the vehicular access towards the footbridge to Field A, and a spur leading to access 2, as well as a number of less well-defined paths.
- 3.588. Field C does not appear to have been in use for sports at the time these photographs were taken: there is no sign of any pitch marking or fixed goal posts. There are paths visible on both the eastern and western sides of Field C, and a path running parallel to the tennis courts. The tennis courts themselves appear to be in very poor condition, and although the diagonal path is still visible, it is no longer so clearly defined. There is a clear path running from the woodland to the north of the tennis courts towards Field C.

**Photographs**

- 3.589. Mr Browne produced the photographs at A1/89-A1/125. The photographs numbered S4, S5 and S6 were taken by Mr Browne in September 2007.
- 3.590. The photographs at A/23I were taken by Mr Browne on 19<sup>th</sup> May 2008. The photographs are taken from the north western side of Field C, looking towards the south eastern corner, with the University's Britannia Mill building in the background. Part of the railings between Field C and the allotment site is visible in the upper photograph. The photographs show that as at that date the grass on the land had not recently been mown: the grass is long and tufty, and numerous dandelion seed heads and a multitude of buttercups are visible. The lower photograph shows a well-worn path in the grass running along the north-western edge of the field, alongside the trees which hide the brook from view. The land is not marked out as a sports pitch and no fixed goal posts are visible. It is obvious from these photographs that Field C was not in regular use as a sports pitch in May 2008.

- 3.591. The remaining photographs at A1/89-A1/125 were taken by Mr Roger Lawson on 12<sup>th</sup> September 2009.
- 3.592. These photographs were taken after the end of the relevant period, and are of only limited assistance.

**4. Evaluation of the Applicant's witness evidence**

- 4.1. More than 200 individuals and couples gave evidence on behalf of the Applicant. Almost all of the Applicants' witnesses completed standard form evidence questionnaires. Many of the Applicant's witnesses, and all of the witnesses who gave oral evidence at the Inquiry, also provided written statements.

***The evidence of those witnesses who gave oral evidence***

- 4.2. The Objector had the opportunity of testing the evidence of those witnesses who gave oral evidence to the Inquiry by cross-examination. This evidence therefore carries more weight than the evidence of those who gave written evidence only.
- 4.3. I was satisfied that the following witnesses who gave oral evidence on behalf of the Applicant were honest, and I accept their evidence: Mr Adkin, Mr Alan Williamson, Mr Harper, Mr Landon, Mrs Bousie, Mr Salter, Ms Powell, Mr Lomas, Mr Sainty, Ms Kim Yeoman, Ms Smith, Mr Rogers, Mr Smart, Mrs Lyn Yeoman, Mr Baker, Mrs Cotton, Mr Clasby, Ms Shardlow, Ms Burnett, Mrs Heaney, Mrs Allitt.
- 4.4. The following witnesses' evidence was unchallenged, and I accept it: Mr Browning, Mrs Webber, Mrs Hyde, Ms Strange.
- 4.5. I make the following particular comments about individual witnesses' evidence:

**Ms Joanna Jennens:** Ms Jennens' evidence that there was a pedestrian gate at Access 4 before February 2007 was consistent with Mr Durham's evidence that the gate at Access 4 was changed in the early part of 2007 to incorporate a pedestrian gate, and I accept that it was accurate. I was satisfied that Ms Jennens was an honest witness with a good recollection and I accept her evidence.

**Mr Cash:** Mr Cash's knowledge and recollection of the application land was good. He had known the land for a long time, and I accept his evidence as to its earlier history. His estimate as to when the Markeaton Brook walk was constructed was accurate, although his recollection of when the school had been demolished was less accurate. I was not satisfied by reference to all the other evidence before the Inquiry that the gate erected at Access 6 in 1995 was unlocked within a week of its erection. If that was his evidence, I do not accept it. However, I note that Mr Cash did not put a date on this incident during the course of his evidence, and it may be, having regard to Mrs Cotton's evidence, that the incident he referred to in fact took place not in 1995 but in 2007.

**Mr Browne:** Mr Browne, although clearly keen for the application to succeed, was an honest witness. He conceded points which should properly have been conceded, and I am satisfied that, in relation to his own period of use of the land, he gave honest and accurate evidence.

- 4.6. I had reservations about the evidence of other witnesses, which I deal with in detail below.

**Mr Topley:** I gained the impression that Mr Topley took access to the land without regard to the question whether or not the landowner would wish him to use his chosen route, for instance walking around the end of fencelines. However, I thought he was otherwise an honest witness, and I accept his evidence.

**Mr Sykens:** In my judgment, although Mr Sykens was an honest witness, his memory was not good. He was unable to recall the configuration of the gate at Access 6, and was unable to remember Access 6 before the Markeaton Brook Walk was constructed, despite the fact that he claimed to have been using the land and gaining access at that point since 1989.

**Professor Rennie:** I was not satisfied that Professor Rennie's evidence was reliable. He regularly gained access to the land by means which he clearly regarded as being contrary to the owner's wishes. His evidence that he had used Access 11 was, as he accepted, not correct.

**Ms Julia Jennens:** Ms Jennens' evidence was not challenged, but she was the only witness who suggested that new fencing had been erected near Access 3 in about 1998. I think she must have been mistaken about this. Otherwise, I was satisfied that she was an honest witness, and I accept her evidence.

**Mr Warren:** I was not satisfied that Mr Warren's recollection that he had come along the Brook to gain access at Access 6 before the Markeaton Brook path was constructed was accurate. It did not accord with the evidence of other witnesses, nor with the documentary evidence, and in particular the planning permission which showed that the fence in front of the Scout Hut was moved back to accommodate the path, and I reject it. I was not therefore satisfied that Mr Warren's recollection was reliable.

**Mr Wroe:** It did not seem likely to me that Mr Wroe would have used Access 6 in 1989, when he first started using the land, both because his recollection of Access 6 appeared to relate to the period after the Markeaton Brook path was constructed and because Access 3 would have been the natural access to use, both en route between Uttoxeter New Road and Allestree, and when accessing the land from Longford Street and Sherwin Street. His recollection that the bridge at point 9 had been built in 1997 was not accurate. I was not satisfied that his recollection was entirely reliable.

**Mr Mackervoy:** Mr Mackervoy's recollection of what the Green Wedge policy leaflet said, and in particular his assertion that the leaflet said that the

land designated as Green Wedge was owned by and for the recreational use of the people of the City, was inaccurate. In my judgment he overstated his evidence by reason of his desire that the application land should remain open for access by all.

**Mr Peter Williamson:** I was not satisfied that Mr William's recollection of the early years of his claimed use was accurate: he gave too early a date for the closure of the school, and had no recollection of the change to Access 6 when the Markeaton Brook path was constructed there in 1993. I was satisfied that he was an honest witness, however, and I accept his evidence as to the period for which he made use of the land.

**Mr Roberts and Mr Cooper:** although the evidence of these two witnesses was not challenged, they both gave evidence that access was freely available through Access 6 before 1993, which I was not satisfied was reliable, by reference to Mr Cash and Ms Smith's evidence, which I prefer. Otherwise, I accept their evidence.

***The evidence of those witnesses who gave written evidence only***

- 4.7. The evidence of those who provided written evidence but did not give oral evidence has not been tested by cross-examination, and therefore carries less weight than the evidence of those who have given oral evidence, but I must nevertheless take it into account.
- 4.8. The written witness statements provided by the Applicant's witnesses appeared to have been individually drafted. In several instances, it was clear, by reason of the inclusion of both a handwritten and a typed-up version of the same statement in the bundle, that the statement had been written by the witness in his own hand. The witness statements all followed the same format, in the sense that they dealt with the relevant material in the same order, and I was not provided with the instructions that they were given for preparing their statements. However there was no evidence to make me suspect that answers had been suggested to witnesses or that standard phrases had been inserted into their witness statements, as I have seen happen in other cases. I was satisfied that the evidence contained in the witness statements represented the witness's own recollections of the relevant events. This evidence supported the evidence given by those who gave oral evidence.
- 4.9. There were two types of evidence questionnaires used in this case: a standard Open Spaces Society-type questionnaire, and a questionnaire based on the Open Spaces Society questionnaire, but amended to relate to the application land. There were many more of the second type of questionnaire than of the former. The former type of questionnaire asked whether any attempt had ever been made by notice or fencing or otherwise to prevent or discourage the use being made of the land by local inhabitants. Most respondents to this questionnaire mentioned the 2007 fencing and gates, but some failed to do so. Where witnesses failed to mention the 2007 fencing, this suggests that their evidence is less reliable. The latter type of questionnaire asked, "Have you ever been prevented from using the land?" in question 27, and in question 28, "Before the summer of 2007, has any attempt been made by notice, fencing, or

other means, to prevent or discourage the use of the land by local inhabitants?” Where respondents to this form of questionnaire did not mention the 2007 fencing in response to question 27, I consider that it can reasonably be inferred in most cases that that was either because the 2007 fencing was specifically mentioned in the next question or because after its erection the gates were maintained open. Several witnesses amended their answer to question 27, having moved on to question 28.

- 4.10. The questions in the evidence questionnaires tend to assume positive answers, and therefore the evidence that is produced is perhaps less reliable than if the questionnaire had contained open questions (e.g. “Did you use the land?”, rather than “Between which years did you use the land?”). The questionnaires (other than question 28 of the second type of questionnaire) did not seek to tie the evidence to the relevant period, so that it may be that the respondent reports activities participated in or seen which occurred before the beginning of the relevant period, or after the end of the relevant period. The format of the question which asks the witness to tick any activities which he has seen taking place on the relevant land, in particular, tends to lead in my experience, to an over-reporting of some activities.
- 4.11. Witnesses who give written evidence only, only very occasionally distinguish between permissive use and use as of right, so in this case for instance, questions about period of use elicited evidence of use as schoolchildren at Markeaton Primary School and Markeaton Girls’ School, which must have been permissive and also evidence of use after summer 2007.
- 4.12. Despite these reservations, the evidence contained in the questionnaires in this case was, by and large, consistent with the evidence given by those witnesses who gave oral evidence, and supported it.

## **5. The Objector’s case**

### **Oral evidence on behalf of the Objector**

- 5.1. The Objector called two witnesses to give oral evidence at the inquiry.

#### **David Ian Durham Dip. Arch. RIBA**

University of Derby

- 5.2. Mr Durham provided an unsigned and undated written witness statement<sup>43</sup> which he read to the inquiry and supplemented in oral evidence. Mr Durham confirmed in his statement that he had read Mr Willgoose’s statement, and had studied relevant documentation in the University’s possession, and believed that Mr Willgoose had presented a true and accurate statement on behalf of the University.
- 5.3. Mr Durham has been the Head of Property Development at the University of Derby since June 2003. His post carries an Assistant Director standing within the University. His prime responsibility is the development of the University’s

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<sup>43</sup> O9



Estates Portfolio in line with the Estates Strategy, by directing and managing the whole of the Property Development Division.

- 5.4. Mr Durham had, prior to his appointment to his present post, been involved in providing professional architectural development advice on behalf of a consultancy appointed by the then Derbyshire College of Higher Education in 1990 to masterplan and implement the institution's first Development Strategy. In oral evidence Mr Durham said that he had a relationship with the University before 2003: the architectural practice by which he was employed was instructed in by the College 1990. He was aware of the purchase of the site at the time it happened. The development on the Kedleston Road campus was his personal responsibility, in terms of providing an architectural service to the University. The first project was the masterplan and Development Strategy between 1990 and 1992. By 1992 the Science and Technology building was in the course of construction. Straight after that was the Business School. After the Business School he looked at the Atrium (the Concourse), then the Learning Centre. These projects have all flowed through one into another. There were also minor projects, some of them enabling projects, and some extension projects, such as workshops. He was constantly at the University. Although his practice was in Wakefield, it was convenient for him, as he also had a major project going through at Leicester.
- 5.5. Mr Durham commented that the activities in the applicant's supporting evidence included fishing, which occurred outside the area owned by the University. Mr Durham said that his statement related to the whole of the area owned by the University and to the small strip of land which is not within the University's registered title, title to which is unregistered, but which he believes to be owned by Derbyshire County Council or Derby City Council.
- 5.6. Mr Durham described the application land. Area A is predominantly used for sport. As at the date of the application it was laid out as two football pitches with secure storage. The external boundaries of area A front onto the A38 and onto Kedleston Road. Three sides of the area are watercourses, which are tree lined to the south, and woodland. In parts these areas are heavily vegetated, particularly in the growing season. There are signs on the external access. There is a small footbridge over the watercourse which gives access to area B. There is no formal access from area A to area C. Area A includes an area of land hatched on the plan at O25, which is unregistered, and which Mr Durham believes to be owned by Derbyshire County Council or Derby City Council. In oral evidence Mr Durham said that, on the ground, that land runs from the fence to the west of the footpath to the old school, to the watercourse to the east, and as far south as the gate which has now been put in by the University.
- 5.7. Area B is the area previously occupied by Sturgess School. The outline of the school is marked on O25. The former car park for the school continues to be used by the University, but otherwise area B is overgrown with a designated walking route around its perimeter which forms part of an environmental nature trail created in liaison with local community interest groups, mainly for educational purposes. The external boundaries of area B front onto the A38 and the Deaf School/ land owned by the City Council to the south. Two sides

of the area are watercourses. These, and the southern boundary, are tree-lined and heavily vegetated in parts, particularly in the seasonal months. There are signs on the external access. The footbridge mentioned in Mr Durham's description of area A gives access to that area. There is no formal access to area C. In oral evidence Mr Durham explained that he understands that the land on the northern side of Mill Dam Pond to the south of the south-western boundary of the University's land and up to half way across the Mill Dam Pond is owned by the City Council. The area from half way across the Mill Dam Pond going further south is owned by the Deaf School. Effectively at the eastern end of the Mill Dam Pond, therefore the University's land adjoins land in both ownerships. It is fenced by the City Council.

- 5.8. Area C is predominantly used for sport. As at the date of the application it was laid out as an American Football pitch. There is a disused tennis court, originally occasionally used for storage, within this area. The external boundaries of this area front onto a housing development to the north, a Scout Hut and allotments to the east, and Markeaton Street to the south. Three sides of the land are watercourses. These are tree-lined and combine with the woodlands to the west. There is one access point in the north-west corner. There are signs on this access. There are no formal access points between area C and areas A and B. In oral evidence Mr Durham said his understanding is that the southern side of the watercourse to the north of area C forms the northern boundary to area C. There is a fenceline along the University's boundary. From that fence to the edge of the verge of Markeaton Street, where there are marker blocks in the verge, belongs to the City Council. The palisade fencing to the north of Mill Dam has been erected by the City Council, and the chain link fencing to the north of that represents the University's boundary.
- 5.9. Mr Durham set out the history of the land. The University purchased the land in December 1993 to enhance its sports facilities. At that time consideration was being given to the feasibility of developing the University's Kedleston Road site, and as a result, potentially losing a percentage of their grass sports pitches. An extract from the Agreement for Sale at O75 shows that the County Council sold as beneficial owner, except as regards the land cross-hatched black on the plan to the agreement, in respect of which the County Council conveyed all such estate right or title (if any) as it had.
- 5.10. Since purchasing the site the University has vastly improved the quality of the playing surfaces, repaired and replaced dangerous fencing, and, in accordance with the advice of an arboriculturalist, carried out essential tree works. Mr Durham stated that the University had worked closely with like-minded interest groups with a view to identifying important environmental points of interest and safeguarding the existing wildlife and its associated habitat. The University has appointed specialist consultants and has developed and endorsed both an Environmental (Ecological) Management Plan, and a Tree Management Plan, covering the application site. An Environmental Management Plan dated April 2009 for the period 2009-2114 was included within the Objector's bundle at O26, and an Arboricultural Survey dated 26<sup>th</sup> May 2009 was included at O37. In oral evidence Mr Durham said that there

had been an earlier environmental plan obtained from another organisation, he thought in 2004.

- 5.11. Mr Durham stated that prior to purchasing the site in December 1993, the University had instructed Grimley J R Eve International Property Consultants to advise in relation to the potential purchase, and to give advice as to the then current planning law. An extract from the report was included at O71, and the whole report was produced to the inquiry. Mr Durham set out an extract from the report, headed history and description of the site:

“The extent of the former Sturgess School Site is shown on the appended plan. We understand that the former school buildings on the site were erected during the 1940s and used continually up to the mid 1970s. At some point after 1976, the Sturgess School was used as an annex to Woodlands School. This use lasted for about 3 years subsequent to which the school was leased to Wilmorton College. Wilmorton College vacated the site in 1988/89 and as a result the buildings were subjected to extensive vandalism. Shortly thereafter, as a result of this damage, the Education Authority demolished the buildings.”

- 5.12. Mr Durham referred to two extracts from the Derby Trader. The 17<sup>th</sup> May 1989 edition of the Derby Trader carried an article headed “Pool Plan for School Site”. It was accompanied by a photograph showing standing buildings on the site, and a sign reading “Danger Demolition in Progress”, with the caption “Demolition in progress at Sturgess – site for sports complex and pool?” A second photograph showed the school buildings, and was captioned “The former school was built in the 1950s”. The article reported that the old Sturgess School was being demolished. The 20 acre site was seen by city planners to have potential for use as a leisure complex with swimming pool, although the county had earmarked it for housing. The article continued:

“In the meantime, the demolition of the old Sturgess School continues. Originally the county intended to keep the old buildings – previously an annex to Woodlands School – as a special school for troubled children. That idea had been scrapped and the buildings, erected in the 1950s, are now coming down. County officers have pointed out that other than moving a playing field of Markeaton Primary nearer the old Sturgess site, there is no specific plan in progress.”

- 5.13. The 19<sup>th</sup> July 1989 edition of the Derby Trader carried an article headed “School’s out – but watch this spot”. It was accompanied by a photograph of the school buildings in the process of demolition. The article read:

“IT’S not a bomb site – it’s a school. And though vandals have been in action in the past, this time it’s the official demolition men who have been at work. The fast-disappearing Sturgess School on Derby’s Queensway has prompted a number of passing motorists on the ring road to ask what is happening. The answer is: No-one yet knows. City planners would like to see a leisure complex with swimming pool and

sports hall on the 20-acre site. But owners, Derbyshire County Council, are said to have earmarked it for private house development. So the message is: WATCH THIS SPACE!”

- 5.14. Mr Durham stated that during the demolition period the whole of the site was secured. Access to anyone with the exception of the contractor’s staff was prohibited. Following levelling of the site, whilst conditions underfoot remained relatively unsafe, restrictions remained. Ground works, foundations, drainage, car park and footpaths were left on site following the demolition and remain on the site.
- 5.15. Mr Durham stated that between 1989 and 1993, at which time the site was owned by Derbyshire County Council, Markeaton Primary School had continued to use the land for sports and nature studies, by agreement. In the County Council’s negotiations with the University before the University’s purchase of the land, the Council had required that that continued use by Markeaton School be secured and in that connection had reserved rights in the sale agreement (an extract from which was included at O73) for the continued use by Markeaton School of the football pitch on the property, until such time as a suitable alternative pitch was available for a maximum of 35 games per year (season), the school to make an agreed contribution towards the maintenance of the pitch, and for the continued use by Markeaton Primary School of the property (with the exception of any playing pitches on the property) for the purpose of nature studies. Access was reserved via the field gate at point A on the plan to the agreement during the continuance of Markeaton Primary School’s use of the football pitch to facilitate pitch maintenance. In oral evidence I asked Mr Durham what information he had to support his evidence that the site was used by Markeaton Primary School between 1989 and 1993, having regard to the statement in the Grimley JR Eve report “We understand that the playing fields, although used informally by the local populous, are not used by the Education Authority. The site remains vacant at present.” He was not able to say what the source of his information that the site was used by Markeaton Primary School between 1989 and 1993, other than the contract rider which referred to continued use.
- 5.16. In oral evidence Dr Choongh asked Mr Durham what he meant by “the property” in that context: he said predominantly area A, and partially field C. That information came from the documents. The plan at O72 is a document he has produced on the basis of the draft purchase documents, part of which is at O73-75. I asked how the documents helped him to state what the uses of the land had been before 1993, and he said the only thing in the documents that led to the assumptions he had made were the reference to continued use, and to the access into area A. He had assumed that the school used the tennis courts and the long jump pits as well as the football pitch, but had no evidence to support that. The information on the plan is what he has inferred from the documents at O73-75. He had assumed from the documents that the school had done the same before the University’s purchase as they were to be permitted to do after the purchase. He does not know whether the school in fact made the use of the land that they were to be permitted to make under the agreement. He was

referred to the words “until such time as a suitable alternative pitch is available”. He does not know until what date the agreement continued

- 5.17. Mr Durham set out in his statement the uses which he said that the University had made of the land since January 1994. He stated that those activities have had both educational and community focus.
- 5.18. There had been community participation activities: the University collaborated with the Friends of Markeaton Brook in making a joint application for Lottery funding under the BBC’s Breathing Spaces initiative. This application was made at about the same time as the present application to register the land as a town or village green was made. Mr Durham said that the application acknowledged that the University was the beneficial owner of the land, and stipulated that access would be with the owner’s consent. There are also various events which have been held on the land either as a result of the University partnering interested groups, or by the University formally agreeing to allow local organisations to hold the events. For some events the University has provided portable toilet facilities. The University has applied (unsuccessfully) for planning permission to site a temporary facility including changing facilities on the site. Designated walking routes have been formed and adjusted to suit the route of the Nature Trail created as part of the Breathing Spaces initiative. The Water Vale Walk has taken place approximately three times a year. It is organised by local organisations and covers the Markeaton Brook waterways. The University has granted permission to enter the application land to survey the watercourses within it. There is a Day of Pondamania event, which predominantly involves a creature hunt in and around Markeaton Mill Pond, but which, by agreement, has extended to the watercourses on the University’s land. Pond Dipping has been organised by the Groundwork organisation, working with local schools to increase environmental awareness in collaboration with the University. The University in collaboration with interested parties has held an Environment Day. The Friends of Markeaton Brook in collaboration with Going Wild, City Partnership and the University has held an Environment Walk. A Fun Day for all has been held on Sturgess Playing Fields during the summer months at a time when the playing fields are free. A Go Wild Nature Walk had been organised by Groundwork and the University in collaboration. A Dawn Chorus early morning event had been held for bird enthusiasts in collaboration with City Partnership and other interested parties.
- 5.19. In oral evidence Mr Durham said that this was a list of activities which took place in 2007. He said that it was representative of the type of activity which would have taken place in the period before 2007. He could not say that the frequency in terms of the numbers and diversity of activities was the same. He knew that activities of that nature had occurred: quite a lot had ended up on his desk awaiting approval.
- 5.20. Mr Durham stated that prior to developing their current football academy in July 2003, Derby County FC gained the University’s approval to use Sturgess Field for their under 16 squad training sessions for a full season. In oral evidence Mr Durham said that he now knew the information in his statement in

relation to the use by Derby County FC to be wrong. In fact, area C land was leased to the Derby County FC for two seasons, but because there were problems with water at the southern end of area C, the University occasionally allowed the Club also to use area A. The use was predominantly during the first season. The use during the second season was not as intense as during the first season.

- 5.21. The site is used for the following activities as part of the University's educational programmes: sports training and coaching techniques generally, but specifically for football, American football, hockey and rugby; Building Technology: land measured and level surveys; Environmental, Biology and Ecology students have used the land for field studies. One of the University's lecturers in Vertebrate Biology is currently undertaking research to establish whether or not there are slow worms on site, with the intention, if there are, of studying their habitat. In oral evidence Mr Durham said that this had been after the application date.
- 5.22. In oral evidence Mr Durham said that when the land was purchased in 1994, the University already had facilities available for sport, and was mid-way through the academic year. At that time he was responsible for a proposed mini-science park which might have been sited on the Kedleston Road sports pitches. That was why it was thought beneficial to purchase the site. The University did not use any of the fields for the remainder of that academic year for organised sport. In the following academic year 1994-95, the land was used possibly on the odd occasion, but he did not think that they used it that year either. There was a programme of sporting modules for the 1995-96 academic year, for which they did use it. These have generally been on area A.
- 5.23. The Building Technology department was based at Kedleston Road. Those activities started around the same time as the sports, during the academic year 1995-96. The same applied to the Environmental, Biology and Ecology use dated from the same time. These uses have been throughout the site.
- 5.24. Mr Durham said that he was aware of the use that was made of the land at the time. I asked him how he was aware of it. He said that he had been involved with a project known as the University figure of 8 probably from 2000 onwards. He had been shown the site in 1994. He cannot remember going onto the site between 1994 and about 2000, but thought he would have been told about what it was used for. In 2000 he would have been walking the site extensively. That was when the University looked at the link road, a pedestrian and cycleway, which became part of the section 106 agreement on the Markeaton Street development.
- 5.25. Mr Durham stated that the leisure use of the land by the University is predominantly by the University's Student Union on a Wednesday and Saturday during term time: the Student Sports Teams use the playing areas for competitive sport, with officiated football, rugby and American football matches taking place against other universities and local teams. Most have spectators present requires medical assistance on hand, in the case of the

American football, including an ambulance. Light permitting, the playing areas are used in the evenings for organised team training.

- 5.26. In oral evidence Mr Durham was asked when the site started to be used for the leisure use. He said that it would have started in the same academic year as the use for courses: 1995-96. He was asked whether the level of use then was the same. He said it has built up, with no doubt. The University, he knew at the time, was improving the pitches at the time. In 2003 the level of use would have been less than he had set out in his statement. The pattern was the same: it is commonplace for university sport to take place on Wednesday afternoons. The University does not have fixed terms. It used to have fixed terms of maybe 36-39 weeks over the year, teaching and courses during the non-traditional term-times has increased over the years. During the summer months the fields would be less used by the University. The leisure use involves visiting teams, other universities and local teams. Mr Durham was asked how many times a week the fields are used for training: he said he could not say, but there will be weeks it occurs and weeks it does not. He is not responsible for the timetable. This use has predominantly been on areas A and C.
- 5.27. Mr Durham said that field C has been used differently to field A: there have been periods when it has not been used at all during term time. Its use has been less intensive. The use of field C commenced at the same time as the use of area A, and at that time was used for football.
- 5.28. Mr Durham stated that such use generally covered the whole of the site, and, by the very nature of such activities when they take place, access over the area of play, by non-participants (members of the general public) is not possible and is therefore restricted. In oral evidence Mr Durham was asked what he meant by his statement that access to the area was restricted: he said that he meant that access to the area of play was restricted, because you cannot walk onto a pitch with organised play going on on it. When he came to later statements within his written statement that no other use or access was possible or permitted when games were in progress, he said that that was the same point.
- 5.29. Mr Durham stated that the University's security staff area responsible for ensuring that all entrance gates to the site are locked at approximately 22:00 and opened again at around 06:00. Over the Christmas period each year the site is secured, at a minimum, over Christmas and Boxing Day. The closure is extended over weekends, dependent on when Christmas falls in any given year. In addition the site is closed during periods when the University is formally closed throughout the year, unless it is formally booked.
- 5.30. In oral evidence Mr Durham was asked when this practice commenced: he said that the gates which were left unlocked had been unlocked since at least 2003 when his employment with the University started. He distinguished between the pedestrian gates which were left open for access during the day and the double gates: the double gates, other than when they were opened for maintenance, had always been locked, because of the potential problems posed by travellers. The big gates he referred to were the gates at access 1, the gate

originally at access 3, and the gates on the bridge at 4 and the gate from the allotments at 11. Those were definitely kept closed and locked, in most cases chained and locked, other than for maintenance. That practice had been in place for as long as he can remember: from at least 2003. So far as the pedestrian gates are concerned, he was referring to the gate at access 1, the pedestrian gate which was associated with access 3, at one time, and, whilst he never saw it, he also understands there was a gate at access 6. The general practice was of locking the small gates between 22:00 and 06:00, but the gate on Markeaton Street (access 1) was effectively locked all the time. The small gate at access 1 was locked at all times from 2003 or 2004 onwards, although he said that he was not saying that people could not get access there. The original gates comprised a set of double gates, and a single gate, set between three brick pillars. The gates were originally connected to the fencing which ran along the University's boundary with the Deaf School, to the south of Mill Dam pond. Panels of that fencing were removed, and access could be obtained around the gates. He did not know when that happened. It continued up until the works that the City Council carried out which started on 20<sup>th</sup> February 2006. He was not sure whether the panels were missing or not when he started working for the University, but said there was definitely an opening there. In February 2006 the City Council carried out work under the Reservoir Act, and repaired the fencing to the west of the gates, closing the access off there, by erecting fencing to the south of Mill Dam Pond connecting to the gate post. To the east of the gates, the fencing along Markeaton Street, to the south of Mill Dam was at that time intact, round to the post. After the City Council's work finished the work (the works lasted 3-4 weeks), the pedestrian gate was kept open during the day, and locked between about 22:00 and 06:00. Mr Durham confirmed that the email on O19/28-29 referred to the works which he had mentioned.

- 5.31. Mr Durham described the various access points to the land. In the north west corner of area A, in January 1994, when the University took possession of the land, the boundary fencing was of a timber post and rail construction, and incorporated a gate giving maintenance access and a stile. The gate was chained and padlocked from the date the University purchased the land, if not earlier. Mr Durham stated that the University had erected a double timber post and sign stated that the land was now under University ownership. This sign, together with the stile, was destroyed, and an unauthorised access point, shown in the photograph on O150 was created. In 1995 the University erected a more robust sign constructed of steel posts with a metal plated sign. This was removed by vandals within the following 18 months. Mr Durham said that the posts were severed at low level, and were still visible on the land. He referred to the photograph on O151. In his opinion the removal was deliberate. In 2006/07 new fencing was erected, removing the potential for access. A sign restating the restrictions on access was posted and re-posted several times. He referred to the photographs of the fence showing the original sign and two replacement signs at O152-154. The adjacent fencing was damaged, and the new fencing was extended towards the end of 2007. In October 2008 the fencing further along was cut through as shown on the photograph at O155.



- 5.32. In oral evidence Mr Durham was asked to describe access 3, working backwards in time. He said that there is now no access there. The new fence went in between February and March 2007. He was asked what the situation was before that. He had spoken to the grounds manager at the time, Mr Alan Lowe, who has since retired, and to a man in the maintenance department who has lived in the area all his life and went to Sturgess School. He also has a degree of first hand knowledge. Other than the erection of the fence in 2007, he has no first hand knowledge, other than his recollections of what he saw when he was a consultant. Mr Durham said that he would first have seen access 3 in 1993 or 1994. He did not remember what it looked like then. He did remember that, when he joined the University in 2003, there were three rails in the gap that is shown on the photograph at O150, and a rather crude stile: a plank between the bottom two rails, supported off timbers. He knows that they disappeared some time in about 2005 or 2006, to leave a clear access. The fence was a continuation of the timber post and rail fence, which continued to the gate. He then said that the stile appeared at a slightly later date, he thought in about 2005, but he was not sure. He remembered the stile because he had fallen off it. There was no guidance post next to the stile. He believed that the stile was taken out late 2005 or early 2006, and then there was a gap there.
- 5.33. A new access bridge was constructed (following the grant of planning permission in 1995) over the Markeaton Brook, giving access for maintenance vehicles from Kedleston Road (access 4). Mr Durham said that he understood the invoice at O19/34 to relate to the construction of this bridge. The invoice states that the works were complete as at 31<sup>st</sup> October 1999. Double gates were installed, which were kept permanently chained and padlocked. A notice was erected on the gates under section 31 of the Highways Act 1980. The gates were replaced in the first half of 2007, and a pedestrian gate was introduced, through which access was permitted during daylight hours. Photographs of the new gate appear at O157 and O159 and photographs of the signs on the new gate at O158. Mr Durham stated that the existing metal highways sign was re-used. In addition ownership and restricted access signs were put on the gate. The original signs were disfigured and were replaced by metal signs.
- 5.34. In oral evidence Mr Durham was asked about the pedestrian gate at access 4: he said that there was no small gate up there until after the application. The purpose of putting the gate in was to allow access through those gates. When the gates went up, it was one set of double gates. Those were kept locked, except for maintenance access. The gates were changed to incorporate a pedestrian gate, to a single large gate and a smaller pedestrian gate, which has been left open between 06:00 and 22:00.
- 5.35. There was access to the school on the site via a footpath leading from Kedleston Road down the side of the Medical Centre (access 8). Mr Durham stated that he believed that the ownership of this path was transferred by Derbyshire County Council to Derby City Council, but the land is unregistered. Both the University and the City Council's engineers inspected the bridge. In July 1995 the City Council confirmed that the bridge was unsafe. The bridge was closed prior to being removed, thereby preventing access along

this route. Mr Durham referred to the photograph at O160, and to a letter at O161 dated 5<sup>th</sup> July 1995 from Mr Collett of Geoffrey Collett Associates to Mr Norman, the University's Estates Manager, reporting on his inspection of the bridge the previous day. Mr Collett wrote:

"I have inspected the footbridge over the Markeaton brook which carried the path leading from Kedleston Road, and I can confirm that it is in a state of partial collapse, and is structurally unstable and dangerous.

Children playing on the bridge could, I believe, precipitate collapse at any time, and while further efforts could be made to try to prevent access, I consider that temporary propping is required as a matter of urgency.

This propping could be from the banks of the brook, for any work within the water course is likely to raise considerable objections from the environmentalists.

With regard to the future I do not believe that it would be cost effective to try to repair/replace the numerous items of steelwork that have corroded, and to restore the pedestrian a new deck supported on the existing concrete piers should be considered."

- 5.36. In oral evidence Mr Durham said that he had no information other than the information contained in this letter as to when the bridge was closed. He had concluded that it was closed in July 1995, but did not know whether it was closed before then. Mr Durham stated that whilst the University had no legal responsibility, it had contributed £10,000 towards the cost of the removal of the bridge.
- 5.37. Mr Durham stated that the access from Markeaton Street via double gates (access 1) had always been restricted other than for maintenance, hopper bus turning, and use of the existing car parking areas. Historically there used to be access onto the adjacent City Council land, but in February 2006 the City Council's Land Drainage and Flood Defence Manager had carried out repair works which prevented access onto their stretch of land adjacent to the watercourse. There were breaches in the boundary fencing between the two different ownerships, which had been caused by vandalism and by a failure to reinstate fencing after watercourse diversion works in the mid-late 1990s. These breaches were rectified as a joint venture between the City Council and the University. The City Council removed the existing fencing leaving bollard boundary indicators and the University provided new fencing along the boundary, and replaced the existing graffiti-damaged gates with the gates visible on O162 and 163.
- 5.38. Mr Durham stated that the existing steel fence line along the western boundary adjacent to the A38, which contained at least two sets of gates, had remained intact. Up until early 2008 the gates were seized up in the closed position and the access to them was overgrown. One set of gates was cleared and eased by

the University to allow access onto the designated walking routes stipulated on the signage shown on O165 next to the gate.

- 5.39. In oral evidence Mr Durham said that when he joined the University, the gate at access 2 was always closed. It was seized, and there was no access through there. The existing fencing along the northern side of the Mill Dam pond, (which was of the same type as the fencing to the north of the gate now) ran along the University's boundary, up to that gate, but was down in parts. That fencing was removed by the City Council as part of the City Council's works alongside the Mill Dam pond and access 1, and bollards were placed to mark the boundary between the University's land the Council's land. The Council then used part of the fence which was removed to stop off the access route on the A38 end of the Mill Pond dam. That fencing was broken down, and the then University decided to replace the bollards with palisade fencing which was carried out in 2007. The breach in the fencing was in existence in 2003. The University had clamped back together bars which had been bent in the fencing on at least three occasions since 2003.
- 5.40. In oral evidence Mr Durham was asked about access 6 after 2003: that entry point had been open up until 2007. The gate which was put there in 2007 is now locked between 22:00 and 06:00.
- 5.41. Mr Durham then set out some information about the Markeaton Brook Walkway. He stated that a footpath leading along the bank of the northern watercourse in area C had over a number of years become known as the Markeaton Walkway. The Markeaton Walkway was a defined route crossing the northern edge of area C. The tributary watercourse dividing area C from areas A and B had its only crossing point on the designated walking route along the Markeaton Walkway, which linked with the Council's property and footbridge mentioned previously. Access along this route ceased in the late 1990s when the bridge was washed away in floods, before the planned removal of the condemned Council bridge. The University is seeking planning permission to reinstate the bridge. One application has been rejected recently, and the University has submitted a revised application.
- 5.42. In oral evidence Mr Durham said that the historic information contained in his statement in relation to the Markeaton Walkway came from the letters produced to the inquiry by the University, and from information he had been told. In addition there is a sign still on the land, pointing away from the land along the Markeaton Walkway. Mr Durham said some of the information he had been told has come from the Director of Estates, and some from colleagues within the estates department who have lived and worked in the area, and who had confirmed the information. The bridge went before he was employed by the University.
- 5.43. In 1994/95 the University erected fencing to restrict access to the Walkway adjacent to the Scout Hut. The fencing was over 2 metres in height, and it was brought to the University's attention that it required planning permission. As a result it was removed some six months later. In oral evidence Mr Durham said

that the source of this information was the correspondence produced to the inquiry by the University.

- 5.44. In 2006/07 the fence was reinstated, at the correct height. Mr Durham referred to the photographs at O169 showing the gap without a fence, and at O170, showing the gate and fence which were erected in 2006/07. There are signs on the gate.
- 5.45. Members of the public have created makeshift-crossing points without the University's authority. The University removes these each year, in order to comply with its obligations under the Land Drainage Act 1991 to maintain water flows and remove obstructions. An example of a makeshift bridge was at O167. In February 2006 the City Council's drainage department undertook works comprising the removal of make-shift bridges, and shoring up of the banks. A photograph of some shoring up was at O168.
- 5.46. Mr Durham stated that area C is effectively landlocked, with the only access being the access next to the Scout hut. Maintenance vehicles obtain access to the site via the University property at Britannia Mill, from where they pass into the City Council's allotment land, via locked gates, and then from the allotment land into area C via the locked gates visible on O171 (access 11). The same access is used for emergency vehicles to support American football on the pitch on area C.
- 5.47. Mr Durham stated that vandalism had been a particular problem on the site over the years of the University's ownership. Fencing had been damaged, signage removed and/or disfigured, security chains cut and/or removed, dog excrement has been deposited anywhere (even after collection bins were installed), watercourses have been obstructed, there has been fly tipping, fires started, football posts have been pulled down and/or removed, trees have been damaged, BMX tracks created, there has been motocross-type bike riding, excavations, the purpose of which is unclear, have taken place, and there has been drug taking, glue sniffing and alcohol drinking parties on the land. He stated that the photographs behind divider 7 in the Objector's bundle provided examples. In about 2007 something which appeared to be a paint substitute-type substance was discharged into the watercourse, apparently deliberately. The University had to pay for its removal, under the direction of the Environment Agency.
- 5.48. In oral evidence Mr Durham said that he had no evidence as to who had discharged the paint into the watercourse, but the construction company was a big concern, and he thought the University would have known about it, had it been the contractor.
- 5.49. In oral evidence Mr Durham said that the photographs behind divider 7 were taken by someone within the Estates Department, Mr Jim Robinson, and not by Mr Durham himself. He thought they had been taken after the application was made, apart from O190, which he thought had been taken between 2003 and 2005. Mr Durham said that he has a mix of photographs, the majority of which were taken after the application date. He knew that work to the fence visible in

the photograph to repair that section of fencing was done between 2003 and 2005, and he that surveyed the work. The work was done after he joined the University in 2003. He thought that the photograph was taken before the work was done. He then said that he had taken this particular photograph, and that although the majority of the photographs were taken by Mr Robinson, he had taken this one.

- 5.50. I then asked Mr Durham to go through the photographs behind divider 7 carefully and identify any others which were not taken by Mr Robinson. He said that he believed that he took O186: there was a complaint from the local authority in regard to some work done to the trees, which are the subject of Tree Preservation Orders, and this was a photograph he had taken to show the authority that damage had occurred to the trees. The photograph shows a branch which has been damaged at the top (although that is not visible in the photograph) and cut at the bottom. He thought that photograph had been taken in about 2007/08 and was taken on the boundary between areas A and B. He also took the photograph at O191: it was taken to show the lug for the missing panels which were part of the fencing, between the woodland area in A and the open area, and which have now been replaced by the gates. The photograph was taken after the application date, probably in mid-late 2007. The photographs at O198-201 were taken either by Mr Barry Scarborough or by Mr Roger Hinkley and were sent to Mr Durham by email. He did not know when the photographs were taken, but said that the incident was well before the application was made.
- 5.51. Mr Durham stated that on a positive note, the University acknowledged that many members of the public act completely responsibly, and as a result, the University continued to grant permissive access.
- 5.52. Mr Durham stated that the University had attempted to put certain control measures in place. Whilst on a few occasions over the previous 7-9 years the University had had to resort to police involvement, generally issues had been addressed using the University's own security personnel. Mr Durham referred to an email from Mr Neville Wells, Head of Campus Services, dated 23<sup>rd</sup> February 2010<sup>44</sup> in which Mr Wells stated that there had been ongoing issues with security incidents on the Sturges Fields over the 9 years he had been responsible for security for the University. For example, groups of youths on the site, mountain bikers and BMX riders loitering on or near the site, and mini motor bikes being brought to the site in the back of vans. In many instances a quiet word and a polite request to leave was all that was needed to prevent damage or antisocial behaviour occurring on the University land. Mr Wells set out 4 instances in the two years before his email, the first of which occurred on 16<sup>th</sup> October 2008, when the police had been involved.
- 5.53. Mr Durham stated that the University had continually replaced signs, which give guidance as to how the University expects people to behave on the land, and eventually used a more robust metal-type sign in around 2007. O204 showed the wording of the signs. The University has replaced damaged locks

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<sup>44</sup> O203

and chains. The University has installed Dog Waste Bins along the designated walking route. Members of the public have been challenged when found walking their dogs off the lead. The University encouraged proper removal of excrement, highlighting the unpleasantness of playing sport with excrement on the pitch and the health risks, with particular emphasis on the effects on organised groups of children on nature trail days. O205 was a photograph of one of the dog bins. The University had maintained the effectiveness of the designated routes by continued cutting, and, with the assistance of the City Council, had continually removed obstacles from the watercourse which were detrimental to its flow, as they were required to do under the Land Drainage Act. The University had replaced football posts and placed them within a secure compound, had made good damaged trees and repaired or replaced damaged fencing, removed rubbish left by fly-tipping, filled in excavations and removed the most dangerous area of the BMX track, had cleared discarded needles, glue sniffing bags and alcohol cans and bottles from the site, and reported specific incidents to the police.

- 5.54. Mr Durham stated that, at specific times, areas of the application site have been closed to public use. In 2000, a temporary compound comprising chain link fencing of approximately 1 metre in height was erected on Field A to designate an area for sports equipment, such as goal posts. This was subjected to vandalism and remained intact for only a short period. A more substantial palisade fence, approximately 1.8 metres high, was erected in 2006/07 to replace it, and that remains on the site to date. O209 showed the area where the compound was located, and there were photographs of a palisade compound on the following pages O210 and O211.
- 5.55. Mr Durham stated that Field A has been used since 1994 by the University for sport and sport coaching, for rugby, football and American football. Rugby and American football have taken place on the same single marked out pitch. When football is played, the area has been marked out as one or two pitches. Whilst coaching and games were taking place no other use or access was either possible or permitted. In addition at least 2-3 times a year, agricultural sand, used in the maintenance of the playing areas, is deposited at the base of the bridge at access 4, blocking all access from the bridge. O212 showed the area used as a playing area and the area where the sand was deposited. O213 showed the area with what appear to be two matches in progress. Mr Durham stated that Markeaton Primary School had also had use of this Field.
- 5.56. The University obtained planning permission on appeal for the bridge at access 4, and the bridge was constructed thereafter. An area necessary for the construction of the bridge at access 4 was designated a site area, and was only accessible by site operatives during the construction period, which lasted for about 3-4 months. Mr Durham stated that the plan at O214 showed the area affected. In oral evidence Mr Durham said that he had drawn the area shown on the plan. The works had taken place before he was in post. He had done so, partly from what is apparent on the site i.e. the bridge itself and the roads leading to it from both side, and partly on the basis of his assessment of the minimum area that would be required for such a construction. He was asked

what experience he has that would enable him to assess the area required. He has been in the construction industry since he was 16, and is an architect.

- 5.57. Mr Durham stated that in 2000, as part of the University's I.T. infrastructure works, ducting linking a number of access chambers was construction through the application site from Markeaton Street to Kedleston Road. A site compound was established on the existing car park for a temporary office and materials and plant storage. A minimum site/working area of approximately 7 metres wide was established. He referred to the area marked on the plan at O216. In oral evidence Mr Durham said that he had drawn the area on the plan at O216. The work was done before he joined the University. The University has a separate department responsible for I.T., which was responsible for the works. There were two people responsible for the project, the lead person, who has since left the University and he had talked to the other, Mr Kevin Booker. Mr Booker said that he had identified the route of the cables as a whole, and zoned the whole area off, but the work had been carried out in sections. When the diggers were working on a particular section, the barriers demarcating the site in that area were removed while the line was excavated, the cables laid, and the soil replaced. Mr Booker estimated that the width of the area affected was about 7 metres.
- 5.58. The hard standing area on Field B had been used in support of education and community events on the fields. From the start of September 2005 until February 2007, the area shown on O217 was also used as a secure compound for the site accommodation required for the Markeaton Street development. The area was subjected to vandalism, but remained secure and inaccessible for the duration of the contract. The University has also used this area to turn the hopper bus servicing the Markeaton Street site.
- 5.59. In oral evidence Mr Durham confirmed that the information about the compound for the Markeaton Street development came from his own personal knowledge. He had marked the area shown on the plan at O217. The compound was on the car park. That area was fenced off during non-working hours. The access to that area was demarcated by a plastic fencing system during working hours, but the fencing would not have remained there fully intact outside working hours. The plastic fencing is not a substantial barrier. There was Heras fencing around the compound, and one panel or maybe two which were opened where the link to the access was, to aid access, and it was locked up at the end of the day. There was 24-hour security on the site, between the compound and the construction site. There was some vandalism to the compound site: people throwing objects at the lights which were there, and at the windows. It was mainly the lights which were damaged, although one of the windows was damaged on two occasions. No-one got into the compound.
- 5.60. Mr Durham confirmed that the photographs at O19/26 and 27 showed the compound as he remembered it. The date on O19/27 is 11<sup>th</sup> June 2006, which he confirmed was during the period of the works.

- 5.61. In 1995 problems occurred with the waterflow between the two main watercourses, both of which are outside the area of the University's ownership, but which are linked across the University's land. There was a long period when the area was flooded and became inaccessible. Works were carried out to rectify the problem. Access to the area was restricted solely to site operatives. In the short term, the solution applied was the formation of a trench. A more permanent solution was subsequently implemented. O222 showed the area affected. O223-O226 were various letters and memoranda dating from 1995. The first was a memorandum dated 27<sup>th</sup> February 1995 from the University's Estates Manager to the Pro-Vice Chancellor, Facilities. Attached to the memorandum was a letter from Geoffrey Collett Associates described in the memorandum as regarding the water problem at Sturgess site. The letter recommended that in the short term a short cut-off channel should be excavated as indicated on the plan enclosed to prevent further undue damage, wholly on the land owned by the University. The letter stated that the channel could be created by the hire of a JCB for no more than one day. The memorandum sought the Pro-Vice Chancellor's comments, and said:

"Should you wish me to go ahead with Geoff's proposal for the formation of a ditch, it would have the effect of stopping the site being used as a thoroughfare by the general public."

- 5.62. O225A was a letter from Derby City Council to Geoff Collett Associates confirming that the channel across the school drive at the Sturgess School Site was to be a temporary connection, as the drive might be required in future as an extension of Markeaton Brook Walkway. The final document in relation to this topic was a memorandum dated 19<sup>th</sup> June 1995 from the University's Grounds Supervisor to the Estates Manager relating to Sturgess and Britannia Ponds. The memorandum stated:

"I thought you ought to know the "locals" are now damming the entrance to the Mill pond over the small stream with sand bags and highway kerbs.

We are removing the debris daily – what happens if they dam it over a Bank Holiday lasting sometimes four to ten days?

As the penstock is still letting out approximately 20% of water from the drain pipes outlet on a continuous basis, won't the Mill pond drain considerably or at worst empty? A culvert under the temporary stream as soon as possible would solve the problem."

- 5.63. Mr Durham stated that the area indicated in green on O219 on Field C was used since about 2000 by the University for American football games and coaching. Vandals damaged the posts in late 2007 and totally removed them in late 2008 or early 2009. Whilst coaching and games were taking place no other use or access was possible or permitted.
- 5.64. Since January 1994 the secure fencing around the original tennis courts had been subjected to vandalism. The perimeter of the courts had become overgrown. The wire mesh fencing had periodically been inspected and re-secured, particularly in respect of the access gates, using the fencing wire. For



a period up to 2005 the courts were protected by a secure fence, albeit the surface was somewhat neglected and the perimeter overgrown. Gradually the chain link was pulled back away from the gates and access was gained to form a route across the courts. On several occasions the University tied back the chain link and wired shut the gates, until finally persons unknown removed the gates. In oral evidence Mr Durham acknowledged that one gate remained on site. The majority of the fencing is now in grave need of repair. During December 2009 works were started to clear the vegetation and reinstate the fencing.

- 5.65. Mr Durham stated that the University wished to continue to use its land uninterrupted for educational and student activities. The land is an important part of the University's plans to improve its sporting facilities. The University had already established a list of community activities and hoped to continue and expand those activities. The University had no desire to treat the application land as development land. The University's view was that if it had to allow unrestricted public access to and use of the land, such use would undermine all the work already achieved by the University and local community groups, such as protecting the biodiversity of the land. He referred to the email sent by JoAnne Hasbury to Ian Willgoose on 8<sup>th</sup> September 2008<sup>45</sup> in which Ms Hasbury reported the content of a telephone conversation she had had with a Lynne Wood. Ms Wood was reported as having said that the village green application was not only nothing to do with the Friends of Markeaton Brook committee, but was something that they would not endorse: increased access under village green status would not be favourable to their objectives as a group anyway. Ms Hasbury forwarded a copy of an email from Ken Clarke, the Chairman of the Friends, sent to Ms Hasbury on 5<sup>th</sup> September 2008, which confirmed that the Friends had not adopted or promoted village green status as the future for Sturgess Fields. Mr Durham also stated that in his opinion educational and Student Union activities would suffer, and the quality of playing surfaces would deteriorate as a result of unrestricted use and abuse.
- 5.66. In oral evidence Mr Durham was asked how it was that the Applicant's witnesses had been able to get onto the site through the gates, when it was his evidence that the gates were locked. He said that the site is not a fortress, and he could only assume that they had gone through or over the fencing. He was asked how reliable the University security personnel are at ensuring that the system he described is adhered to. He said that he cannot guarantee that the gates are locked every night. Instructions have been given on more than one occasion to the security manager, who will then pass those instructions to whoever is on duty at the time. Mr Durham himself first gave that instruction within 9 months of his arrival in 2003. Shortly after that there was a change in security manager, and he gave the instruction again. He had also spoken to the security manager's line manager, the Head of Estate Services, Mr Neville Wells on several occasions. He knew that Mr Wells had passed the instruction on, because he had seen emails of him doing that.

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<sup>45</sup> O229

- 5.67. In cross-examination Mr Petchey asked that, if Mr Durham did not know the answer to any question, he should say so. Mr Durham agreed that the University was established in about January 1993. Before that date he had been involved with the University's masterplan. In 1993, the responsible personnel within the University were Michael Hall, the Commercial Director, John Norman, the Estates Manager, Mr Willgoose, the Deputy Estates Manager, Ken Newton, the Security Officer, and Alan Lowe the Grounds Supervisor. Mr Durham had not spoken to Mr Hall, Mr Norman or Mr Newton in the course of preparing his evidence. He had spoken to Mr Lowe and Mr Willgoose. Neville Wells is the current Head of Estates Services. The security manager, Simon Dixon, reports to him. He has spoken to Mr Wells and Mr Dixon. He had also spoken to Malcolm Allerton, although he was not sure of the surname, in the maintenance department, whom he had mentioned. He agreed that there were some people who potentially had important evidence to give to whom he had not spoken.
- 5.68. Mr Durham agreed that he had said that the information he had given in relation to the closure of access 6 in 1995 was derived from the documents. Mr Durham was not involved in any way with the acquisition of the land in 1993/94. He was not, at that time, called in to look at the land and advise about it. He was not involved with the purchase. He did not see the advice from Grimley JR Eve at the time it was prepared (July 1993), but had seen it before he was preparing for the inquiry, in connection with the planning application for the route across Sturgess Fields, probably in about 2005 or 2006. Mr Durham was taken to that report, and to paragraph 4 of the report, where the author records his understanding that the playing fields were used informally by the local populous. He was asked whether that was his understanding at the time. He said he was not involved with the purchase, and was not aware of that use at that time. He was asked whether that information was correct or not: he said that the foundations might be unsafe, and there had been problems with collapsing drainage and manhole covers on the site. When that was investigated two years ago, it appeared that they had been filled before, but the filling had been washed away. He thought in the period immediately after demolition, the area occupied by the buildings would have been difficult to walk over. He was asked whether, having seen the document, and heard the applicant's witnesses' evidence he accepted that the local populous was using the land. He said he understood that that was the author's understanding, and could not contradict it or confirm it.
- 5.69. Mr Durham did not give any planning advice to the University in about 1993/94 in relation to the Fields. He knew the University had another local firm of architects look at the potential for providing changing facilities. It was put to him that Derby City Council's planning policy from 1988 was that there should be a walkway through the site going up to Markeaton Park. He said that he did not know that that was the position. He said in his view the fact that it was that their policy at that time would not have inferred that the University had to provide it. He did not know whether the University had objected to that planning policy, but said that there would in any event have been no obligation on the landowner, other than an owner who wishes to develop the land, to comply with planning policy aspirations. In the present Development

Framework, two of the fields are recreation and leisure, the site is green wedge, part of the University quarter, there are zones within the land of natural interest, specifically the woodland, there are two Tree Preservation Orders on the land: one in respect of the woodland, and one in respect of bands of trees around the perimeter. The position of the University on the walkway has not been discussed in Mr Durham's presence. He did not know whether the University had ever objected to it. He does not know what route is shown in the Local Plan. There have been discussions within the University with regards to the extension of Markeaton Brook Walk across the University's land, linking the end of Watson Street and Kedleston Road, via access 4. The suggestion was that that link would be put in at the University's cost and handed over to the City. The University has applied to put in a new bridge over the watercourse, but the application was rejected, because of the Environment Agency's objection to the potential effect of the bridge as designed on the watercourse.

- 5.70. Mr Durham said that he does not know what the position of the Markeaton Brook Walk on the ground was at the time of the University's purchase of the land. Mr Durham was shown the planning permission for the construction of the Markeaton Brook Walk. He said that the application was by the City Council. Notice would have had to be given by to the County Council as landowner. The grant of permission did not necessarily mean that something was put in. It was put to him that it was common ground at the inquiry that the timber footbridge at the far end of the path as shown on the plan accompanying the permission was constructed. He was asked whether in 1993/94 he was aware of the path up to the point shown on the University's land. He was not. From his investigations and the evidence to the inquiry, he agreed it was clear that the path did extend as shown on the plan, but he said that did not mean there was a right of way over that path. He knows the bridge existed. His understanding is that the bridge was not there at the time the University purchased the land, because it had been washed away by that time. That is an understanding derived from other people or from correspondence. It was put to him that it appeared that the permission had been granted on 5<sup>th</sup> January 1993, the bridge was put in before the end of the 1992/1993 financial year, and then washed away before the University bought the land in 1993. It was put to him that the University's solicitors and the officers of the University would have known about the physical existence of the pathway when the land was acquired. He said that he does not know whether they knew or not. He was unable to comment on what the University's attitude to the permissive path across its land was at the time it purchased the land. The earliest discussions in which he had been involved concerning the path were the ones he had referred to, which had been within the last 2 years.
- 5.71. Mr Durham was asked about the position in 1995 and the steps taken to stop access being taken at that point. His information in relation to that incident was derived from the documents produced to the inquiry. He was asked about his inference that the access was restricted for six months. He said that that was his assumption. It was put to him that there was nothing in the documents which suggests that the period was six months. He was referred to Mrs

Panter's letter received on 12<sup>th</sup> July 1995<sup>46</sup>, and he agreed that it was likely from that letter that the access had been blocked off on about 10<sup>th</sup> July 1995. The next letter in time was Councillor Bolton's letter dated 10<sup>th</sup> August 1995. The last letter in that correspondence was the reply dated 30<sup>th</sup> August 1995. He was asked where the six months came from. He said that he had been told in discussions that the letter from Councillor Bolton instigated a meeting with the planners, and he understood that the planners met on site, and that that was when the height issue was discussed, and the University was asked to reduce the height of the fencing. At about that time Mr Norman took early retirement and Mr Willgoose took over. It was Mr Willgoose who instigated the removal of the fence, and Mr Durham had deduced from the financial processes which would have been gone through within the University to get financial approval for that job would have taken six months. He said that it might only have been two months or one month. It was put to him that he had said that he had deduced the six months from the documents. He said he had deduced it up to the 30<sup>th</sup> August 1995 letter, and then the further bit was from a discussion with Mr Willgoose. He did not remember the incident himself, but remembered the change over from Mr Norman to Mr Willgoose. No-one has told him it was six months. That is his assessment, on the correspondence, plus what he had been told, and his knowledge of the way the University operates in order to put finance in place for works. It was put to him that no-one had been able to say how long the fencing was there for: what he had been told about was the process, and he had made deductions as to how long that process had taken. Anything over two metres requires planning permission. The University had not applied for planning permission. When the fencing was measured by the University and the planners on site, it was over 2 metres. He said there were then several choices: to rectify by reducing the height, to put in a retrospective planning application, or to remove it. It was put to him that it was ridiculous to suggest that it would have taken 6 months, and that it might have taken some time perhaps because of the transition between the two managers. He agreed that there was no accurate assessment of the timescale and he did not know how long it would have taken to obtain the finance to take the fence down. It was put to him that it would have been the work of moments to issue an instruction that the gate should no longer be locked. He agreed. It was put to him that the local people were very cross about the walkway being crossed, and a senior Councillor was writing to the Chancellor, and it seemed likely that that instruction would have been given. He agreed, but said that he did not have any personal knowledge as to whether that instruction was given. He thought that from the documents that it was unlikely that such an instruction had been given by the time Mr Norman's letter dated 24<sup>th</sup> July 1995<sup>47</sup> was written. He also referred to the evidence that a public meeting had been held, and said that that did not take just 24 hours either.

- 5.72. It was put to Mr Durham that had the matter been long and drawn out there would be correspondence with the planning authority on the file. He agreed, and agreed there was none of that, and he agreed that maybe a commitment

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<sup>46</sup> O19/6

<sup>47</sup> O19/9

was given. It was put to him that that suggested a speedy informal resolution, and he said he could see why Mr Petchey said that.

- 5.73. Mr Durham was asked whether he knew whether the iron bridge at access 8 was available as an access at the time the University acquired the site. He did not, because he was not involved in the acquisition process. Mr Durham agreed that the information in his statement in relation to the bridge was derived from the documents before the inquiry. He had no knowledge as to when it was closed, other than the inference to be drawn from Mr Collett's letter that it was closed in July 1995. He was employed by the University at the time it was removed. It was put to him that the bridge would have provided access to the site at the beginning of the relevant period. He said that he could not comment, and he did not know whether that access remained available when the University acquired it. He did not know anything about the University's attitude to the bridge when it acquired the land. It was not part of the land acquired by the University. It was put to him that there was a public bridge which provided access onto the University's land at the time of the acquisition. He said he did not know what the position was at the time: it seemed clear to him looking at the position now that the reason for the bridge was to serve the school, and, if you look at the line of the fencing, the route through to the school was protected, although there were gates in it.
- 5.74. Mr Durham was asked about access 2. He agreed that he was unable to say what the position was at the time the University acquired the land.
- 5.75. He was asked whether when he joined the University in 2003 he did a tour of the estate. He did: Mr Willgoose took him around. They did not tour the whole estate, because there were parts that he knew well, but the parts he viewed were effectively ones which the University was seeking to dispose of. This was not one of them. He was aware of the site.
- 5.76. The first time he looked at the site in detail was in 2004 about 9 months after he joined the University. He agreed that that was the date from which his evidence in relation to the position when he joined the University dated, except he said that he knew the links between Britannia Mill and the site, on the Markeaton Street side before that, i.e. the area around access 1.
- 5.77. He was asked about access 2: to the left of the gate the bars were prised apart, and to the right of the gate, the fencing was down. He agreed that the City's fencing to the right of the gate along the frontage to the A38 was in disrepair as well, so that access could be obtained from the A38, along the western end of the Mill Dam pond, because the two fences, which should have obstructed that route, were both down. Mr Durham was asked about his evidence that the gate was seized, and he was asked whether he was confident it was locked. He was not, but he was confident that people could not get through it: it was difficult for the University's direct labour force to unseize it. He thought they broke it during that process: they broke the keep on the bolt section.
- 5.78. Mr Durham was asked about access 4: he was asked whether it was right that there was a period after the bridge went in when there was no gate at all. He

said that he thought that was not right: his understanding, although he has no personal knowledge of this, was that when the bridge was practically complete, on 31<sup>st</sup> October 1999, although the gates did not go in at that time, there was Heras fencing across the bridge. He had seen the order for the gates which was put in 12-18 months after that. When the gates were installed, he understands that they were locked at all times. He was able to confirm that they were locked in 2003, when he looked at the entrance from the Jonty Farmer from the other side. The reason they were kept locked was against travellers.

- 5.79. The quotation for the gate was produced and it was dated 16<sup>th</sup> December 2002. Mr Durham accepted that his recollection that the order had gone in 12-18 months after the bridge was practically completed was incorrect.
- 5.80. Mr Durham was referred to O158: he agreed that it was a photograph of access 4. It was put to Mr Durham that the access sign dated from August 2007, he said it was certainly 2007. The highways sign was an earlier sign, taken off the existing gates and put on the new ones. It was put to him that that was a sign that usually an owner put on an access which was left open, over which the owner did not want the public to acquire rights. He said it was his decision, and it was mainly for the periods when there were maintenance vehicles on the land. Mr Durham agreed that his involvement with the sign was to ask the contractor putting in the new gates to take it off the old gates and put it on the new gates. He was not involved in the original decision to put the sign on the old gates: that was before his time.
- 5.81. Mr Durham was asked about access 3. It was put to him that he had taken some care in putting together his statement: he said some care, but obviously not enough. It was put to him that his statement says at paragraph 10.2 that the timber post and rail fencing incorporated a stile, whereas when he had been asked to expand on that in oral evidence in chief, he had said that the stile had appeared after 2004. It was put to him that there was nothing in his statement about the access being inhibited until the fence was put in in 2007. He said that information was wrong, it was from the information he obtained from people, and from the fact that he could remember there being a stile there at some time. He had since spoken to the grounds manager at the time, Mr Alan Lowe, and he had said that the chain of events was different. It was put to him that his evidence had involved a third party putting in a stile where there was not one there before. He said it was not a formal introduction of a stile by the University. The statement was made with the knowledge that he knew that the stile was there at some time. He now thought, having spoken to Mr Lowe on Tuesday morning during the inquiry (16<sup>th</sup> March 2010) that his timing was wrong. When he wrote his statement his recollection was that the stile had been there for all the time that he knew the land from 2003, until it was removed. Mr Lowe told him that his recollection was that it had been put in in 2005. Mr Durham had accepted that that Mr Lowe's recollection was more likely to be correct than his recollection, and that is why his evidence has changed. Mr Lowe said that when the University bought the land in about 1993 the boundary at this point comprised a timber post and three rail fence, with a vehicular gate and a small gate to the side. Mr Lowe had said that the gate had a spring loaded throw bolt with padlock facility, which he understood

Derbyshire County Council used to use, and which the University padlocked. He also referred to an anxiety about travellers, which Mr Durham understood to relate to this access in particular, as he was speaking to him specifically about this access. He said that the small gate was padlocked, but opened when access was required for marking for the primary school. The small gate disappeared, he thought around 1999, and there was a gap there. He thought that the three bars had been put in in about 2003. He remembered the stile being formed in 2005. I asked Mr Durham why Mr Lowe had not put in a statement, and he said that that was his fault, he should have asked him to do a statement.

- 5.82. The basis of the information in Mr Durham's written statement was that he recalled personally going onto the stile, but that would be about 5 years ago. I asked him why he had put in the January 1994 date, and whether he had projected back 10 years from 2005, to arrive at that evidence. He said that he had spoken to someone else who said that there was no stile there, but Mr Durham knew there was from his own recollection. I asked him why he had put January 1994. He said he could not remember why he put 1994. He had assumed it had been there since then. I asked him how he suggested Markeaton Primary School would have got access to the fields to use them, if it were correct that there was no stile before 2005, and if there was instead during the time the school was using the fields, a pedestrian gate which was kept locked, and he said he could not answer.
- 5.83. Mr Petchey asked when the photograph on O150 was taken. Mr Durham did not know. He did not know who took it. He thought it was taken since 2003, and he thought it was before the fence was put up. He then said that the photograph had been taken by a contractor, the contractor who the University got initially to put in the fence that we now see. That would have been in the early part of 2007.
- 5.84. Mr Durham was asked next about access 1. He agreed that he accepted that historically there was access via the City's land onto the land which was the County's land, and which became the University's land. There was a gap in the fence along the University's boundary, where the fence had been taken down. Mr Durham said that the position varied over the relevant period: he understood that the access became a lot wider when there were problems with the flood. A JCB had been used to dig a trench between the two mill ponds, and he had been told that certain panels were taken down at that time, to make what had been forced access a lot wider. That remained like that until the City Council did their works in February 2006. He was asked whether it was his understanding that there was access through that point at the beginning of the relevant period. He said that he did not know. He did not ask Mr Lowe about the position in relation to this access. He was asked whether he had spoken to anyone about the position at access 1. He has not. He has spoken to Mr Willgoose about what happened at the time of the drainage problems, and there was some correspondence dating from that time. He has no recollection of the boundary fencing at that point from the time when he walked down there as a consultant. His recollection of the state of this fencing dates from after the time

of his appointment in 2003. That is what he meant by “historically” in his statement.

- 5.85. Mr Durham agreed that the information relating to the period prior to 2003 in paragraph 10.4 of his statement comes either from Mr Willgoose or from the documents before the inquiry.
- 5.86. Mr Durham was asked about the 2006 and 2007 fencing works, and about his recollection of the position before those works. Mr Durham said that a sketch plan of the fencing as at the date of the site inspection drawn by Mr Petchey was spot on. The new fencing originally went to the brick pillar. There were no gates in it. As part of the work that the University did, the fencing round the back of the mill pond, the University installed the pedestrian gate to the Mill Dam pond area. The City’s works were started in February 2006. The fence erected by the City was attached to the brick pillar which was at point 2 on the sketch plan. The City also put up the fencing from point 5, round the corner to join with the old fencing to the north of the Mill dam to the east of the access. Mr Durham was asked whether, as the photograph suggests, there was free access between the pillar at 2 and the left hand pillar to the vehicular gate. Mr Durham said there was not free access: there was a gate there, and the gate was locked. From 2006, when the City’s works were completed, that gate was opened during the day, and locked between 22:00 and 06:00.
- 5.87. Mr Durham was asked whether before 2006, access was freely accessible to the left of the brick column at point 2. He agreed that access could be gained through there, and there was no obstruction, the fencing had been removed. He agreed that he knew it was open from when he had first visited in 2004, but he cannot remember what the position in relation to the fencing was from the time before he was employed by the University.
- 5.88. To the right of the gate, there was no access to the site to the right of the brick pillar at point 5. It was not possible to get round to the right hand side of the pillar at 5. There was access into the Mill dam from the University side, but not access to the University land from the City’s land. The breach in the City’s fence line to the south of point 5 post-dates the application. That fenceline was complete previously, and that was why there was no application into the University’s land via the City’s land.
- 5.89. Overnight Mr Durham produced some further photographs and he explained those photographs: they related to the work done by the City Council at access 2. O171A was taken by Jim Robinson on 23<sup>rd</sup> July 2007. O171B was taken by Mr Robinson on 19<sup>th</sup> July 2007. This is the fencing which was moved from the southern boundary of area B, and originally it extended across the edge of the concrete forming the edge of the Mill Pond and preventing access along that concrete edge. The photographs show it having been pushed back or having collapsed back, Mr Durham cannot say which, so that access, before the palisade fence was erected, would have possible via the edge of the dam. The piece of fencing to the right of the gate continued along Queensway, and turned to form a return in the location shown in the photographs.



- 5.90. The photograph on O171E shows the pillar which was out of shot on the graffiti photograph at O171C. The palisade fencing is the City Council's fencing. The pedestrian gate between pillars 3 and 4 is visible to the left of the photograph.
- 5.91. Mr Durham was asked in further cross-examination about O171C: he agreed that at the moment the photograph was taken the gate was open. It was put to him that there might also have been a further gap beyond the wicket gate. He said he believed that there was. He agreed that it would be reasonable to assume that the patch on the ground without vegetation to the right of the pillar was where people had walked before the palisade fencing visible was put up. The pedestrian gate is not closed in the photograph.
- 5.92. Mr Durham was asked about the email at O171D: he was asked whether it was sent at the time the fence was put in. The contractor who had the 2005-2007 compound on the car park damaged one of the pillars, he understood when they were taking one of their portacabins off the site. Mr Durham did not know how the damage occurred, but the contractor made a financial contribution to replacing the gates. It was put to Mr Durham that damage to the bricks at the top of the pillar would be unlikely to lead to a contractor paying for new gates. The photograph at O171C was taken by the City Council who were complaining about the graffiti on the gates. The contractor made a contribution and the University paid the rest of the cost of replacing the gates. The palisade fencing on O171E is the City's fencing, and the University took the pillar out by agreement with the City. Photograph 171C shows the City's 2006 fencing around the back of the Mill Dam, and is taken after the damage to the pillar.
- 5.93. Mr Durham was asked about O171A. It was put to him that the photograph was consistent with Mr Browne's evidence that there was access through that point. He said that the access was in that place. The fencing in the photograph was used to patch that access, and in the photograph access is once more available. Before 2006 there would have been a gap in the University's fencing allowing access. In these photographs the gap has been addressed by re-used fencing put up by the City. They plugged the gap by re-using the old fencing from the southern boundary of Field B. The City did this in the course of the 2006 works. It was put to him that because the patch was Heath Robinson it did not effectively patch the gap, and the University therefore put in the palisade fencing which is visible in the photograph. The path in the form it is in the photograph would have been created between February 2006 and July 2007.
- 5.94. Mr Petchey next asked about paragraph 13.6 of Mr Durham's statement, where he dealt with flooding in 1995 and works carried out to rectify that problem. He was asked whether the short-term solution was that shown on O225. He said it was before his time and he only has correspondence. He said that he thought it might have been a slightly different solution: a trench dug through from between the end of Mill Dam pond and Mill pond. He said that there was nothing in the correspondence which suggested this, this was his understanding from discussions with colleagues. He was referred to Mr Norman's

memorandum at O223 and his comment that the ditch “would have the effect of stopping the site being used as a thoroughfare by the general public.” He was asked whether he agreed that that suggested that at that time the site was being used as a thoroughfare by the general public. He did. He was referred to the letter from Derby City Council dated 3<sup>rd</sup> May 1995 at O225A, which confirmed that the channel was agreed to be a temporary connection. It was put to him that none of the correspondence related to any more permanent solution. He agreed. He thought he had seen other correspondence which related to a section of pipework from the side sluice which leads to the watercourse running between Markeaton Street and Watson Street (Mackworth Brook). He understands that that sluice was blocked and the final solution was to find it and unblock it.

- 5.95. Mr Durham was asked whether the reference in his statement to the failure to reinstate fencing after watercourse diversion works related to the permanent works or to the digging of the trench. He did not know when the permanent works were done. He thought that the fencing went down when the trench was dug across the drive. It was not reinstated until the City Council’s 2006 fencing works were done. It was put to him that the access referred to in Mr Norman’s Memorandum referring to the site being used as a thoroughfare at O223 must therefore be access through the gates. He said it was between the watercourses, which includes through the gates. The ditch linked the two watercourses. It was put to him that there was access through the gates prior to the trench being dug, and then, when the trench was dug, the access was made easier because some of the fencing was taken down, providing a choice of access. He agreed that effectively there was access through at that point until 2006, although he said that for some of that time you would have had to go over the trench. It was put to him that in February 1995 people were taking access through the gates: he said he could not say definitely and he did not know. He was asked whether it was his understanding was that there was access through the gates. He said there was access at that point, whether it was through the gates or breaching fencing, he did not know. He agreed that whatever access there was, the access was made easier because fencing was taken down. It was potentially more difficult because there was a trench there. He agreed that Mr Cash had said it was possible to step over the trench. At some point a permanent solution to the flooding problem was put in, but the fencing was not put back.

- 5.96. Mr Durham was next asked about the correspondence between Mr Norman and Mrs Panter at O19/6-9. Mrs Panter’s letter received on 12<sup>th</sup> July 1995 stated (as relevant):

“I live in Brookside Close a small cul de sac off Watson Street, Derby, and I would be extremely grateful if you could kindly let me know what it is intended will happen to the land situate at the rear of the Scout Hut off Watson Street.

On my return home from work yesterday my neighbours and I found that the access to the footpath laid by the City Council had been blocked off. The City Council had, in fact, informed us that this

pathway would continue to Queensway to give easier access to Markeaton Park.

...

We do feel that the time has come for the University to give something back, even if it is only to open the footpath referred to above up again and to continue this through (for the public's enjoyment) to Queensway.

5.97. Mr Norman's reply by letter dated 17<sup>th</sup> July 1995 stated (as relevant):

"The City Council transferred ownership of the Sturgess School site to the County Council some years ago due to local government re-organisation. When Sturgess School was closed, the site was offered for sale and was purchased by the University for use by students for sporting facilities. You will notice that a sign has now been erected indicating this and that with effect from 1 October 1995 the area will be used by the University for these facilities.

Due to the number of people in the vicinity who walk their dogs in this area, it has been necessary to take control of the area to prevent dogs from fouling the site, as the University have a responsibility under Health and Safety to the students. This is the reason why the fence you mentioned has been erected. For your information, there is no right of way across the site. "

5.98. It was put to Mr Durham that, in the context of the correspondence, the sign was at access 6: he said he believed it was access 3 that was referred to. He was referred to Mrs Panter's undated letter at O19/6. He was asked again whether in that context he agreed that the sign referred to by Mr Norman was probably at access 6. He agreed that the sign was mentioned in correspondence which related to access 6, but he knew from information given to him by others that signs had gone up at point 3, and therefore he thought it was at point 3.

5.99. Mr Durham was referred to his statement that a double timber post and signage depicting the fact that the land was now under University ownership was erected at Access 3. He was asked where this information came from: whether it was from Mr Norman's letter to Mrs Panter, or from somewhere else. He said that from his recollection he was convinced that there was a sign there. That was from his time as a consultant. It was positioned there because it was the most prominent location on the site. It was put to him that a sign saying University ownership, in the context of closing an opening would be an explanation to the public as to why the access was being closed. He thought it was more likely to be sign saying that the land was owned by the University.

5.100. Dr Choongh said that the Objector's position was that it was unable to say that the pedestrian gate at access 3 was locked or that there was a sign there which prohibited access.

- 5.101. Mr Durham was asked about locking of gates. It was put to him that the period to which he referred in his statement was not clear. He was asked whether in fact it related to the period post-2003. He confirmed that it did. He was asked to which access points the locking regime applied. His discussions with the security manager were a general statement to make sure that the site was closed between those times, so that all gates which could be locked would be locked. He was asked whether this was a new instruction. Mr Durham said it was probably the first instruction he had given. He did not know what instruction the security manager was given prior to the start of his employment. It was put to him that he must have known at the time what the previous regime was. He agreed and said he cannot now remember the discussion, but he does not think that he was confirming existing arrangements, rather he was instituting new ones. It would therefore seem to follow as a matter of logic that before the instruction was given the gates would have been left open, but he was not absolutely sure. He said that part of the discussion was that he felt that the University ought to be making sure that the site was closed off at a particular time in order to maintain “ownership”. There was no objection to the public having access to the site at that time. At that time the access was not coupled with a notice. He did not ask for any notices to be put up at that time, and nothing he knows about suggests that notices were put up at that time. The notices first went up in 2007 when the fencing went up.
- 5.102. Mr Durham was asked to confirm whether the new locking regime applied to points 2 and 4. He said that it would not have applied to point 4, because the gates there were kept locked, other than for maintenance access. It did not extend to access 2 either, because it was not possible to open that gate because it was seized up. He said that he did not believe there was a lock on it, but his understanding was that it was not practically possible to open it. He said where there was no gate it would not have been locked. At 6 there was no gate to lock.
- 5.103. Mr Durham was asked whether the change at access 1 in 2006 had any bearing on the opening regime: he said that it had not. In 2007 new gates were installed at access 1, and permissive notices were erected for the first time. The regime continued and was for the first time communicated to the public. A gate was also erected at access 6, and the same sign was erected.
- 5.104. Mr Durham agreed that he had said that he could not guarantee that the locking regime had been carried out. He did not do it himself, and cannot guarantee that it was done in the way he instructed. He accepted that in practice it might have been more liberal than he had stated. He did not issue any further instructions after that.
- 5.105. Mr Durham was asked whether the date for the erection of the compound for sporting equipment was correct. He said he did not know. There was no planning permission for the compound. It was put to him that the compound was put in in 2008 rather than 2006/07 as he had stated. He could not say whether the date was correct or not.

- 5.106. He was next asked about his evidence about the construction of the bridge at access 4. He agreed he had said that the area shown was the area, using his construction expertise, which he estimated would have been used. He said that the area shown was the minimum area required. It was put to him that it was the wrong way around, because the bridge was built from the road side. He did not know, but would assume that it would have been. He said that he had assumed that there would have been limitations in using the area to the north of the bridge for the construction area. It was put to him that if he had not made that assumption the area would be the other way around. He said he thought it unlikely that it would have been that way around, the logic would have been to use the open space. It was put to him that had the restraints not obtained, it could have been the other way around. He said that had it been open fields, it could have been. He had assumed that there were those restraints. Mr Durham was referred to A29, and he said that he thought that supported his view, and one had to look at the ownership of the land.
- 5.107. Mr Durham was asked about the network ducting: this happened when he was not on the University staff and he was not there when they were carried out. It was put to him that he does not refer to fencing in the paragraph, and he agreed. It was put to him that there was no fencing or barricades marking off the route. He said he did mention that the area was demarked. The information he has been given is from Mr Kevin Booker. He said he would not necessarily have done it like that. It was put to him that the fact that he would not have done it like that and that local people did not remember it being done like that suggested that Mr Booker's recollection might be mistaken. He said that that was what Mr Booker had said. Mr Booker had not given evidence to the inquiry because Mr Durham had not asked him to do so.
- 5.108. Mr Durham was next asked about the 2005-2007 works. It was put to him that the access was not fenced off: he agreed that there was no fencing around the access. He had referred to plastic barriers. The compound was Heras fencing, and the other area, because they had vehicular traffic between the compound and the bottom of Markeaton Street, they used a plastic low level protection to that area. That was not there all the time.
- 5.109. Mr Durham was then asked about the community participation activities he had set out in his statement. The list was the itinerary for 2007. The first one was in May 2007. He agreed that the Friends of Markeaton Brook application is dated 7<sup>th</sup> January 2008<sup>48</sup>, and that that was not a 2007 event. It was put to him that the Fun Day was a reference to the event described in the Risk Assessment at O126, and was scheduled for 20<sup>th</sup> June 2009. He said that it was purely indicative of the type of events which take place on the field. He had not seen a risk assessment for a 2007 Fun Day event. He has no evidence that a Fun Day occurred in 2007. He has photographs of Fun Days, but does not know when the Fun Days shown took place. He was referred to the Dawn Chorus risk assessment for a 2009 event. He said that he was able to say that the Dawn Chorus was an ongoing event. He is confident that there was a Dawn Chorus walk in 2007.

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<sup>48</sup> O101

- 5.110. The list of events came from a sheet he was given by a colleague, the University's Community Manager, Mr Walker. He asked for a list of events which had occurred with the involvement of the University. He thinks that Mr Walker obtained the list from Beverley Rhodes at the City Council. Mr Durham does not know how long Mr Walker has been employed by the University.
- 5.111. Mr Durham said that the flooding was quite extensive from what he had read and from the photographs he had seen. He was asked whether when the temporary measure was in place the flooding was solved. He said that the water problem started to subside when the trench was dug. He thought that was in 1996, and that the final repairs were carried out in 1998.
- 5.112. Mr Durham was asked about his statement that the tennis courts were protected by a secure fence for a period up to 2005. He agreed that he could see a path being made across the tennis courts in the aerial photographs at A35 and A36 which date from 1999. He also agreed that the fencing had been damaged by trees and bushes growing around the perimeter of the courts, and said that it had been further damaged recently by the University cutting back those trees and bushes.
- 5.113. Mr Durham was asked about his statement that area C was predominantly used for sport and on the application date was laid out as an American Football pitch. It was put to him that that was not correct. He did not agree. He was referred to the University's objection statement at paragraph 3.12<sup>49</sup> where it was stated that an area was overgrown and not presently suitable for sporting purposes and was left as a wild meadow. He was referred to A23I. He said that at the time his statement was written it was laid out as an American Football pitch, but said that it was correct that there were periods when the University did not use it. He was asked whether his statement that it was used as an American Football pitch at the application date was incorrect. He accepted that it might be wrong. It was used as an American Football pitch when he wrote his statement, but it might not have been at the date of the objection statement. It is not correct to say that field C was inaccessible as at the date of the objection. It must have been accessible. It certainly was not so overgrown that it stopped people going on it.
- 5.114. There was no re-examination.

**Mr Joseph Ian Willgoose**  
University of Derby

- 5.115. Mr Willgoose provided an undated unsigned written statement<sup>50</sup> which he read to the inquiry. Mr Willgoose stated that he had read Mr Durham's statement and confirmed that Mr Durham had presented a true and accurate statement on behalf of the University.

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<sup>49</sup> O4  
<sup>50</sup> O20

- 5.116. In 1987 Mr Willgoose was employed by the then Derbyshire College of Higher Education as Deputy Estates Manager. The University was formed in 1992. Mr Willgoose's career has developed and he is currently employed by the University as its Director of Estates. His post carries a place on the University's Corporate Management Team. The departments he manages within Estates include Estates Development Strategy and Planning, Building and Grounds Maintenance, Transport and Security.
- 5.117. Mr Willgoose stated that the University, which was awarded University status in 1992, had experienced year-on-year growth in student numbers. The student numbers had risen from about 3500 in 1990 to about 18000 by 2005. The University's estates portfolio had to develop in line with the increased demand. As a result, by 2002, the University occupied some 110,000 square metres gross of academic space, located on 11 sites totalling 171 acres, including the 21.79 acre Sturgess site which had been purchased from Derbyshire County Council in 1993. There was duplication of core facilities and inefficient running costs, and as a result, in October 2002, the University developed an Estates Strategy for the period 2003-2008, the core thrust of which was to consolidate the University's estates portfolio into one area, the "University District" located to the north west of Derby centre. The plan identified the disposal of the Mickleover campus, which was formerly a sports and recreation college, and which housed most of the University's sports facilities. It was therefore a key requirement of the plan that the Sturgess site should be retained for use as a replacement recreation, leisure and field sports facility. The University has made various planning applications in respect of the site: an application for construction of a road and bridge over Markeaton Brook, granted in March 1996; an application for outline permission for an artificial turf area, floodlights, two-storey pavilion and associated parking, which was granted with conditions in May 1997; an application for permission of temporary buildings for changing facilities and associated parking, which was granted; an application for permission to use two temporary containers as changing facilities, which was refused; and, in 2005, an application for permission for temporary site accommodation to support the development of the University's new site on Markeaton Street. The University is now working on the Estates Strategy 2007-2012, after up-dating from the Estates Strategy 2005-2008. The development of the Sturgess site for use as a sports facility remains a core delivery item, required in order to ensure that the University fulfils its Sports Development strategy, which brands the University as "Serious about Sport".
- 5.118. Since purchasing the land in 1993, the University has granted access to the public either for access across the site to Markeaton Park, or for walking around the perimeter of the site for personal pleasure, and for a number of organised public events, including Walkabout lunch, Dawn Chorus, and free breakfast at the University's main site, Bat walks, and many Wild and Fun days. Those activities take place with the consent of the University. Mr Willgoose referred to a bundle of emails, a list of events for 2007, and a series of risk assessments and photographs at O118-O136. In addition to sport, the students carry out brook cleaning days, and entertain school parties on nature trips around the site. Mr Willgoose stated that the University's security locks

off all gates to the site between 23:00 and 06:00 or thereabouts, and over any formal University closure periods (Christmas), in line with the opening and closing of the University's other academic sites.

- 5.119. Mr Willgoose said that the University, since it purchased the application land in 1993, had neither looked at or identified it for use for anything other than leisure recreation and sport, and as a proposed link route for use by a single dedicated controlled bus transfer service and cycle route between the sites in the Derby Campus. He said that in his opinion the University had been very open and honest in communicating its intentions, and pointed to the publication of a sketch plan in the Derby Evening Telegraph published on 29<sup>th</sup> September 2004<sup>51</sup>. Senior members of the University, including Mr Willgoose, meet on a regular basis with officers of the City Council and members of the Cabinet Committee with responsibility for Regeneration and Community to discuss the University's development plans, including its plans for the Sturgess site. The University has also, on three separate occasions, presented its development strategy to the full City Council cabinet Committee. At no time during these meetings or any other public communication has the site been referred to as a potential village green. The University never considered that it had that status. No-one had ever endeavoured to stop the University's use of the site for sport or other activities, by the assertion that the land is a village green.
- 5.120. The site is maintained in line with the University's Management Plans, including the University's Environmental and Tree Management Plan. A copy of a Management Plan for 2009-2114 relating to the Sturgess Fields Nature Area was included in the Objector's bundle at O26ff.
- 5.121. Mr Willgoose stated that the site is subject to continual vandalism, misuse and criminal damage, in the form of fires to trees and fallen wood, BMX biking both through the woodland and over purpose dug tracks over the fields, and continual damage to the perimeter fencing and removal of signs. In 2006 old paint was disposed of in the Brook watercourse, resulting in a clean-up charge to the University of about £12,000. The land had been acknowledged by the police as an area for drugs. Mr Willgoose said that the University works with the police to try to eliminate the serious issues, but absorbs the impact of the other issues via increased maintenance, organised litter picking events, and working in partnership with other interested parties, such as the Friends of Markeaton Brook.
- 5.122. Despite the lack of any changing facilities at the site, it is currently used for football, rugby and American football matches, and is maintained to the standard necessary to support this use. The University also ensures that there are well-maintained designated cut pathways across and around the site for users. Mr Willgoose said that should the site be registered as a village green, resulting in a right for all to cross the land at will, then, as the level of sport the University teams are involved in requires a high standard of maintenance and guarantee of no interruptions and certainty of delivery, the University would

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<sup>51</sup> O227



have no alternative but to withdraw from the site, and would withdraw its commitment to maintain the area. Mr Willgoose said that the University has no hidden agenda over the site: it requires the land for use by its own students, local schools, scout groups (who have been given permission to hold open fun day events on the land) and wider community groups with the granted permission of the University. The University is committed to reinstating the wooden footbridge over the brook, at its own cost, which was washed away in a flood, although, technically, it is the responsibility of the City Council, to ensure a safe permissive pathway over the site by establishing the former Markeaton Walk for members of the general community. The University is also committed to the Breathing Spaces application made in partnership with the Friends of Markeaton Brook, and supported by the local Councillor, a copy of which is at O79ff. Mr Willgoose said that the site would remain accessible to the general public for the vast majority of the time via permissive designated cut and maintained walkways. In his opinion the University is the best custodian for the site. He asked me to reject the application.

- 5.123. In oral evidence in chief Mr Willgoose said that he had worked for Derbyshire County Council in its property services division between 1983 and 1987. The head of the division was Gerald Tommy. When he moved to the Derbyshire College of Further Education in 1987, he had a telephone call from Mr Tommy informing him that the Sturgess School site was potentially available. Mr Willgoose visited the site in June 1988 with Mr Norman to have a look at the property to see whether it might be suitable for student accommodation. The memorandum at O19/16 relates to that proposal. Mr Easingwood spoke to people at the County Council, and the note records that the officers' view was that the buildings had "had it" and were probably only fit for demolition, but that the county was likely to want to redevelop it if the buildings were developed.
- 5.124. Mr Willgoose said that the buildings were predominantly single storey. He was aware it had been used for painting and decorating: he was aware of that through his employment with the County Council. Looking at the building they thought it was suitable for conversion for accommodation. The building was not dilapidated in June 1988, although he thought that definitely by early 1989 it was in a poor state of repair. He said that such buildings attract children, and he thought that its falling in to disrepair suited the County Council, as they wished to demolish it.
- 5.125. Mr Willgoose was asked what his experience of demolition was. He has a BSc in Construction, having done an ONC and an HND. His role has been to develop the University's estate, and the University has demolished many buildings. Mr Willgoose was referred to the plan of the footprint of the School at O25. He was asked how he thought that the demolition process would have worked in practice. He had undertaken similar work for the County Council. He said the Council would have selected a contractor from an approved list, to ensure that they had public indemnity insurance, and conformed with health and safety requirements. The job was really dismantlement, rather than demolition: you demolish a building in the same way as you build it. You need large plant and equipment, and need a working area for that, and also a

working area for the materials coming off, so that you can load it onto lorries and take it away. You would establish a perimeter fence around the whole site. He thought that it was unlikely that they would have put a secondary fence around the buildings, and more likely that they would have used the existing perimeter fencing around zone B, making sure that any breaches were made good.

- 5.126. Mr Willgoose was asked about the closure of access 6 in 1995. He was asked to explain the context in which the letters at O19/1 and O19/2 were written. O19/1 was a letter from Councillor Robert Laxton of Derby City Council to Mr Hall, the Commercial Director of the University dated 1<sup>st</sup> June 1995. Mr Laxton wrote:

“Now that the University are in ownership of the old Rykneld school site and associated land, I write to ask whether you could make arrangements to have the public footpath sign removed from the Watson Street access into this area. My understanding is that there has never been a legal right of way across this land, but now it is in the ownership of the University there is no clear route through onto Markeaton Street.

I have received a number of complaints from people living in the Watson Street area that the sign appears to be causing some confusion and I think on balance it would be better if the sign were to be removed. Hopefully this will stop the public getting on to your land to exercise their dogs, etc.”

- 5.127. The reply at O19/2 was written by Mr Norman, the Estates Manager. He wrote:

“I refer to your letter addressed to Michael Hall dated 1 June 1995 regarding the sign at Watson Street access to the old Rykneld school site and would advise that arrangements have now been made for the sign to be removed, as you have suggested.”

- 5.128. Mr Willgoose said that at this time he was the Building Services Manager, a post which was on a level with Mr Norman’s post, reporting directly to Mr Hall, the Commercial Director. He said that some people refer to Sturgess School as the old Rykneld School. There was a signpost next to the Scout Hut entrance (the signpost seen on the site visit), which at the time was pointing in both directions. The confusion was being caused because the bridge to cross the brook was washed away, Mr Willgoose thought in the winter of 1993/94. Mr Willgoose’s team were asked to remove the sign. He understands that the finger pointing to the west was taken off. Mr Willgoose gave the instruction for the job to be done.

- 5.129. Mr Willgoose knew of the incident in 1995 in relation to access 6. Mr Willgoose, Mr Norman and Mr Hall met on a weekly basis. He was aware of what was happening from those meetings. When the University bought the site, it was well aware that the City Council had an ambition to put a footpath across it. That was part of the reason for employing Grimley JR Eve. Also the

County Council had initially sought a purchase price of £1.365m, and the University bought it for considerably less. The County Council was suggesting it would be re-developable, and therefore had more value. The University employed Grimley JR Eve to advise on this point. The University's intention was not to develop, but to ensure that the price was reasonable. Mr Willgoose stated that the footpath was never completed along its intended route south to Markeaton Street. He accepted that it was possible to come from the bridge out of the site to the north along the path to the school. In 1993/94 the bridge was lost. The University had to complete on its purchase prior to 31<sup>st</sup> December 1993 because at that date the unitary authority came into existence. At that time the University was in discussion with the City Council about the proposed route out to Markeaton Street, and the University was content with the proposed route. The bridge was lost late 1993 or early 1994, and as a result the people using the path had no alternative but to walk further down Field C and cross further down, where it was easier to cross. At that point the University got more aggressive. Mr Norman recommended that it was necessary to secure and take control, and Mr Hall agreed. Mr Willgoose was present at that meeting. As a result the University put up the gate next to the Scout Hut and locked it. Mr Willgoose's department obtained the quotations for Mr Norman, and it was erected by contractors. He thought that this was in around mid July 1995, and he thought that the suggestion that it was on or around 10<sup>th</sup> July 1995 was correct.

- 5.130. Mr Willgoose's involvement then continued in the following way: he was away on annual leave during the last week of July and first week of August. When he returned Mr Hall requested to see him, and told him that Mr Norman had taken early retirement and had left the University. Mr Willgoose was asked to take over both departments and run them as Head of Estates Management. Just after his return from holiday, the University received a letter from Councillor Sara Bolton, the letter to Professor Waterhouse, the Vice-Chancellor, at 019/12. Mr Willgoose said that he thought that the reason Ms Bolton wrote to Professor Waterhouse was because Ms Bolton and Mr Hall had a very poor working relationship. Mr Willgoose was asked by Professor Waterhouse to contact Ms Bolton and resolve the situation, because Professor Waterhouse was concerned that things had gone too far. Mr Willgoose therefore as a first step instructed security to open the gate. That would have been after Sarah Boulton's 10<sup>th</sup> August 1995 letter, more or less as soon as he came back from holiday. Mr Willgoose told Ms Boulton that he had instructed the gate to be unlocked. He contacted the planning officer at the City Council and arranged a site meeting to look at the gates. They considered a number of alternatives: applying for permission, reducing the height and taking them down. Mr Willgoose decided that the easiest thing was to take the fencing down: he had picked up a number of issues and he also had the National Rivers Authority on his back in relation to the damage done to the brook. The fencing was removed, and no gate was put there again until 2007.
- 5.131. At the Markeaton Street gate, in 1994 that section of the site, to be fair to Mr Norman, was subject to continual flooding, because the sluice, (which is not the responsibility of the University, but is on City Council land), was blocked and was not doing its work. There is a lot of correspondence between the

University and City Council, including correspondence with Geoffrey Collett and Eversheds whom the University had instructed in relation to the matter. Mr Norman, in an attempt to resolve the problem, hired a JCB and cut a large trench between the Mill Dam pond and the Mill Dam as it carries on to Britannia Mill, in effect making a continuous water flow. This eased the flooding situation. The final works were undertaken in around 1998, when the City Council repaired the overflow and sluice, and jetted out the pipes which run into the Mackworth Brook tributary. There was still some evidence of flooding up until about 2000, but there had been no further problems since that time. Whilst the works were undertaken to dig out the trench, which Mr Willgoose said would have taken a maximum of 3 days, the gates were secured, and Heras fencing was put up on the northern side. For the rest of the time you could get across Area B with Wellingtons, but not with shoes or walking boots. The perimeter of the field was useable, but Mr Willgoose said that a tree on the north west side of field B had died as a result of the flooding.

- 5.132. Mr Willgoose was asked what the position was after 1998. He said that the foundations of the building are just under the surface, and there are manhole covers, which the University has filled, but which continue to fall in. About 2 years ago, they decided to cut designated pathways for people using the land, to give them a route which the University thought was safe to follow.
- 5.133. Mr Willgoose was asked to look at O19/25, a memorandum dated 24<sup>th</sup> July 2000 from Jo Seabrook to Mr Willgoose, copied to Mr Lowe. Mr Willgoose was asked whether since the aggressive stance taken in 1995 when the University put the fence up, the University's attitude had changed. Mr Willgoose said that whilst the land was under Mr Willgoose's control, the University was happy to allow access to the public. They were looking at putting a stile in at the Markeaton Street entrance, in the gap to the left of the single gate, on the City Council's boundary. In the end the University opened the wicket gate, and left it open. In 2000 the instruction to security was just to shut it at Christmas, and no more. Since the new fences have gone up they are locked around 22:00 and opened at 06:00. It could be 00:00 to 05:00, because Mr Willgoose had had a conversation with one Councillor who said he liked to walk through on his way home from the pub and Mr Willgoose had said shut it at 00:00, he was not really bothered.
- 5.134. Finally, Mr Willgoose was given the opportunity to respond to the letter written by Mr Ken Clarke, the Chairman of Friends of Markeaton Brook. He said that the University has continued meetings with the Friends in the absence of Mr Clarke, who has not attended since he walked out of one of the meetings.
- 5.135. In cross-examination Mr Willgoose confirmed that this was his first experience of a village green inquiry. He was asked whether he had been surprised about the level of detail into which the inquiry went in relation to boundaries and accesses. He said he had no comment either way. He was referred to paragraph 2 of his statement where he said he agreed with Mr Durham's statement. It was put to him that one of the important issues before the inquiry related to access 6. He was referred to Mr Durham's statement at page 15 of the bundle,

where Mr Durham said “In 1994/95 the University erected fencing to restrict access at this point of the walkway adjacent to the Scout Hut, but unfortunately some six months later, as it was over two metres in height it was brought to the University’s attention that it required planning permission. To avoid any breach in Planning Law the University removed the fence”. Mr Willgoose agreed that that was what he was signing up to. He agreed that it was put to the applicant’s witnesses that the access had been blocked for a number of months. It was put to him that that version did not accord with his evidence. He said that the University opened the gate within a short period of time, although it was some time before the fence came down. It was locked about 10<sup>th</sup> July 1995, and opened again when he came back from holiday, to discover the problem.

- 5.136. Mr Willgoose was asked whether it was right that the Markeaton Brook path was put in sometime at the beginning of 1993. He agreed that that was correct. He agreed that it appeared that the path was put in in the period immediately before the University’s purchase. Mr Willgoose thinks the bridge was washed away in the winter of 1993/94. When he went to look at the site after the purchase, he saw evidence of the bridge’s existence, remnants of timber, but it had been washed away. The University’s intention at that time was to open the path. He said that on the site visit there was no evidence of any structure retaining the bridge, and he therefore thought that the bridge was timber, and low in its installation, and the watercourse took it away, in other words it was not adequate for the purpose which it was to serve.
- 5.137. Mr Willgoose was asked about the flooding in 1995: it was not seasonal flooding, it was related to the blocking of the culvert. It was at its worst in 1995, although it started in 1994. The temporary works were building a 3 metre wide trench joining the Mill pond to the Mill pond dam. The watercourse was then continuous, but when it went down to Britannia Mill, there was a pen-stock, which Mr Norman ordered to be lifted. Unfortunately in lifting the pen-stock, it was broken, and as a result, there was a lot of flooding. The University received a fine for this. To repair the pen-stock the University put in place piled metal sheets. The effect of that was that there was no control over the water-levels at the pen-stock, and therefore the water-levels rose. The City Council also had to repair the weir to the Mill Dam itself as well. Until those two matters were sorted out, there was no control over the water-levels. Those problems were related to the flow of water in the stream as well: so it ebbed and flowed according to the rainfall. He was asked whether it was the case that whether it was difficult to walk on field B would depend on the state of the water in the Mill Dam. Mr Willgoose said that field B remained very flooded: it got worse when it rained but the flooding was still there if it did not rain, until the problem was solved. The trench Mr Willgoose thought from memory was there quite a while, perhaps six months. He agreed that it was ultimately found that the University should not have dug the trench: the main damage was the damage to the penstock, but the trench was a contributory factor.
- 5.138. Mr Willgoose agreed that he had said that in 2000 the University was happy with the public having access to the site. It was put to him that that could have

been just a matter of letting the existing situation continue, so that people could have continued to go around the side of the wicket gate. He agreed that they could have done so until 2006. He was asked whether in fact the wicket gate was left unlocked. He said that his recollection of that is limited. He said that his understanding from the correspondence was that the gate was locked, but there was a large enough gap at the side, so there was no need to open the gate. That was not necessary until the new gates were put up, which are locked. Mr Willgoose does not know whether or not Mr Durham gave an instruction, as he had said, in 2003/04, that the gate should be locked overnight.

- 5.139. Mr Willgoose said that the hours that the gates are locked vary. 22:00 is a typical time that the University does a lock-down. It depends on what the security officer is doing at the time: he also does the Britannia Mill and the Markeaton campus. The opening hours are definitely not shorter than 06:00 to 22:00.
- 5.140. There was no re-examination.

#### **Other witness evidence on behalf of the Objector**

- 5.141. The Objector did not provide a witness statement for any other witnesses.
- 5.142. O203 was an email from Neville Wells, Head of Campus Security, dated 23<sup>rd</sup> February 2010. Mr Wells did not attend the Inquiry to give evidence and the information in his email was not subject to cross-examination, but nevertheless it seems to me that his email was effectively a written witness statement and should be given some weight. Mr Wells stated that there had been ongoing issues with security incidents on the University of Derby Sturges fields over the 9 years that he had been responsible for security for the University. Mr Wells stated that in most instances a rapid security presence and intervention had proved effective in resolving the incident. He gave the examples of groups of youths on the site, mountain bikers and BMX riders loitering on or near the sites, and mini motorbikes being brought to the site in the back of vans. In many instances a quiet word and a polite request to leave had been all that was needed to prevent damage or antisocial behaviour occurring on the University land. He gave details of the four specific instances of when the police had been called in the previous two years. The first incident described was on 16<sup>th</sup> September 2008, after the end of the relevant period. The incidents were vagrants attempting to camp on the site, mini motorbikes found using the playing field, pouches of Crystal Meths found and an abandoned cycle reported and removed.

#### **Documentary evidence provided by the Objector**

- 5.143. I have re-read all the documents in the Objector's bundle. Some of the documents have already been referred to in the sections dealing with the oral evidence given on behalf of the Applicant and the Objector. I here summarise only those documents which are most relevant and which have not already been mentioned.

5.144. A large number of documents were produced by the Objector during the course of the inquiry, rather than in its inquiry bundle, as directed. The Applicant made no objection to the late production of these documents, and I allowed them to be adduced.

5.145. O19/16 was an internal memorandum from Mr Norman, Estates Manager of the then Derbyshire College of Higher Education, to Mr Easingwood, Deputy Director (Resources) dated 7<sup>th</sup> June 1988. Mr Norman stated that he had again looked at Sturgess School as an alternative for student accommodation. It is clear from his memorandum that, as at that date the buildings were still standing. Mr Easingwood's handwritten response states that the view of the County Council's officers was that the buildings had "had it" and were probably only fit for demolition.

5.146. O/77 was an article from the Derby Trader published on 17<sup>th</sup> May 1989. The article referred to the site of the old Sturgess School "now being demolished" and having referred to discussions for the potential future of the site, and to plans for development of Markeaton Park, continued:

"In the meantime, the demolition of the old Sturgess School continues. Originally the county intended to keep the old buildings – previously an annexe to Woodlands School – as a special school for troubled children. That idea had been scrapped and the buildings, erected in the 1950s, are now coming down. County officers have pointed out that other than moving a playing field of Markeaton Primary nearer to the old Sturgess site, there is no specific plan in progress".

5.147. The article was accompanied by two photographs: one showing the school buildings, apparently complete, and the other showing the school buildings with, in the foreground, a sign reading "DEMOLITION IN PROGRESS".

5.148. O/78 was an article from the 19<sup>th</sup> July 1989 edition of an unnamed local newspaper, which I assume is the article in the Derby Evening Telegraph referred to by Mr Browne during the course of his evidence. The article was headed by a photograph of the Sturgess School buildings in the process of demolition and read:

"IT'S not a bomb site – it's a school. And though vandals have been in action in the past, this time it's the official demolition men who have been at work. The fast-disappearing Sturgess School on Derby's Queensway has prompted a number of passing motorists on the ring road to ask what is happening. The answer is: No-one yet knows. City planner would like to see a leisure complex with swimming pool and sports hall on the 20-acre site. But owners, Derbyshire County Council, are said to have earmarked it for private house development. So the message is: WATCH THIS SPACE!"

5.149. During the course of the Inquiry the Objector provided a complete copy of a report dated July 1993 written by Grimley JR Eve for the University before the University purchased the application land. The report was written in response

to instructions contained in a letter dated 8<sup>th</sup> June 1993 written by Mr Hall, which was not provided. It was not therefore possible to determine whether some of the factual statements made in the report were taken from that letter, or whether they resulted from the independent inquiries of the author of the report. However, the report does summarise the factual position as it would have been known to the University in July 1993, following receipt of the report.

- 5.150. The Objector also provided a complete copy of the transfer dated 22<sup>nd</sup> December 1993 by which the University acquired the application land from Derbyshire County Council. The plan annexed to the 1993 Transfer of the application land to the University shows the footpath from Kedleston Road to the old Sturgess School site, over a footbridge, and also a footbridge marked over Markeaton Brook from Field A. There is no footbridge shown at point 9. The hardstanding area of the school is shown, together with a roadway to the hardstanding. The plan also shows a pavilion building in Field A.
- 5.151. O73 was an extract from the contract for the sale of the application land to the University. It provided (as relevant):
- “14. The Seller reserves the right for the continued use by the Markeaton Primary School of
- a) the football pitch on the property until such time as a suitable alternative pitch is available subject to a maximum of 35 games per year (season) and with the school making and agreed contribution towards the maintenance of the pitch
- b) the property (with the exception of any playing pitches thereon) for the purpose of nature studies.
16. The Seller reserved the right for the continued use of the field gate at point A on the plan during the continuance of the Markeaton Primary School’s user of the football pitch on the property to facilitate pitch maintenance.”
- 5.152. O/74 was a draft licence allowing Markeaton Primary School to use the property as defined by a plan (which was not provided).
- 5.153. Mr Norman wrote to Grimley JR Eve by letter dated 4<sup>th</sup> March 1994, with the result of his further researches into the former Sturgess School site. He stated that his information was that the Sturgess School was first used in 1951.
- 5.154. O161 was a letter dated 5<sup>th</sup> July 1995 from Mr Collett of Geoffrey Collett Associates, consulting civil, structural and highway engineers, to Mr Norman. Mr Collett stated that he had inspected the footbridge over the Markeaton Brook which carries the path leading from Kedleston Road the previous day, and was able to confirm that it was in a state of partial collapse and was structurally unstable and dangerous. Mr Collett recommended temporary propping of the bridge, and suggested that it would be more cost effective for



the future to provide a new deck supported on concrete piers than to try to repair or replace the numerous items of steelwork which had corroded.

- 5.155. O19/6-12 was correspondence in relation to the erection of a fence and gate by the University at Access 6 in July 1995.
- 5.156. A Ms Panter of 5 Brookside Close wrote in a letter addressed to Mr Hall and received by the University on 12<sup>th</sup> July 1995 that on her return from work the previous day she and her neighbours had found the access to the footpath to the land to the rear of the Scout Hut off Watson Street, laid by the City Council, had been blocked off. This must be a reference to access 6. She stated that the City Council had told them that the pathway would continue to Queensway to give easier access to Markeaton Park. She objected to the fact that the walks around the brook which they had enjoyed for many years (with no objection from any person) had been taken from them. She asked that the University should open the footpath up again and continue it through, for the public's enjoyment, to Queensway.
- 5.157. Mr Norman, the University's Estates Manager, responded by letter dated 17<sup>th</sup> July 1995. He stated that the Sturgess School site had been bought by the University for use by students for sporting facilities and that she would notice that a sign had now been erected indicating this. The University proposed to use the area for sporting facilities with effect from 1<sup>st</sup> October 1995. Mr Norman stated that, due to the number of people in the vicinity who walk their dogs in the area, it had been necessary to take control of it, to prevent dogs from fouling the site. That was the reason why the fence mentioned by Ms Panter had been erected. Mr Norman stated that there was no right of way across the site.
- 5.158. Ms Panter responded by letter dated 20<sup>th</sup> July 1995. She asked whether the public would be invited to use the sporting facilities. She agreed with Mr Norman's comments regarding people walking their dogs over the land, and said that this practice was extremely unhygienic, as, in the great majority of cases the dogs were only taken there for one purpose, although that did not refer to everyone. She noted Mr Norman's comments regarding the public right of way across the land, but stated that the footpath running alongside the brook near to Watson Street and thence to Mill Dam had been laid by the Council some time ago, and said that Derbyshire County Council was of the opinion that the public had a right to walk over it. The County Council had told Ms Panter and her neighbours that the footpath would be carried on to Queensway, and there had been an article in the Derby Evening Telegraph confirming this. Ms Panter asked whether there was a covenant in the transfer to the University requiring the University to carry out this obligation.
- 5.159. Mr Norman replied by letter dated 24<sup>th</sup> July 1995. He agreed that people walking dogs across the site did not refer to everyone, but said that the amount of faeces on the site generally was excessive and it was very difficult to take control of the site without securing the boundaries. He stated that the University's solicitors had advised him that there was no covenant requiring the University to honour a right of way, nor to lay footpaths over the site.

- 5.160. O19/10 was a letter dated 19<sup>th</sup> July 1995 from Mrs Tinsley of 176 Mansfield Road. Mrs Tinsley wrote in response to an article in the Derby Evening Telegraph which she said reported that the University had fenced off some land and were now in dispute with the council and local inhabitants. Mrs Tinsley said that the event had no effect on her personally, but she wished to challenge the reason given by the University's spokesperson for the University's actions "People... endlessly walking their dogs across there which foul the grass... people playing sport and catching diseases as a result". Mrs Tinsley stated that the only disease dog excrement may contain in Toxocaria, which is extremely rare and not as damaging as the media would like people to think. She was appalled that the University was using this media-led misleading inaccurate information for its own ends, and said that such actions and statements perpetuate the myth, and, she feared, would eventually result in the banning of dogs in public places.
- 5.161. Mr Norman replied to Mrs Tinsley by letter dated 25<sup>th</sup> July 1995. He enclosed information issued by the County Council on Toxocariasis. He wrote that the Sturgess School site, since being purchased by the University, is not a public place, but an area to be utilised for sporting facilities as an extension of the University.
- 5.162. O19/12 was a letter from Councillor Sara Bolton written to Mr Waterhouse, the Chancellor of the University, stating that she had been inundated with complaints in the last few months in relation to the former Sturgess School sites off Watson Street from nearby residents. One of the matters of which she complained was the erection by the University's staff which did not have planning permission and which was not discussed with the Scout group to whose property the fence was connected. Mr Hall, the Vice-Chancellor, responded by letter dated 15<sup>th</sup> August 1995<sup>52</sup>, offering a meeting to discuss her concerns. Mr Hall wrote a further letter dated 30<sup>th</sup> August 1995, after he had seen Councillor Bolton at a "Millennium" meeting, noting that she had said that she did not feel it appropriate to arrange a meeting and asking for a list of the issues which she felt should be addressed.
- 5.163. O19/33 was an invoice dated 31<sup>st</sup> October 1999 in respect of the works to the access bridge at Access 4.
- 5.164. O19/23 was a letter dated 21<sup>st</sup> July 2000 from Mr Frearson, the Land Drainage Officer of Derby City Council to Mr Willgoose, following a joint site visit undertaken by Mr Willgoose and Mr Frearson. Mr Frearson wrote:
- "Out of interest the access currently used by the public onto the site is through where a section of the fence has been removed. The wicket gate, along with the main entrance gate remains locked."
- 5.165. O19/25 was an internal memorandum dated 24<sup>th</sup> July 2000 from Ms Seabrook, the University's Senior Administrator/Environmental Officer to Mr Willgoose

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<sup>52</sup> O19/15

relating to the application land. Ms Seabrook had been on a site visit with Mr Lowe, the Grounds Supervisor and two others and reported on the feasibility of cleaning the site. She continued:

“We also have the issue of the broken piece of fence near the mill ponds off Markeaton Street. According to Allan we have on numerous occasions fixed this fence only to find on our return visits that it has been vandalised. With no running security on the site this poses a problem with regard to prevention of further vandalism. You are well aware of the public usage of the site and as a compromise I would suggest the following solution. Why not build a wooden style [sic] in where we currently have a gap in the fence. This would mean that access to the site is limited but with regards to the public, staff and students access can be gained without being forced.

Having walked the site there are many points of access that we have no real control over and I do not think it is in our interest to try and prevent access to this area without the appropriate security to maintain it. By keeping access to a minimum we are surely showing compromise and hopefully discouraging further vandalism of the gate.”

- 5.166. O19/26 was a large scale aerial photograph showing the construction compound. There is a line visible around all four sides of the hardstanding area, suggesting that the area was fenced. The fencing does not appear to extend along the vehicular access. There is no fencing visible which would block access to the worn paths which can be seen in the photograph.
- 5.167. O19/28 and 30 were two emails dated 17<sup>th</sup> February 2006 from Mr Pauli of Derby City Council to Mr Durham and an email from Mr Durham to Mr Pauli. Mr Pauli’s first email set out work to be done by the City Council, including re-fencing of the City Council’s fence line in the vicinity of the Mill Dam pond. New fencing was to be erected from the corner of the existing fence to the top of the culvert outlet, extending 1.8 metres into the culvert to prevent access from the A38. This seems to me to relate to the culvert at the northern end of the Mill Dam Pond. A section of the fencing was to be replaced using some of the existing fencing, part of which was to be removed and replaced with wooden marker posts, and part of which was to be removed and replaced with 1.8 metre Palisade fencing. Mr Durham replied “There was a discussion regarding barriers to the stream across our land to prevent trespassers “bridging” across and effecting the flows. Is this covered?” Mr Pauli responded that he had asked for the fence at the top of the pond near the A38 to run from the corner to the head wall of the spillway and jut out 3 feet or so to preclude access onto the University’s land as much as possible, and had asked for a section of the old fence to replace the section with 3 spikes bent, again near the A38, to stop people squeezing through. The banks by the ditch to the south of the pond were to be made up with a wooden retaining wall and earth to stop people crossing there or to make it more difficult at least. He commented that he suspected that people would merely find an easier place to cross, but at least he could make it difficult for them.

- 5.168. O/79 was an application for a grant under the Breathing Places grants programme. The application was dated 7<sup>th</sup> January 2008 and was made by the Friends of Markeaton Brook. I was asked to note that in question 4, the Friends stated that there was currently free visitor access to the Sturgess Fields site, with the owners consent. Although I accept the accuracy of this statement as at the date it was written, it did not assist me in forming a judgment as to what the position was during the relevant period.
- 5.169. The documents at O/117-143 mainly comprise emails seeking permission from the University from various groups to use the land for various specific activities or events. All of the emails post-date the end of the relevant period, but some refer to events having taken place in previous years.
- 5.170. Mr Willgoose's email in relation to Derby City Council's application for permission to access the site for a day as part of the Wild Derby Summer Scheme<sup>53</sup> suggests that Derby City Council was given permission to use the land in connection with the same event for a few years prior to 2008. Derby City Council held a Dawn Chorus event on 10<sup>th</sup> May 2009<sup>54</sup> and a Wild and Fun Day on the site on 20<sup>th</sup> June 2009<sup>55</sup>.
- 5.171. The Friends of Markeaton Brook were given "renewed" permission in 2008 to hold a Go Wild nature walk through the application land<sup>56</sup>, following a walk on 30<sup>th</sup> June 2007<sup>57</sup>. The Friends were also given permission to hold their Wild Derby event on the land on or around 16<sup>th</sup> August 2007. The facilities provided for the event included a portaloo<sup>58</sup>. The tone of the emails concerning the 30<sup>th</sup> June 2007 walk and the information provided and sought<sup>59</sup> suggests that the 2007 walk was the first walk for which permission had been sought by the Friends. O124 appears to be the Friends list of events for 2007. It is possible that the 10<sup>th</sup> June 2007 event also required access to the site, but there are no emails requesting permission for this event.
- 5.172. The University itself held an Environment Day on an unknown date in 2007, but before 14<sup>th</sup> May 2007, on the application site<sup>60</sup>.
- 5.173. The photographs provided of these events did not suggest that the whole of the application site was taken over by the events. The participants appeared to be occupying only a small part of the site.
- 5.174. O137-143 contained some evidence relating to use by the University of the land in connection with its courses. The assessment referred to took place after the end of the relevant period, and was described by its organiser as "totally

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<sup>53</sup> O117

<sup>54</sup> O129

<sup>55</sup> O126

<sup>56</sup> O118

<sup>57</sup> O120

<sup>58</sup> O123

<sup>59</sup> O120 and O121

<sup>60</sup> O119 and O120

new” in March 2009<sup>61</sup>. Mr Rowe, the University’s Programme Leader for Conservation Biology wrote of that occasion:

“Moreover, it was so nice to see Sturgess Fields being heavily used this morning. Apart from the “group” of dog walkers there were three other groups also on site! Two university groups were present: the Ecology students from Kedleston Road and some Surveying students from Markeaton Street. There was also the School group out Pond Dipping with Ros and Tracey. Lots of different activities on site at the same time but plenty of space for all! I hope this was a vision of the future.”

- 5.175. O144-147 were some undated photographs of football being played on Field A. O148 and 149 were photographs dated in the bottom right hand corner 2009 of American football being played on Field C.

*Photographs of the land provided by the Objector*

- 5.176. The photographs of the land behind divider 6, described in the index to the Objector’s bundle as “Miscellaneous photographs”, behind divider 7, described in the index as “Photographs showing vandalism and damage” and behind divider 8, described as “Documents evidencing control measures taken by the Objector” were largely undated. By themselves, without dates, they did not assist me a great deal in reaching a decision on any of the issues before the inquiry. I will here refer to the most helpful, insofar as they have not already been described in the section dealing with oral evidencel.
- 5.177. O150 showed access 3: a 5 bar gate with a gap between the westernmost gatepost and the beginning of the wooden post and rail fencing to the west. Someone, but I was not told who, had annotated the gap with an arrow and the words “Stile removed”. O154 shows the same section of the boundary fenced with silver palisade fencing, as it was at the time of the Inquiry. O155 was dated 9<sup>th</sup> August 2007, and showed a path, with some chain link fencing to the left hand side of the foreground of the photograph. It was not possible to determine from the photograph where it had been taken. The photograph does not show, as Mr Durham stated in his evidence, fencing which was intact but was cut through in October 2008. O157 shows the gate at access 4 as it was at the time of the Inquiry. O162 shows the gate at access 1 as it was at the time of the Inquiry. O164 shows the gate at access 2 as it was at the time of the Inquiry. O169 showed access 6 before the erection of the gates which were present at the time of the Inquiry, and which are visible on O170. There is no barrier visible between the end of the railings to the footbridge over Markeaton Brook leading to the Scout hut and the application land: it appears that access at that point was open. O171 shows access 11.

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<sup>61</sup> O142

6. **Evaluation of the Objector's witness evidence**

*General comments*

- 6.1. I was surprised that Mr Durham had been chosen as, effectively, the University's lead witness. He had only been employed by the University for a relatively short time within the relevant period. Mr Willgoose had been employed by the University for far longer, and had had much more direct involvement in the matters relevant to the inquiry. There were matters which of which Mr Willgoose had direct knowledge and Mr Durham had no direct knowledge and yet which were dealt with in Mr Durham's statement rather than Mr Willgoose's statement.
- 6.2. There were noticeable gaps in the Objector's evidence: the two witnesses who gave evidence had no direct involvement with the security of the site and, although they were in a position to say what instructions had been given to security staff, they were unable to give evidence as to whether in fact the gates to the site had been locked and if so from what date. It was surprising that none of Allan Lowe, the Grounds Supervisor, Neville Wells, the Head of Campus Services, (both of whom indirectly provided information, Mr Wells in the form of an email<sup>62</sup>, and Mr Lowe in the form of reported information in a memorandum from Jo Seabrook to Mr Willgoose<sup>63</sup> and in the form of reported information in Mr Durham's oral evidence) or Jo Seabrook, Senior Administrator/Environmental Officer, who all appeared to have more direct experience of the site and continue to be employed by the University, were called to give evidence or at least provide a written statement. Mr Durham also related information given to him by Mr Kevin Booker about the network ducting works. He acknowledged in cross-examination that Mr Booker had not given evidence to the inquiry because Mr Durham had not asked him to do so.
- 6.3. Where conversations with other employees of the University who could have given evidence themselves were reported, the information reported in my judgment was potentially unreliable: there was the possibility that the reporting had been inaccurate in addition to the lack of opportunity to test the evidence of fact by cross-examination. I have therefore been unable to place any weight on such reported information.
- 6.4. A large number of documents were produced by the University during the course of the Inquiry, which should have been contained in the Objector's bundle. Other documents which might have been produced were not provided. For instance, the evidence given by the Objector's witnesses as to when the silver palisade fencing was erected around the site and as to when the signs granting limited permission to the public to use the site were erected was extremely vague. There must be, within the University's records, documentary evidence to show when signs were commissioned and erected and when, and when the silver palisade fencing was erected, but it did not appear that these had been consulted in the course of the preparation of the witness statements.

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<sup>62</sup> O203

<sup>63</sup> O19/25

- 6.5. Mr Durham gave a date of 2006/2007 for the erection of the fencing, which, given the relevance of the date to the determination of the relevant period, was surprisingly inaccurate. The Objector's witnesses appeared to accept that the Applicant's case that the fencing was erected in August 2007 was correct, and even had they not done so, I would have preferred that evidence to the Objector's vague dates.
- 6.6. Both Mr Durham's statement and Mr Willgoose's statement were drafted in such a way as to suggest that the events described in the statements had taken place during the whole of the period of the University's ownership (Mr Durham "the uses the University has made of the land since January 1994"; Mr Willgoose "Since purchasing the land back in 1993"), when in fact, the supporting documentary evidence provided by the University suggested that the activities were much more recent, any in many instances had only taken place after the end of the relevant period. The tendency of both witnesses to project back in time information which related to the period after the relevant period for the purposes of the application into the relevant period made it difficult to assess the relevance of the evidence given.
- 6.7. Despite the fact that Mr Durham in oral evidence stated that the activities mentioned in his statement were activities which had taken place in 2007 and were representative of the type of activity which would have taken place in the period before 2007, no documentary evidence was produced to support this evidence. Without doubt, the University must have, within its records, copies of applications for approval for activities within the relevant period which Mr Durham said had ended up on his desk. I infer from the fact that no further documents were provided that there were no such activities within the relevant period. I am satisfied that the vast majority of the events mentioned in both statements as having taken place on the land with the permission of the University had taken place before the end of the relevant period. The only event which appeared on the basis of the evidence provided to have taken place before 2007 was the City Council's Wild Derby Summer scheme, and that had only been taking place during the last few years of the relevant period, whereas the impression given by Mr Willgoose's statement was that all the mentioned events had been happening since 1993. Mr Willgoose's statement that the University had granted access to the public either to gain access to Markeaton Park across the site or for walking around the perimeter of the site related to the notices erected in August 2007. Similarly, Mr Durham's reference to the creation of designated walking routes around the site related in my judgment to the work done with the benefit of the Breathing Places grant, which was not applied for until after the end of the relevant period.

*Evaluation of Mr Willgoose's evidence*

- 6.8. I was disappointed by the lack of detail in Mr Willgoose's written statement. Mr Willgoose has been employed by the University since the beginning of the relevant period, and had had direct involvement in a number of key incidents relating to the land. He was involved in the acquisition of the site: he received the telephone call alerting the Objector to the possibility that it would be for sale and visited it at that time with Mr Norman in order to evaluate its potential. He was directly involved with the decision to erect fencing and a

gate at Access 6 in 1995, and it was his decision to take the fencing and gate down again. These matters should have been dealt with in his written evidence and were not. Mr Willgoose's failure to deal with the 1995 incident in his statement was a serious omission, and confirmed the view I formed from the late production of documents by the University that documents which should have been consulted in preparation of his statement had not been looked for or found until after the Inquiry began.

- 6.9. Mr Willgoose appeared to have had some involvement in the attempts to resolve the flooding experienced from the Mill Dam Pond, and, if no direct involvement, at least direct knowledge as a result of his employment by the University at the relevant time. It would have been much more appropriate for this incident to have been dealt with in his statement, than in Mr Durham's. Instead, Mr Willgoose was left to provide a considerable amount further detail in evidence in chief. This too should have been dealt with in his statement.
- 6.10. Mr Willgoose's statement confirmed that in his opinion Mr Durham's statement set out an accurate factual account, whereas in a number of respects, as Mr Willgoose must have known from his own personal knowledge, Mr Durham's statement was inaccurate. In particular, I was troubled by the fact that Mr Willgoose had effectively agreed with Mr Durham's statement that the gate at Access 6 had been up for some six months before the potential breach of planning law it represented was brought to the University's attention, and that the gate University had thereafter decided to take down the fence, whereas Mr Willgoose's own oral evidence was that the gates had been up for only approximately 5 weeks, and that the planning breach had been raised during the period between the gates being erected and taken down.
- 6.11. In his statement Mr Willgoose said that the University's security locks off all gates to the site overnight and during the Christmas holidays. This statement was also contained from Mr Durham's statement. The impression given by both Mr Durham and Mr Willgoose's statements was that this regime had been in place during at least part of the relevant period, and in the case of Mr Willgoose's statement, as it was contained in a paragraph introduced by the words "Since purchasing the site back in 1993", since the site came into the University's ownership. This, on the basis of the evidence before the inquiry, was not an accurate statement, and moreover was not consistent with Mr Willgoose's own oral evidence in chief.
- 6.12. Mr Willgoose stated in oral evidence that after he took over responsibility for the site, the University was happy to allow access to the public, and he looked at putting in a stile in the gap to the left of the single gate at the Markeaton Street entrance, on the City Council's boundary, but in the end, opened the wicket gate and left it open. He stated that in 2000 the instruction to security was just to lock the wicket gate at Access 1 at Christmas.
- 6.13. Assuming in Mr Willgoose's favour that this was a change in regime, it should have been possible to support the statement that an instruction was given to security to leave the wicket gate open by reference to the University's records, for instance a letter or email giving the instruction, but Mr Willgoose's



evidence on this point was unsupported by any such document. The source of Mr Willgoose's evidence seemed to be the memorandum dated 24<sup>th</sup> July 2000 from Jo Seabrook, produced during the course of the Inquiry, in which Ms Seabrook raised the possibility of building a stile in the fence, and reported Mr Lowe's statement that the University had on numerous occasions fixed the fence near the mill pond off Markeaton Street, a statement which the Objector, through its Counsel, accepting in closing it was unable to prove, because it had been unable to trace any of the documents which such expenditure would have created in its records. Furthermore the suggestion that a new instruction had been given in 2000 was directly contrary to Mr Willgoose's written statement, which, as set out above, sought to give the impression that the gates to the land had been locked overnight and during the Christmas holidays throughout the period of the University's ownership. Mr Willgoose resiled from his evidence that there had been an instruction to leave the wicket gate unlocked in 2000 in cross-examination, saying that his recollection of whether in fact the wicket gate at Access 1 was left unlocked was limited, and that his understanding from the correspondence was that the gate was locked, but there was a large enough gap at the side for there to be no need to open the gate and that remained the position until the new gates were erected in 2007.

- 6.14. I was puzzled by Mr Willgoose's anecdote in relation to the locking of the new fences: he stated that it could be that gates in the new fences were locked between 00:00 and 05:00 rather than around 22:00 and 06:00, as he initially stated in oral evidence (or 23:00 and 06:00 as he had stated in his written evidence), because he (Mr Willgoose) had had a conversation with one Councillor who had said he like to walk through the application land on his way home from the pub, and Mr Willgoose had said shut the gates at midnight, he was not really bothered. This evidence not only contradicted both Mr Willgoose's own written evidence and Mr Durham's written evidence, but it also contradicted Mr Durham's evidence that he was the person responsible for giving instructions to security as to whether and when the gates at the site should be locked. It seemed to me that this was perhaps an attempt by Mr Willgoose to deal with the evidence of those of the Applicant's witnesses who had given evidence that they had not encountered locked gates on late night or early morning walks. It did not have the ring of truth about it, and I reject it.

*Evaluation of Mr Durham's evidence*

- 6.15. Much of Mr Durham's written evidence was stated in tones of certainty but with no reference as to the source of his information. He did not make it clear when matters described were within his own knowledge, and when they were not. Some of these assertions, in particular in relation to the period before he was employed by the University, it transpired when he gave oral evidence, were mere speculation (for instance, his evidence that Markeaton Primary School continued to use the site after its sale to the University and as to the extent of the site used by the school, and his evidence as to the extent of the site occupied by the various works carried out on the site before Mr Durham's involvement). Others were, by reference to other evidence before the Inquiry, demonstrably inaccurate. I was not at all satisfied that Mr Durham's evidence had been prepared with an appropriate degree of care.

- 6.16. Mr Durham's statement was misleading in many instances, because it stated or tended to suggest that various situations had pertained throughout the whole of the period of the University's ownership, or at least for some time during the relevant period, whereas in fact the situation had only been current since the end of the relevant period. I have mentioned above the evidence in relation to community participation events on the land.
- 6.17. There was no documentary evidence at all to support Mr Durham's assertions as to when use of the land by the University in connection with its courses (sporting modules, Building Technology, Environmental Studies, Biology and Ecology) began. The question of whether the land was used for these courses before the commencement of Mr Durham's employment with the University was not within his knowledge, and he should have stated the source of his information. I do not accept his evidence that he would have been aware of the use of the land during the 1990s as a result of his work with the University as an architect, as he suggested. Although I accept his evidence that he visited the site in 2000 in connection with the University's proposal to put a link road across the site, I think it unlikely that he would have been able to tell from looking at people on the land whether they were Biology or Ecology students, for example, and I think it inherently unlikely that he would have been told. The small amount of documentary evidence which Mr Durham did produce post-dated the end of the relevant period. In my judgment his evidence on this point was not reliable.
- 6.18. Mr Durham's evidence that the application land had begun to be used for sporting activities by the University during the academic year 1995-1996 was contradicted by the Applicant's witnesses' evidence. He did not state the source of his evidence. Although Mr Norman's correspondence in the summer of 1995 stated that the area would be used by the University for sporting facilities with effect from 1<sup>st</sup> October 1995, it seemed inherently unlikely to me, in the light of the fact that the Mill Dam bank was breached in summer 1994, and the site was flooded, that that proposed use actually begun in October 1995. There was no evidence of any sporting use visible in the aerial photographs dating from 1999. Mr Durham's evidence that American football was played on Field C before 2007 was not consistent with the aerial photographs taken when the works compound was on site, and is likely to be incorrect, in my judgment: at the time the aerial photographs were taken the rugby posts were on Field A. Further, the photographs provided by Mrs Jane Roberts and taken in December 2005 show rugby or American football posts in the background on Field A<sup>64</sup>. Had Mr Durham's evidence that the posts were removed in about 2007 been given in relation to Field A rather than Field C, it would have been consistent with the photographic evidence: in the later aerial photographs, the rugby posts are gone and Field A is laid out as football pitches. I am not satisfied that Mr Durham's evidence that Field C was used for American football between about 2000 and 2007 was reliable, and I prefer the Applicant's witnesses' evidence that Field C was not used for American football until after the end of the relevant period. In my judgment the information given by Mr Durham related to Field A rather than Field C.

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<sup>64</sup> A155C

- 6.19. In the light of my doubts as to the reliability of Mr Durham's evidence on matters which, essentially, were peripheral to the core issues before the inquiry, I approached his evidence in relation to the question of the locking of the access gates to the land with some caution. It was clear that much of Mr Durham's evidence was speculation and was not accurate: he claimed that pedestrian gates at access 3 and access 6 had been left open for access during the day. There was no other evidence to support Mr Durham's suggestion that there had at one time been a pedestrian gate at access 3. The gate at access 6 to which he referred was the gate erected in 1995, which, on the basis of the other evidence, I am satisfied was locked continuously until Mr Willgoose made the decision that it should be taken down, from which time it was continuously unlocked.
- 6.20. Mr Durham's evidence was that he had given an instruction to the University's security manager within 9 months of beginning his employment with the University in June 2003 that the gates to the application land should be locked overnight and at Christmas. He stated that he gave the instruction again, shortly afterwards, when there was a change in security manager. In cross-examination he acknowledged that this instruction would not have applied to Access 4 because the gates there were kept locked, or to Access 2, because the gate there was seized up. There was no gate at Access 6 to lock. There was no gate other than the vehicular gate at Access 3, which was kept locked. The gate to the allotments at Access 11 was kept locked. Access at 8 had been blocked since about 1995.
- 6.21. What Mr Durham's evidence appeared to amount to therefore, was that he had in 2004 instructed the security manager to apply the locking regime in place which he said had been instituted in respect of all gates after August 2007 in respect of Access 1. Mr Durham produced no documentary evidence to support this evidence: for instance a written memorandum or email. He stated that he had also spoken to Mr Neville Wells, the Head of Estate Services, who is the security manager's line manager on several occasions and knew that Mr Wells had passed the instruction on, because he had seen emails in which he had done so. However Mr Durham did not produce copies of those emails. In the absence of any documentary evidence, and in the light of my findings as to the unreliability of other elements of Mr Durham's evidence which were unsupported by documentary or other evidence, I was not satisfied that Mr Durham had given these instructions in 2004, as he said he did. Further, even if Mr Durham did give those instructions, there was no direct evidence to show that those instructions were carried out. Mr Durham himself acknowledged that he was unable to guarantee that the gates were locked every night, and in fact it did not appear that, from his own personal experience, he could say that they had ever been locked at night.
- 6.22. Mr Durham was asked specifically whether the change in Access 1 in 2006 had any bearing on the opening regime and he said that it did not. He did not say that he had issued any further instructions at that time.

- 6.23. Mr Durham's evidence was asked in oral evidence how the Applicant's witnesses had been able to get onto the site when the gates were locked. He was quick to say that he assumed that they had gone through or over the fencing. Given that there was no gate which could be locked at Access 6, this seemed to me to be an unjust accusation, and in my judgment was informed by Mr Durham's anxiety that the application should not succeed. It did not reflect the true position which was that access at Access 6 was freely available on what appeared to be an official path, throughout the relevant period, with the exception of a period of 5 weeks in 1995.
- 6.24. The Applicant's witnesses evidence was that the pedestrian gate at Access 1 was not locked before the new gates were erected in 2007 (Bousie, Salter, Lomas, Yeoman, Rogers, Smart). Mr Durham's evidence that the pedestrian gate was locked at all times from at least 2003 or 2004 onwards was directly contradicted by this evidence. It was also contradicted by Mr Willgoose's evidence was that from 2000 at least, the pedestrian gate was unlocked except at Christmas. Mr Durham's evidence that following the completion of the Council's fencing works the pedestrian gate was kept open during the day and locked between about 22:00 and 06:00 was also contradicted both by the Applicant's witnesses' evidence and by Mr Willgoose's evidence.
- 6.25. Having regard to all the evidence before the Inquiry, I am not satisfied that the pedestrian gate at Access 1 was locked before August 2007. I reject Mr Durham's evidence on this point.

## 7. **Evidence from Members of the Public**

- 7.1. I received a letter dated 18<sup>th</sup> March 2010 from Mr Ken Clarke of Shaws Green, West End, Derby. Mr Clarke stated that he has been Chairman of the Friends of Markeaton Brook since February 2008. The group was constituted in January 2005. Mr Clarke stated that the group had been consistently agnostic on the question of whether village green status would further its objectives and safeguard the application land. He wrote in response to the evidence provided by Mr Willgoose. He was concerned that Mr Willgoose had mentioned the Friends without their prior knowledge or consent, and sought to correct any impression given that the University operates in partnership with the Friends.
- 7.2. Mr Clarke stated that in Jun 2008 the Friends had received a Breathing Places Project grant from the BBC/Big Lottery Fund with matching funding from the University to create a nature trail on Sturgess Fields, to enrich the biodiversity of the site, and to increase community engagement. The University between the application and award of the grant had appealed a previous refusal of planning permission for a road across the site. Mr Clarke said that Mr Willgoose, concerned with the appeal, had failed adequately to resource the project. Mr Clarke stated that it emerged that Mr Willgoose's concept of the nature trail was a simple walking loop designed to restrict public access in the light of the village green application and to stop local people "walking across his back garden". Mr Clarke stated that the University's officers had prepared a planning application for the site, purporting to act as agent for the Friends, and had made a second application for new development on the site which was

refused consent. The Committee of the Friends had decided to withdraw from the project because it took the view that Mr Willgoose was not prepared to stand by the original project brief, and the Friends returned the unspent portion of the grant.

- 7.3. Mr Clarke said that he wished to disassociate himself from Mr Willgoose's claim that the University was the best custodian of the site to the benefit of the local community. He said that whilst the Friends remained neutral about the application, they were dismayed by the negative attitude shown in Mr Willgoose's threat to withdraw from the site, should the application succeed. Mr Clarke also asserted that Mr Willgoose had acted in ignorance or disregard of planning requirements, and had allowed on his watch without the necessary consent the erection of fencing in 1994/95, the erection of contractors' huts in 2006/07 and the pruning and felling of trees protected by Tree Preservation Orders in 2007/08.

## **8. The Law**

- 8.1. The Commons Registration Act 1965 provided for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31<sup>st</sup> July 1970 for the registration of greens. By s. 1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be...a town or village green unless it is so registered".
- 8.2. The concept that land could be registered as a new town or village green if it had been used as of right by the inhabitants of any locality for lawful sports and pastimes for more than 20 years was introduced by sections 13 and 22 of the Commons Registration Act 1965 which provided for the amendment of the register where any land could be shown to have become a town or village green after the end of the original registration period. The courts placed a narrow construction on the words "inhabitants of the locality", and by section 98 of the Countryside and Rights of Way Act 2000, this aspect of the requirements for registration was widened, so that it was sufficient if user was by "a significant number of the inhabitants of any locality or of any neighbourhood within a locality". The amended provisions were repealed and replaced by section 15 of the Commons Act 2006, which was brought into force on 6<sup>th</sup> April 2007 by the Commons Act (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007<sup>65</sup>.
- 8.3. The present application was made under section 15 of the Commons Act 2006, falls to be determined under that section. Section 15 provides (as relevant):
- “(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
- (3) This subsection applies where—

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<sup>65</sup> SI 456/2007

- (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;
- (b) they ceased to do so before the time of the application but after the commencement of this section; and
- (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b)."

- 8.4. Many of the words and phrases used in section 15 of the Commons Act 2006 are identical to the words and phrases used in section 22 of the Commons Registration Act 1965. The decided cases on what those words meant in the 1965 Act remain authoritative when considering the meaning of the same words in the 2006 Act.

***a significant number...***

- 8.5. "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers<sup>66</sup>. It is not necessary that the users come predominantly from the claimed locality or neighbourhood: provided a significant number of the inhabitants of the claimed locality or neighbourhood are among the users, it matters not that many or even most come from elsewhere<sup>67</sup>. The requirement is that the users include a significant number of inhabitants of the claimed locality or neighbourhood, so as to establish a clear link between the locality or neighbourhood and the proposed town or village green, even if such people do not comprise most of the users.<sup>68</sup>

***...of the inhabitants of any locality...***

- 8.6. A "locality" cannot be created by drawing a line on a map<sup>69</sup>. A "locality" must be some division of the county known to the law, such as a borough, parish or manor<sup>70</sup>. An ecclesiastical parish can be a "locality"<sup>71</sup> but it is doubtful whether an electoral ward can be a "locality"<sup>72</sup>.

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

- 8.7. The clear intention of Parliament in introducing these words was to relax the requirements necessary and to weaken links with the old rules relating to common law village greens. In a neighbourhood case, the technical difficulties in the word "locality" that have arisen in relation to common law greens should not be imported. As a result, where the locality relied upon is, for instance, a town, it can be a relevant locality even if it is not (or is no longer) a

<sup>66</sup> R (McAlpine) v Staffordshire CC [2002] EWHC 76 (Admin) at para. 77

<sup>67</sup> Oxfordshire and Buckinghamshire Mental Health Trust v. Oxford City Council [2010] EWCH 2010, paragraph 71.

<sup>68</sup> Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 69.

<sup>69</sup> R (Cheltenham Builders Ltd) v South Glos, DC [2004] 1 EGLR 85 at paras 41-48

<sup>70</sup> Ministry of Defence v Wiltshire CC [1995] 4 All ER 931 at p 937b-e, R (Cheltenham Builders Ltd) v South Glos. DC at paras 72-84 and see R (Laing Homes Ltd) v Buckinghamshire CC [2003] 3 EGLR 69 at para. 133

<sup>71</sup> R (Laing Homes) Ltd v Buckinghamshire CC

<sup>72</sup> R (Laing Homes) Ltd v Buckinghamshire CC

recognisable local government unit.<sup>73</sup> A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood<sup>74</sup>. A neighbourhood need not lie wholly within a single locality<sup>75</sup>: the claimed neighbourhood can fall within two or more localities. Further an Applicant may rely on two or more qualifying neighbourhoods within a locality or localities<sup>76</sup>.

- 8.8. It was said in *R (Cheltenham Builders Ltd) v South Gloucestershire County Council*<sup>77</sup> that a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness<sup>78</sup>:

“a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a locality... I do not accept the Defendant’s submission that a neighbourhood is any area of land that an Applicant for registration chooses to delineate upon a plan. The registration authority have to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise, the word “neighbourhood” would be stripped of any real meaning. If parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so.”

- 8.9. However, these words have to be read in the light of the fact that “neighbourhood” is an ordinary English word, defined in the dictionary as “a district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity” and of Lord Hoffman’s comment in *Oxfordshire* that the word “neighbourhood” was deliberately imprecise<sup>79</sup>. There are various factors to be taken into account in determining whether there is a neighbourhood, including whether the area has community facilities and shops, whether estate agents sell properties by reference to the area, the names of the street, whether the area contains connecting streets, the style and date of the housing within the area<sup>80</sup>. The boundaries of a neighbourhood are often not logical, and it is not necessary to look too hard for reasons for the boundaries.<sup>81</sup>

- 8.10. In my judgment there must be a reasonable spread of users throughout the claimed locality (in a locality case) or neighbourhood (in a neighbourhood case), so that it can sensibly be said that the users come from the claimed locality or neighbourhood as a whole. In a neighbourhood case, it is not necessary for the locality within which the claimed neighbourhood falls itself

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<sup>73</sup> Leeds Group PLC v. Leeds City Council [2010] EWHC 810, paragraph 89.

<sup>74</sup> R (McAlpine) v Staffordshire CC

<sup>75</sup> Oxfordshire County Council v. Oxford City Council (“the Trap Grounds case”) [2006] UKHL 25, para. 27 disapproving R (Cheltenham Builders Ltd) v South Glos. CC at para. 88

<sup>76</sup> Leeds Group PLC, paragraph 96.

<sup>77</sup> [2004] 1 EGLR 85

<sup>78</sup> at para 85

<sup>79</sup> Leeds Group PLC, paragraph 103

<sup>80</sup> Leeds Group PLC, paragraph 104

<sup>81</sup> Leeds Group PLC, paragraph 105

to be small enough to accommodate a proper spread of qualifying users: it is sufficient if the neighbourhood is small enough to accommodate such a spread.<sup>82</sup>

*...have indulged as of right...*

- 8.11. Use of land “as of right” means use that is not by force, nor stealth nor with the licence of the owner (“*nec vi, nec clam, nec precario*”)<sup>83</sup>. Whether use is of right does not turn on the subjective beliefs of users<sup>84</sup>. User “as of right” must be use as a trespasser and not use pursuant to a legal right<sup>85</sup>. The requirement that use should not be by force includes a requirement that use is not contentious, that is that the use is not one which continues despite the land owner’s protests and attempts during the relevant period to interrupt it<sup>86</sup>.
- 8.12. Where the owner has erected notices on the land, the fundamental question is what the notice conveyed to the user: if the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render the use contentious. The notice should be read in context, and in a common sense, rather than a legalistic way<sup>87</sup>. If it is suggested that a landowner should have done something more than erect a notice, the decision maker should consider whether anything more would have been proportionate to the use in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user<sup>88</sup>.
- 8.13. In *R (on the application of Lewis) v Redcar & Cleveland Borough Council*<sup>89</sup> the Supreme Court held that, where the land had been used concurrently by both the landowner and by local people during the qualifying period, the apparent deference of the recreational users to the landowner’s own use of the land did not preclude their use being use as of right. However where there have been successive periods in the qualifying period during which recreational users are first excluded and then tolerated as the owner decides, for instance a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals are indoors for the worst of the winter, the use over the qualifying period as a whole is not use as of right<sup>90</sup>.

*...in lawful sports and pastimes...*

- 8.14. The words “lawful sports and pastimes” form a composite expression which includes informal recreation such as walking, with or without dogs, and

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<sup>82</sup> Leeds Group PLC, paragraph 90

<sup>83</sup> *R (on the application of Lewis) v. Redcar and Cleveland BC* [2010] UKSC 11, para 20.

<sup>84</sup> *R v Oxfordshire CC ex p Sunningwell PC*

<sup>85</sup> *R (Beresford) v Sunderland CC* paras 3, 9 & 30

<sup>86</sup> Lewis, para 89-91

<sup>87</sup> Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 22.

<sup>88</sup> Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 22.

<sup>89</sup> [2010] UKSC 11 delivered on 3<sup>rd</sup> March 2010

<sup>90</sup> Per Lord Walker at paragraph 27



children's play<sup>91</sup>. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way<sup>92</sup>.

***...on the land...***

- 8.15. "Land" is defined as including land covered by water<sup>93</sup>. In *Oxfordshire County Council v Oxford City Council*<sup>94</sup> it was held that land, substantial parts of which were overgrown and inaccessible for recreation, could be registered as a new green, provided that the land could be regarded as having been used as a whole for recreation.

***...for a period of at least 20 years and they ceased to do so before the time of the application but after the commencement of this section; and the application is made within the period of two years beginning with the cessation.***

- 8.16. The House of Lords held in *Oxfordshire* that the relevant 20 year period under section 22(1)(a) of the Commons Registration Act 1965 was the 20 years immediately before the date of the application (rather than the date of registration, as the Court of Appeal had held). The 2006 Act sets out this aspect of the test clearly in the statute: in order to satisfy the criteria contained in section 15(3), the qualifying use must have ceased before the application was made but after 6<sup>th</sup> April 2006, and the application must have been made within two years of that date.

**Procedure**

- 8.17. The procedure on applications to register new greens is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

**Who can apply?**

- 8.18. Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

**Application**

- 8.19. An application made under the 2007 regulations is required to be made in prescribed form 44, signed by or on behalf of the Applicant and must be supported by a statutory declaration in the prescribed form<sup>95</sup>.

**Accompanying documents**

- 8.20. The application is required to be accompanied by every document relating to the matter which the Applicant had in his possession or under his control or to which he had a right to production, or a copy of every such document<sup>96</sup>. In most cases, there are few documents other than user questionnaires or statements as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

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<sup>91</sup> R v Oxfordshire CC ex p. Sunningwell PC [2000] 1 AC 335 at pp 356F-357E

<sup>92</sup> Oxfordshire CC v Oxford CC [2004] Ch 253 at paras 96-105

<sup>93</sup> Commons Registration Act 1965, section 22; Commons Act 2006, section 61.

<sup>94</sup> [2006] UKHL 25, [2006] 2 AC 674, at para 44.

<sup>95</sup> 2007 Regulations, regulation 3.

<sup>96</sup> 2007 Regulations, regulation 3.

### **Preliminary consideration**

- 8.21. Where an application appears on preliminary consideration by the authority not to be duly made, the authority may reject it without publicising it, but must give the Applicant an opportunity to put the application in order, if it appears that he might be able to do so<sup>97</sup>.

### **Publicity and inspection**

- 8.22. The registration authority must publicise any application which it does not reject on preliminary consideration<sup>98</sup>:
- By sending by post a notice in form 45 to every person whom the authority has reason to believe to be an owner, lessee, tenant or occupier of any part of the land affected by the application, or to be likely to wish to object to the application
  - Publish and display a copy of the notice in the concerned area
  - Serve a copy of the notice on every concerned authority
  - By fixing the notice to some conspicuous object on any part of the land which is open, unenclosed and unoccupied, unless it appears to the registration authority that such a course would not be reasonably practicable.

- 8.23. The date to be inserted in the notice as the date by which statements in objection to an application must be submitted to the registration authority must be such as to allow an interval of not less than 6 weeks from the latest of the receipt in the ordinary course of post or publication and display of the notice<sup>99</sup>.

### **Objections**

- 8.24. Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land. The authority must consider any written statement that it receives before the date on which it proceeds to further consideration of the application and may consider any objection received after that date, but before the authority finally disposes of the application.<sup>100</sup>

### **Determination of application**

- 8.25. The Regulations make no specific provision as to how a Registration Authority ought to determine a contested application. A practice grew up under the predecessor regulations to the 2007 Regulations, the Commons Registration (New Land) Regulations 1969, which was repeatedly approved by the Courts, whereby the Registration Authority appointed an independent legally qualified inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. This is the procedure which has been adopted in this case.

### **Procedural issues**

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<sup>97</sup> 2007 Regulations, regulation 5(4)

<sup>98</sup> 2007 Regulations, regulation 5

<sup>99</sup> 2007 Regulations, regulation 5(2)

<sup>100</sup> 2007 Regulations, regulation 6

8.26. A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the Applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be “properly and strictly proved”<sup>101</sup>. However, in my view, this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.
- **Defects in application form.** The House of Lords held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4 of Form 30, provided that there is no procedural unfairness to the Objectors. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green
- **Withdrawal of application.** The Court of Appeal held in the *Oxfordshire* case that the Applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the Applicant’s wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view.
- There is no power to award costs.

## 9. Submissions on behalf of the Objector

9.1. At the end of the inquiry I invited both the Objector’s and the Applicant’s barristers to make closing submissions. Dr Choongh provided written closing submissions which he amplified orally.

7.1. Dr Choongh made the following general submissions: the Applicant must show at least 20 years user and bears the burden of proof. The burden of proof is to be taken seriously (Pill LJ – *R v Suffolk County Council Ex p Steed* (1996) 75 P&CR 102, 111: “It is no trivial matter for a landowner to have land ... registered as a town green”).

### *Zone B (1987 – 1989) Excluding Field*

7.2. Dr Choongh said that the extent of School buildings is shown on O25. The buildings covered the vast majority of site – only the northwest corner remained open land.

7.3. Dr Choongh submitted that it was clear on the evidence that the school was not demolished until post July 1989 – O77 Derby Trader May 17 1989 described as demolition in progress; O78 Derby Trader July 19 1989 photo shows rubble

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<sup>101</sup> R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in R (Beresford) v Sunderland at para. 2

very much still in existence.

- 7.4. Dr Choongh posed the question whether there could have been as of right indulgence in lawful sports and pastimes on this site in this two year period? He said that the answer was no. There was no reason why people would want to walk dogs and pursue the type leisure activities witnesses described on an old, dilapidated and vandalised site, especially when (on the applicant's case) such attractive green fields readily were accessible all round the site (He asked me to note the escape from urban sprawl point relied upon by many witnesses).
- 7.5. Dr Choongh said that the Applicant had sought to rely on the fact that not all the area shown as footprint of school was built area: some of it was playground/car parking. He submitted that that does not detract from the above point – there is no reason to walk around rather sad looking buildings other than curiosity. Dr Choongh referred me to the evidence of the following witnesses on this point:
- Topley (in xx) – dilapidated and vandalised, glass everywhere – tried to avoid because did not want dog on glass. May have popped his head around out of curiosity.
  - Sainty (in xx) – stopped children from going on the school site because it was dangerous. Boys may have gone in to look at school on one or two occasions out of curiosity.
  - John Smart (in xx) – I would not go anywhere near the school site because that was a derelict area.
  - Bill Cash – Never went onto the school. It was fenced off. But now and again, once a week, once every few weeks – walked over the field. Kept away from the school – nothing of interest to look at.
- 7.6. Dr Choongh submitted that this type of very occasional wondering onto the site does not amount to the required quality of user. Although dog walking and recreational walking falls under the rubric of lawful pastimes and sports, wondering onto an old school site out of curiosity (“to have a look”) does not. It follows that whether or not the objection is successful on other points, the school site (i.e the area of the school footprint, including play areas and car parks) cannot be registered a town or village green because the Applicant cannot demonstrate 20 years user for lawful pastimes and sports during the requisite period.

*Implied permission*

- 7.7. Dr Choongh turned next to the question of implied permission. He submitted that as a general proposition, if access to the land is with permission of the owner than right cannot accrue. *R v City of Sunderland* establishes that the permission can be implied (per Lord Bingham at paragraph 5):

“A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on

occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use".

7.8. Dr Choongh said that whilst correct that implied permission does not necessarily defeat "as of right", for the implied permission not to do so the facts must be such as to suggest the implied permission was a permission for residents to use the land permanently and was therefore dedicatory in nature. (He referred me to the words of opinion of Lord Scott in *Beresford* at paragraphs 45-49). In that case implied permission did not stop the acquisition of 20 years as of right user because the landowner gave no sign that the permission was intended to be temporary or revocable.

7.9. However, *Beresford* demonstrates that the landowner does not have to do much to make it clear that there is implied permission and that permission is may be withdrawn at any time. Lord Walker's opinion at paragraph 83 shows that if the landowner does something to limit or regulate the use at any time during the prescriptive period he will succeed in showing that the user was by implied permission:

"In the court of appeal Dyson LJ considered that implied permission could defeat a claim to user as of right .... I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or by asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission".

7.10. Dr Choongh submitted that in the present case there is ample evidence to show that access onto the land by the residents was pursuant to the implied permission of the objector. The fact that access was taken with permission, rather than as of right, is demonstrated by the fact that objector on a number of occasions excluded the public from the land.

7.11. Dr Choongh submitted that there is no rule of law that requires that the exclusion of the public has to be for any particular length of time. As a matter of principle, all that is required is exclusion, no matter how brief, because, if people were using land as of right, it would not be possible to exclude them at all. Any restriction or regulation of the user by the landowner defeats use as of right (that "regulation" will suffice is supported by the quotation from the judgment of Lord Hope cited by Lord Walker at paragraph 78 of *Beresford*).

7.12. The first type of regulation in this gate is the locking of gates. Mr Durham gave evidence that this commenced in around 2003, whereby attempts were made to keep access restricted 6am to 10 pm. Although some of the locals gave evidence that they were able to take access at night, others did report coming across locked gates. Although it possible that the security personnel on occasions failed to follow instructions, the Applicant must show on the balance

of probabilities that access was always free and unrestricted throughout the 20 year period. He cannot show this – there will have been occasions when the gates were locked at night time, as accepted by some of his witnesses.

- 7.13. Dr Choongh accepted that the Objector was unable to establish on the evidence that there was a time within the relevant period when it was possible to lock and bar all accesses to the land so that people could not get in. However, there were periods when the number of accesses were not so plentiful, for instance the period after Access 8 was barred off and before Access 4 was created. Dr Choongh submitted that the fact of regulation was sufficient: if the landowner says “you can come through this entrance at this time, but not at that”, that is sufficient for implied permission. Access must be uninhibited to be access as of right.
- 7.14. In addition, the Objector relied upon the following exclusions to show that when people did come on the land they came by virtue of its implied permission:

*A. Exclusion from the school site during demolition*

- 7.15. Demolition commenced some time prior to May 1989 (O78 newspaper for 17 May states in progress). O79 July 19 shows considerable debris still on site. The proper clearance of a site to comply with Health & Safety requirements is a lengthy process. Dr Choongh invited me to find that the site was probably not clear until weeks possibly months later. He accepted that this was speculation, but said that it accorded with commonsense.
- 7.16. Dr Choongh submitted that it was inconceivable that the site would not have been properly secured and fenced, given the concerns about civil liability. Also the area that would have been fenced off would have included an area much larger than the footprint of the site itself, given the need for a works compound, storage, the parking of large machinery and the stockpiling on site of debris before it was taken off site. Mr Willgoose’s evidence was that there was no internal fencing, just the Field B fencing.
- 7.17. Dr Choongh invited me to find that it was more probable than not that the area fenced off would have included at least part if not all of the field in the northwest corner of Zone B.

*B. Compound on Zone B*

- 7.18. A compound was created for the site accommodation required for the University’s Markeaton Street development. The compound was created pursuant to planning permission, and there could be no serious dispute that stayed in place for considerable period of time (September 2005 to February 2007). The compound would have been secured so that there could be no public access – this would be common sense, and common practice. If anything more were required, there is also the evidence not only of the Objector’s witnesses, but of the Applicant’s witnesses also:

- Prof Rennie – (xx) Q: compound 2005/6 you couldn't get access to it could you? No. Re-examination – was the compound fenced off A: Yes – it would be crazy not to.
  - Cash (x/c) – the builders had a compound on the car park – their site was all blocked. Gated off and shut and always chained and locked.
- 7.19. Dr Choongh invited me to find that the compound covered a substantial area, as is shown in plan on O217 and in the aerial photos at O19/26-27.

*C. Network Link/Ducting – Zones A and B*

- 7.20. Dr Choongh invited me to find that the area affected by the network link/ducting was the area shown on O216. He reminded me that Mr Durham in evidence in chief had said that an area running from one side of the land to the other north east to south west 7 metres wide was sectioned off. He submitted that this would have been a considerable obstruction to local users of the land, and lasted for several weeks.
- 7.21. Dr Choongh said that there are other examples of the landowner excluding access from parts of the site in Mr Durham's statement.
- 7.22. Dr Choongh asked the question, what is the effect of this exclusion? Does it mean that only the land from which there was exclusion was not used as of right and therefore cannot be registered? Or does it mean that the application land as a whole cannot be registered?
- 7.23. He submitted that the exclusion must, as a matter of principle, mean that the application for the land as a whole fails. The fact of exclusion, whether from one part of the land or several parts of the land, demonstrates that access to the land was taken with the permission of the owner. The owner had the right, and exercised the right, to exclude members of the public at will. That negatives one of the preconditions that an applicant must establish ("without permission"), and therefore the application must fail.
- 7.24. Dr Choongh submitted in the alternative that, even if the exclusion from parts did not defeat the application in relation to the whole, the areas of exclusion were significant and comprised large parts of the site. Given the length of the time of the exclusion, the affected areas, the school area and the compound, should not be registered.

**Without Force**

- 7.25. Dr Choongh dealt next with the issue of without force under two aspects: contentious use, and breaking down fences.

*A. Contentious Use*

- 7.26. Dr Choongh submitted that the local inhabitants' use of the objectors land must be without force. The Supreme Court in *Redcar* endorsed long-standing authority that force is not confined to physical force. Lord Rodger at paragraph 89 approved the following passage from the judgment of Theisiger LJ in *Sturges v Bridgman*:

“consent or acquiescence of the owner of the servient tenement lies at the root prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be *nec vi nec clam nec precario*: for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, *or which he contests and endeavours to interrupt*, or which he temporarily licences” [emphasis added in the same place as Lord Rodgers].

- 7.27. Lord Rodgers said that “if the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as *vi* and so does not give rise to any right against him” and, quoting Bowen J (at para. 89):

“Bowen J equated user *nec vi* with peaceable user and commented that a neighbour “without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised”.

- 7.28. Dr Choongh submitted that all that is required to destroy the peaceable nature of the user is for the owner to show that he contested the public’s use of his land. He does not have to show he interrupted it, only that he endeavoured to do so. Protest is enough.
- 7.29. Dr Choongh submitted that there was protest in this case. He submitted that there could be no real doubt that in mid 1995 the Objector blocked off Access 6. A number of the Applicant’s witnesses accepted that this incident took place, although they insisted the blockage remained in place for only a few days. The length of time that the access was blocked is a matter of inference, but Dr Choongh submitted that from the correspondence at O19/4-15 a reasonable inference is that it took a few weeks for the gate to be opened and referred me also to the evidence of Mr Willgoose.
- 7.30. Dr Choongh said that in any event the point is not duration. The point is the context – was it a protest, an endeavour to interrupt the user? He submitted that it was. It was clear that Mr Norman, upon taking the helm, was seeking to secure the boundaries of the university owned land:
- O19/ 4 – letter 6.07.95: I am sure you will appreciate the University have only recently acquired this particular site *and are beginning to take control*
  - O19/7 – Letter 17.07.95 – it has been necessary to take control of the area
  - O19/9 – letter 24.07.95 – the amount of dog dirt across the Sturgess site generally is excessive and it is obviously very difficult to take control of the site to prevent this *without securing the boundaries*
- 7.31. As Lord Rodgers explained, there can be “force” where the use is contentious. This episode more than demonstrates that the use was contentious – the locals



asserted a right, the owner resisted that right. It sought to take control. Ultimately it was defeated by political pressure, but that is not the point. On the facts the University did not concede that there was a right. There was a change of tack by the University: there was a move from the aggressive approach of Mr Norman to a more conciliatory approach as represented by Mr Willgoose's regime. The attempts to prevent access were defeated by political pressure and by the desire to have a relationship of trust with the community, as a result of which a political decision was taken not to argue about the use of the walkway, coupled with a practical realisation that, given the size of the site, not every access could be secured. However the 20 year user was broken, and thereafter the history was one of regulation and control rather than attempts at outright prohibition.

- 7.32. In conclusion on this point, Dr Choongh submitted that registration ought not to be recommended because the owner endeavoured to interrupt the user (and that is all that is required as a matter of law).

### *B. Breaking Down Fences*

- 7.33. Dr Choongh submitted that there can be no distinction, on grounds of principle, between those who break down fences to get in and those who walk through gaps and holes which it is obvious have been illegally created by others.
- 7.34. Dr Choongh accepted that, in the light of the evidence, it was not possible for him to submit that I should find that the University secured its boundaries when it first acquired the site. There was no evidence of the chain of authorisations that would have been necessary to secure approval of expenditure on fencing.
- 7.35. Dr Choongh said that the Objector accepted that there were periods when a member of the public would not feel that he was doing anything wrong in accessing the site. He accepted that there was plenty of evidence of people walking across the brook or through large gaps in the fence, and said that the case was not really a fencing case.

## **10. Submissions on behalf of the Applicant**

- 10.1. Mr Petchey made oral closing submissions at the conclusion of the Inquiry.
- 10.2. Mr Petchey said that it is clear that the land has been used by a significant number of people, as required by the statute: that is borne out by the evidence of local people, oral and written. There is also the documentary evidence in the form of the Grimley JR Eve report dating from 1993, based on information which it appears was given to them by the University itself, which states that the fields were at that time used informally by the local populous.
- 10.3. Mr Petchey submitted that the use was not contentious: there were no notices making access contentious, and no warnings off. Access has always been freely available. Mr Petchey submitted that if there was access available to the

site at all material times which would appear to a reasonable person to be a lawful access, that is sufficient: it does not matter that the location of the access has changed over the relevant period.

- 10.4. In relation to Access 1 Mr Petchey submitted that there was no evidence from the University as to whether the gates were open or shut before the University acquired the site. The Applicant's witnesses' evidence was that access had always been open at that point. It may be that access was to the side of the gates at the beginning of the period - there certainly was access to the side of the gates in 2000 - but it does not appear that there is any dispute that there was free access at this point from the beginning of the period through to 2003. Historically there may be arguments about the access to the side being through fencing, but the fencing seems to have gone at an early time. Mr Petchey submitted that the University's relaxed attitude was evident at the time of the drainage works, because there was no reinstatement of the fencing after those works, and the University had no issue with people coming onto the land by the side of the gate.
- 10.5. Mr Petchey said that because there is no positive evidence from the University that the pedestrian gate was locked at all until 2003, I might conclude that the Applicant's witnesses who said access was free were either going through that gate, or that it was possible to go around the side before 1995, as well as after that date.
- 10.6. In 2003, there was conceivably a change, because that was when, according to Mr Durham's evidence, he gave the instruction that the gates should be open in daylight hours, and locked at night. Mr Petchey submitted that this was the one potentially legally significant act. But no sign went up to say that the gates were being locked at night. The majority of people would have been unaware of the change in regime. The exact regime was free and easy: there was no strict regime imposed. Mr Petchey submitted that it matters whether the users might be aware of the locking, because that is what makes the use contentious.
- 10.7. Access 2 was not locked but the Objector's evidence was that it became seized at some stage during the relevant period. Mr Petchey submitted that the fact of the gate being seized does not support the Objector's argument that access was contentious, but was just a factual impediment. Mr Petchey accepted that those who went through a bent gap in the bars were using force. However, he submitted that the use of those who came in through a legitimate entrance, but then went out through such a hole, could not as a whole be *vi*.
- 10.8. Access 3, in Mr Petchey's submission, was open all the time. Even if there was a pedestrian gate, there was no evidence that it was locked. At some time there was a stile. Mr Petchey said that I should weigh up Mr Durham's evidence that the stile was only lately installed against the evidence of the Applicant's witnesses that there was a stile then a gap.
- 10.9. Mr Petchey said that although it had seemed at the beginning of the inquiry that the Objector's evidence would be that there were locked gates throughout at Access 4, it emerged that after the access was put in there were no gates

there for a period. There was some evidence that the double gate was open at times, which is corroborated by the Highways Act notice. Mr Petchey accepted that the locking of the gates at times other than the times when the gate was being used for maintenance showed that the owner was exerting control, and prevented the use at other times being as of right. However, he submitted that I should stand back and look at the situation as a whole: if there was lawful access at access 6 all the time, then if the user slipped out through access 4 when it was open, that did not make the whole user not as of right.

- 10.10. In relation to Access 6, Mr Petchey submitted that it is a matter of making a judgment as to what the correct approach is: what the University was potentially doing by putting up the fence and gate was making the access contentious. But the moment there was an outcry, the University backed down. Although Dr Choongh said that the entitlement to block had been demonstrated, that is not how it would appear to the reasonable user. Mr Petchey suggested that a useful analogy might be found in *Cheltenham Builders* at paragraph 68 and 71: in that case, at the opening shots, the local people had backed down: here the landowner, at the opening shots of the local people, backed down. The matter has to be looked at from an objective point of view: the landowner's own reasons are subjective and not relevant if not communicated: what one is looking at is how the situation would appear to a reasonable observer. Adopting a commonsense approach in the continuum of 20 years, the erection of the fence and gate was a tiny matter which would not have impinged on quite a few users at all. It was not substantial enough to be an interruption in use.
- 10.11. Access 8, the old iron bridge, was in a poor state of repair in 1995, but would have been available, certainly, at the beginning of the period and for some time thereafter.
- 10.12. Finally, Mr Petchey reminded me that quite a few people had spoken of crossing the brook on the northern boundary of the site where it was shallow, and of there being stepping stones there.
- 10.13. Mr Petchey turned next to deal with the question of the school buildings on Field B: he referred me to the *Oxfordshire* case, and to the statement of the facts in the Inspector's report at paragraph 1, and to Lord Hoffman's comments at paragraph 75. Mr Petchey said that arguably following *Redcar*, one could be more relaxed about the presence of the building, because of the element of give and take after registration. The analogy he drew with the *Oxfordshire* case was in relation to the element of time: although the building occupied the site for 2 of the relevant 20 years, it was not there for the remaining 18. Mr Petchey said that one also has to look at the geographical issue: whether the presence of the school on part of the site prevents me arriving at the view that the whole of the site was used. *Oxfordshire* was relevant to this point: *Oxfordshire* supported a submission that if 25% of the site is accessible the whole was used.

- 10.14. Further, the building was not being used within the relevant 20 year period. Mr Petchey said that fact is relevant in this way: where there is a positive use, that is different to the situation where there is no use at all.
- 10.15. Mr Petchey submitted that if I am not satisfied that the statutory test for registration is met in relation to that part of field B which was occupied by the buildings, then I should recommend registration of field B in part: there was evidence that field B was used not just for right of way type user going out through accesses 1 and 2, but for lawful sports and pastimes while the school buildings were still up: he drew my attention to the evidence of Ms Burnett and Mr Williamson.
- 10.16. In relation to implied permission, Mr Petchey submitted that there is not ample evidence of implied permission: what the landowner needs to do in order to establish implied permission is to put up the sort of sign which was put up in 2007. The thrust of the applicant's witnesses' evidence was that the gates were not locked. Mr Petchey said that I would have to make a factual finding as to whether Mr Durham's instruction was followed at all. Mr Petchey said that I should look carefully at my notes of the evidence to see whether the acceptance that there was of locking at night by the Applicant's witnesses was in relation to the period after 2007 or before 2007.
- 10.17. In relation to the Objector's submission that there was implied permission because the local people were excluded from bits of the site at the landowner's convenience, Mr Petchey said that there was not very much in the way of exclusion. Exclusion may make the use of those areas contentious during that period, but cannot make the use of the whole area permissive. There is nothing in the landowner's use of parts of the site from which permission to use the whole can be inferred. Mr Petchey said that it may also be that this is a use by the landowner during the qualifying period which on the give and take principle in *Redcar* will survive registration, but it is not a use which should defeat the application.

## **11. The Application Land**

- 11.1. I carried out an accompanied site visit during the Inquiry and visited the site unaccompanied both before and during the Inquiry.
- 11.2. The application land is a large site of some 22 acres, contained within an area which is enclosed on the north west by the A38, on the north east by Kedleston Road and Watson Street, on the south east by the Ashbourne and District Allotment Association site and the Scout Hut site, and on the south west by Markeaton Street and the path which extends towards the A38 from the end of Markeaton Street. The land comprises three fields which were identified during the course of the inquiry as Field A, the northern-most field, bounded by the A38 and Kedleston Road, Field B, the western-most field, bounded by the A38 and the path from the northern end of Markeaton Street, and Field C, the southern-most long field, which borders the allotments.

- 11.3. There are a number of watercourses which run near to and through the application site. To the south west of the application land, between the boundary of the application land (Field C) and Markeaton Street is a watercourse known as Mill Dam. Between the boundary of the application land (Field B) and the path which extends towards the A38 from the end of Markeaton Street there is a pond known as Mill Dam Pond. Markeaton Brook runs along the eastern boundary of Fields A and C. Fields A and B are divided by another watercourse known as Mackworth Brook. There is a footbridge over Mackworth Brook at its south eastern end which gives access between Fields A and B. An unnamed watercourse, possibly a drainage ditch, which contains shallow running water, separates Field C from Fields B and A (“the drainage ditch”).

*Field A*

- 11.4. Fields A, at the time of my site visits, contained a large central area of closely mown grass. Field A was marked out with a football pitch and a match was being played during the accompanied site visit. On the north western side of Field A, there is an embankment to the A38. This area comprised unmanaged grass and scrubland. On the north eastern and south eastern sides of Field A there are areas of woodland along the banks of Markeaton Brook and the drainage ditch. There was a palisade fencing compound on the northern side of the pitch within the woodland for sports equipment. The southern corner of Field A is an attractive area of mature woodland. There is a path within the woodland which runs towards access 4. The path is fenced on both sides, but there are designed exits from the fencing to both the east and the west, including an opening in the fence giving access to the woodland. There are double gates into Field A, but it was agreed on the site visit that these were erected after 2007, and that before that, there was just a gap at that point. The path towards the remains of the bridge at point 8 was fenced at the end, but passable to that point, although obviously little used beyond the woodland. On the other side of the Brook, the path continues, although it is fenced at its southern end, where the bridge would have been. There is a gate into the path from Watson Street which was locked shut.
- 11.5. There is a ramp and bridge giving vehicular access to Field A from a driveway to the medical centre and Jonty Farmer pub off Kedleston Road. The bridge had a gate and a pedestrian gate on it. The vehicular gate was locked with a padlock at the time of my site visit. On the northern boundary of Field A, where Markeaton Brook is culverted, there is palisade fencing meeting old chain link fencing. At the end of the palisade fencing, wooden post and four rails fencing continues marking the northern boundary of Field A. There were holes in the wooden fencing through which access could be obtained. It would in any event be easy to climb the wooden fencing.

*Field B*

- 11.6. The grass in Field B was longer and tufty. It did not have the appearance of having been regularly mown. A path of shorter grass around its perimeter had been cut together with a path across. There is a large area of hardstanding in the southern corner of Field B. There is vehicular access to the hardstanding from gates at Access 1. The embankment of Field B going up towards the A38

has raspberries and brambles as well as nettles growing on it. There are also belts of trees along Mackworth Brook, and along the drainage ditch. There is green traditional metal fencing along the southern bank of Mackworth Brook within Field B, and along the western boundary, at the top of the embankment. There is a gate in the fencing at Access 2. From the corner where the gate is, a line of silver palisade fencing runs along the north of the Mill Pond to the gates at Access 1. The gates comprise a vehicular and a pedestrian gate in the silver fence giving access to Markeaton Street. To the south of the gate, and continuing along the southern boundary of Field C, there is palisade fencing inside what appears to be older chain link fencing, which is joined in places to traditional style metal railings.

#### *Field C*

- 11.7. Field C is a long rectangular-shaped field. Fields C also, at the time of my site visits, contained a large central area of closely mown grass. At the north eastern end there were tennis courts. The tennis courts were in a very poor state of repair at the time of my site visit. The fencing around the courts was also in a poor state of repair. Trees had grown through the fencing. One of the gates remained, but the others were missing. To the north of the tennis courts was a path which had been made up with wooden edging and hardcore surfacing along the bank of Markeaton Brook. There were trees between the path and the brook. The path was identical in construction to the path from Mundy Pleasure Ground to the boundary of the application land, and had the appearance of having been laid as part of that path. There was a sign within the application land comprising a metal finger post, pointing away from the land and signposting the Markeaton Brook Walkway. Within the site was difficult to see to where the path had led, after it left the southern bank of Markeaton Brook. On the accompanied site visit, the ground was carefully examined for any sign of the former bridge at point 9. It was difficult to see where it had been. There were some remnants on the bank of the drainage ditch, but it was not clear whether they were the remnants of the bridge erected in connection with the path or an earlier bridge. There was no fencing between Watson Street and the application land. The Applicant's witnesses suggested that it might be possible to ford the Brook at that point, or to use stepping stones to cross it. This seemed to me possible, if adventurous, in the right weather conditions. Once on the southern bank of Markeaton Brook, access to Field C could be obtained around the eastern side of the tennis courts, without going through.
- 11.8. On the site visit Access 6 was carefully examined. The traditional style railings on the boundary with the allotment/ Scout hut site appeared to have been cut off. There was an incomplete section and a diagonally cut end. There was a silver post with a lug to accommodate a catch, "I" shaped in cross-section, which the Objector's witnesses said, and it was agreed was likely, was the remnants of the 1995 gate. There were no other remnants of the 1995 fence. There were nothing about the rails on the bridge to the Scout hut which suggested that the railings had at one time been longer than they were. There was a gate at Access 6 on posts which were square in cross-section with rubber tops. This was hinged to the left as one enters the site, and so was clearly nothing to do with the I cross-sectioned post.

- 11.9. The central area of Field C to the south of the tennis courts was closely mown. Around the margins of the field there were brambles on the south eastern and south western sides, and trees along the drainage ditch. Field C is fenced against the allotments to the south east by traditional green metal railing fencing. The area at the south western end of the field, although overgrown, had paths running through the undergrowth. It was possible to obtain access via a brick built culvert from Field C to Field B. The evidence suggested, and I accept this as likely, that the south western end of Field C tends to flood in the winter months.
- 11.10. The majority of the trees on the site are covered by one of two tree preservation orders: TPO 197, dated 30<sup>th</sup> May 1991, and TPO 1995 No 116, dated 17<sup>th</sup> August 1995.
- 11.11. The Registration Authority, in its role as Highway Authority and as the Surveying Authority stated that there are no recorded or established public rights of way across the land. However, there is no Definitive Map or Statement for the area including the application land. At the time Derbyshire County Council prepared its Definitive Map and Statement, the County Borough of Derby elected to opt out of doing so, on the basis that it was an urban area. No part of the application land is registered as common land.

## **12. The claimed locality or neighbourhood within a locality**

- 12.1. The locality or neighbourhood within a locality to which the claimed green related was stated in the application to be polling districts DL2 and DL3 of Darley Ward. That area was said to be shown on Map B accompanying the application<sup>102</sup>. By my directions I required the Applicant to include in his bundle a map on which the boundaries of the claimed locality or neighbourhood within a locality. The Applicant produced the map at A25. The map at A25 shows a smaller area than that shown on the map accompanying the application: the eastern boundary of the area runs along the Duffield Road (A6), rather than along the Sir Frank Whittle Road (A61), and consequently the whole of the area between those roads, which was, on the map accompanying the application, included within the claimed locality or neighbourhood, was excluded. The northern boundary was also amended, so that the whole of the area between Duffield Road and the A38 at the northern tip of the claimed locality or neighbourhood was not included: the housing on Stanley Close, Beech Drive, the southern side of Broadway to the east of the first cul-de-sac, and the housing on Duffield Road to the north of its junction with Darley Park Drive were excluded. There was no map attached to the general (i.e. those which were not specific to this piece of land) Open Spaces-type questionnaires. The map attached to the evidence questionnaires which had been modified so as to relate to this land in particular was the same as the map at A25.

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<sup>102</sup> A10

- 12.2. In his response to the objection Mr Browne described the claimed locality or neighbourhood as a part of Darley Ward known as the West End, and the centre of the area as Kedleston Road. The description of the claimed locality or neighbourhood as the West End was carried through into his statement of case. However, Mr Browne's statement of case also continued to describe the claimed locality or neighbourhood as polling districts 2 and 3 of Darley Ward.
- 12.3. All of the amenities referred to in Mr Browne's statement of case relate to the area shown on the map at A25, rather than to the larger area shown on the map accompanying the application. The Darley Ward beat 513 (West End) appears to correspond to the area shown on the map at A25 rather than the larger area (all roads mentioned are to the west of Duffield Road).
- 12.4. It must be the case that both maps cannot show polling districts 2 and 3 of Darley Ward, as the maps show different areas. Mr Browne was not asked to explain the discrepancy between the map accompanying the application and the map at A25 when giving evidence.
- 12.5. I recommend that the Registration Authority should accept the map at A25 as showing the claimed neighbourhood of the West End within the locality of the City of Derby.
- 12.6. The reporting of a strong community feeling within the claimed neighbourhood by the Applicant's witnesses is somewhat self-serving, and I do not place much weight on it, but there was a substantial amount of other evidence that the West End had the requisite degree of cohesiveness to qualify as a neighbourhood within the meaning of the statute. The area has community facilities, including a Community Centre, called the West End Community Centre, a Women's Institute, local shops and local pubs. It forms a single police beat. The bowling green within the claimed neighbourhood is called the "West End Bowling Green". Two churches within the neighbourhood were mentioned by witnesses: St Alkmund's and Broadway Baptist Church and appeared to add to those witnesses sense of belonging to a community. There is a Scout Hut adjacent to the application land from which Scout, Cub and Brownie groups have been run throughout the relevant period, attended by the children of the neighbourhood. There is a local doctor's surgery, at which many of the witnesses were registered. There is a local school, Markeaton Primary School, within the area, the pupils of which have used the application land both for sport and for other educational uses.

*Where did the users come from?*

- 12.7. The Applicant helpfully provided a map showing by coloured dots where his witnesses live. With the exception of two witnesses who provided evidence questionnaires, all the witnesses came from within the claimed locality or neighbourhood as shown on A25. The greatest concentration lived in the roads to the north and east of the application land, but there were witnesses spread throughout the whole area. There was no evidence at the inquiry as to how those who were to give evidence were selected or identified. No user survey appeared to have been carried out on the land to determine where people using the land lived. However, on the basis of the user evidence that was before the



inquiry, in my judgment it is clear that the application land was used by a significant number of the inhabitants of the claimed neighbourhood as shown on A25.

13. **Additional Findings of Fact**

*The history of the application land before it was acquired by the University*

- 13.1. A school known as Sturgess School was erected on Field B and operated on the site from 1951 until the mid 1970s. When the school was first built, Field A was used as a playing field, and contained a pavilion. Field C was used as allotments<sup>103</sup>. The A38 had not at this time been upgraded to form a dual carriageway. There were two footbridges over Markeaton Brook giving access to the field from the north: one at Access 8, and one slightly further to the north west than the present Access 4. There was also a footbridge in the position of the present footbridge over Mackworth Brook giving access from Field B into Field A. There is no record of there being any access from Field A or B into Field C on the Ordnance Survey map dating from this time.
- 13.2. At some time before 1976 Field C also began to be used as a playing field. Tennis courts were built on the northern part of Field C. The Ordnance Survey map showing the Sturgess School buildings and Field C in use as playing fields does not show what, if any, access there was between Fields B and C and A and C. The path from Access 1 to Access 8 by this time was established for the whole of its route. The playing fields on Fields A and C were used both by Sturgess School and by other local schools, including Markeaton Primary School.
- 13.3. The buildings had ceased to be used by Sturgess School by, at the latest, 1976. For some time after 1976, the buildings formerly occupied as Sturgess School were used by Woodlands Comprehensive School, as an annex to its buildings, to house the first year pupils. The article published in the Derby Trader on 16<sup>th</sup> October 1985 reports that the school would be amalgamated on one site by June 1986. It seems likely therefore that Woodlands School had ceased using the buildings by the end of the academic year 1985-1986.
- 13.4. After Woodlands School ceased to use the buildings, the buildings were made available temporarily in the autumn term of 1986, and for at least the first term in 1987, to Derby College of Further Education, to accommodate the College's painting and decorating course<sup>104</sup>.
- 13.5. The Grimley JR Eve report states that the buildings were leased to Wilmorton College until about 1988/89. I am not sure what the relationship between Derby College of Further Education and Wilmorton College was, but I note that the Minutes refer to the intention to accommodate the course at the new unit at Wilmorton. Mr Kemp who was employed by the College referred in his statement to being employed by the Derby College of Further Education at Wilmorton. I infer that the letting to Wilmorton College referred to by

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<sup>103</sup> OS map enclosed with WK Marshall's letter to Mr Norman dated 18<sup>th</sup> January 1994.

<sup>104</sup> Minutes of the College's Governing body A23J

Grimley JR Eve and the loan of the buildings to Derby College of Further Education referred to in the Minutes in all likelihood refer to the same occupation.

- 13.6. There is a letter appended to the Grimley JR Eve report dated 18<sup>th</sup> August 1993 written by Mr Hall to the author of the Grimley JR Eve report which states that the University had established “beyond reasonable doubt” that educational activities ceased at Sturgess School in the summer of 1986, and that the school was in fact demolished during 1988. It is clear from the Minutes of the College that, so far as use by the College was concerned, this is not accurate, although in my judgment the summer 1986 date is the likely last date of use by a Derbyshire County Council school, and this is perhaps what was meant. As to for how long the College occupied the buildings, I note that the Governing Body stated that it was essential that the new unit be completed by Easter 1987. Although it is possible that the new unit was not completed by this time, so the College had to continue to make use of the old Sturgess School buildings after Easter 1987, it seems, given the urgency which was expressed, unlikely that the College’s use would have continued into 1989. Mr Norman’s letter to Grimley JR Eve dated 15<sup>th</sup> June 1993 stated that Wilmorton College vacated the site before its lease expired. Having regard to the urgency expressed in the Minutes, I think it likely that Mr Norman’s statement that the College vacated the site before its lease expired is correct. The Applicant’s witnesses’ evidence was that the buildings had been empty for a couple of years before they were demolished. Taking all the evidence together I think that it is likely that the buildings ceased to be used by the College in about the summer of 1987.
- 13.7. I am satisfied that the old Sturgess School buildings remained standing in June 1988, and that they were demolished in 1989. In this respect also, it seems to me that Mr Hall’s letter of 18<sup>th</sup> August 1993 was inaccurate. A handwritten note on the Grimley JR Eve report records that a memo from T Hird of Derbyshire County Council to Woodlands School states that demolition was to commence on 8<sup>th</sup> May 1989. The Derby Evening Telegraph article published on 19<sup>th</sup> July 1989 clearly demonstrates that demolition was in course during July 1989 as it refers to the buildings being “fast-disappearing”<sup>105</sup>. It is not clear from the words of the 17<sup>th</sup> May 1989 article in the Derby Trader whether demolition had started by that time, or whether what was being reported was that demolition was about to begin, but the accompanying photograph suggests that the demolition began at that time. I am therefore satisfied that demolition of the school buildings took place between about May 1989 and continued into at least July 1989.
- 13.8. I was satisfied that the public would have been excluded from that part of Field B which was occupied by the school buildings and also from an additional area sufficient to ensure the public’s safety and to provide a working area for the demolition workers. I was not satisfied that the whole of Field B was closed during the demolition. For some period after the physical removal of the

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<sup>105</sup> O/78

buildings, the site of the buildings would have been unattractive and potentially dangerous.

- 13.9. By the date of the Grimley JR Eve report (July 1993), the author stated that little remained of the former school buildings, apart from signs of foundations and hard standings. The plan to the Transfer is consistent with this, showing on Field B the driveway to the school from Access 1, and the area of hardstanding only.
- 13.10. The whole of the application land was identified in the Council's April 1989 Green Wedge Policy, as part of an area of open land to be protected against encroaching development. This designation has continued in Local Plans to date.
- 13.11. Ownership of the land was transferred by the County Council to the University of Derby on 22<sup>nd</sup> December 1993. Although Grimley JR Eve's July 1993 report states that use of Fields A and C by the Education Authority had ceased by the time the report was written and the site had been unused for some 4 years by that time, I note that the pre-contract correspondence with Derbyshire County Council<sup>106</sup> states that the northern field, Field A, remained in use as a playing field by a local primary school, and that the County Council wished to agree some temporary use by the school both of the playing field and of the woodland on the site which the school used for nature studies.

***History of the land after the University's acquisition***

- 13.12. In the early period of the University's ownership of the land, Fields B and C, at least, were effectively unmanaged<sup>107</sup>. In June 1994 the University secured a temporary access to the application land via the Allotment Association's road, and wrote to Derby City Council informing the Council of its intention to flail and the grass on the site<sup>108</sup>. The intention was that, after the flailing, the grass should thereafter be cut regularly with a gang mower by the University.
- 13.13. After acquiring the site, the University commissioned the preparation of proposals for bringing the site into use and made several applications for planning permission in respect of the site.
- 13.14. During 1995-96 the Gibson Hamilton Partnership was instructed to carry out a strategic study for the development of sports facilities at the application land. Gibson Hamilton prepared a plan of the proposed leisure facilities in June 1996, and provided a report for the planning department in August 1996. Gibson Hamilton reported that the drainage problems rendered the pitches on the land totally inadequate for playing sport during most of the winter period.
- 13.15. In the summer of 1994 the bank of the Mill Dam Pond was breached. Water overflowed onto the application land, rendering part of it unusable<sup>109</sup>. There

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<sup>106</sup> Letters dated 6<sup>th</sup> August 1992 and 6<sup>th</sup> April 1993 from Mr Tommy to Mr Norman

<sup>107</sup> Mr Norman's letter dated 6<sup>th</sup> July 1995 to Mrs Bolton.

<sup>108</sup> Mr Norman's letter dated 22<sup>nd</sup> June 1994 to Derby City Council and the internal memorandum from Mr Norman to Mr Hall dated 4<sup>th</sup> May 1994.

<sup>109</sup> O19/18.

was also general seepage from the pond<sup>110</sup>. These difficulties took some time to resolve. On 23<sup>rd</sup> February 1995 Mr Collett of Geoffrey Collett Associates advised the University that a channel should be cut across the school drive<sup>111</sup>. He enclosed a plan showing where the channel should be excavated, and advised that it could be dug wholly on land owned by the University, and could be achieved by the hire of a JCB 3C or similar for no more than one day. On the same date Mr Collett wrote to the City Council, and stated that part of the site was under water and the remainder boggy in February 1995<sup>112</sup>. Even following repair of the breach, drainage would have to be improved to enable the sports field to be useable throughout the winter months. Mr Norman sent a copy of Mr Collett's letter to the University attached to a Memorandum to Mr Hall, the Pro Vice-Chancellor Facilities, seeking his decision as to whether to arrange for the proposed ditch to be dug. Mr Norman commented:

“Should you wish me to go ahead with Geoff's proposal for the formation of a ditch, it would have the effect of stopping the site being used as a thoroughfare by the general public.”

- 13.16. On 25<sup>th</sup> April 1995 Mr Collett wrote to Derby City Council informing the Council that his firm had recommended that a channel should be cut across the school drive and that the breach in the bank should be repaired<sup>113</sup>. Mr Porritt of the Council replied by letter dated 3<sup>rd</sup> May 1995, confirming that the channel was a temporary connection, as the drive might be required in the future as an extension of Markeaton Brook Walkway<sup>114</sup>. Undated photographs produced by the University show water running across the site, and standing water on the site<sup>115</sup>. I am satisfied that the channel was dug in about 1995.
- 13.17. In 1995 the University made an application for planning permission to construct a bridge to give vehicular access to Field A, and the application was granted in March 1996. The bridge was built and was completed by the end of October 1999.
- 13.18. I was satisfied that part of Field A would have been affected by the works of construction for the bridge at Access A in about 1999. Access to the unaffected part (the vast majority of the field) remained available during this period.
- 13.19. In 1997 outline planning permission was sought for the formation of an artificial turf area, the erection of floodlights, the erection of a two-storey sports pavilion and associated car parking. The application and permission were not provided, but this scheme seems from its description to have been the scheme devised by the Gibson Hamilton Partnership in 1996. The application was granted with conditions in May 1997, but the development was never been carried out.

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<sup>110</sup> O19/19.

<sup>111</sup> O224

<sup>112</sup> O19/20

<sup>113</sup> O19/21

<sup>114</sup> O225A

<sup>115</sup> O19/22

- 13.20. In about 1998 the University carried out permanent flood alleviation works in the Mill Dam area: the repair of the overflow and sluice and the jetting out of the pipes which run into the Mackworth Brook tributary. There was no specific evidence as to whether or not the trench was filled in at this time, but I infer that, having served its purpose, it is likely that it was at least filled sufficiently to block the flow of water between Mill Dam and Mill Dam Pond.
- 13.21. In 1999 the University sought planning permission to erect temporary buildings to form changing facilities. This application was granted, but the proposed buildings were not erected. An application to site two temporary containers on the site for use as changing facilities was refused the same year.
- 13.22. In 2000 a trench was dug across the land to accommodate network cables for the University's computer system. I am satisfied that these works would have necessitated some localised fencing around the area where the trench was being dug. I am not satisfied that these works caused any substantial interference with local inhabitants' use of the land.
- 13.23. In 2005, the University sought and secured planning permission to use the hardstanding on the site as a works compound in connection with the University's Markeaton Street development. The driveway to the hardstanding was re-surfaced. The hardstanding was also resurfaced and was extended. The improved hardstanding was used as a construction compound between about September 2005 and February 2007. A Heras-type fence was erected around the edges of the hardstanding to secure the construction compound, but it remained possible to obtain access to the remainder of Field B.
- 13.24. In 2006-2007, the City Council erected new silver palisade fencing on its boundaries to the south west of Mill Dam Pond and to the north east of Mill Dam. They took down the University's boundary fencing to the north of Mill Dam Pond, by agreement with the University, and reused part of it to effect repairs to their boundary to the north of Mill Dam Pond, by the A38. The silver palisade fencing blocked off the access to the north of the pedestrian gate, which had been available for many years, but the gate was open during the course of the works, and remained open and unlocked thereafter until the University's new gate at Access 1 and the new fencing around the remainder of the site were erected in August 2007.

#### ***Signs and new fencing***

- 13.25. In August 2007 the University erected new silver palisade fencing which blocked Access 3, and erected new gates and fencing at Access 1 and Access 6. The gate at Access 2 was unseized to allow access at that point. The University affixed signs to Accesses 1, 2, 4 and 6 in the following terms:

“This land is owned by the University of Derby (the owner). The Owner hereby permits access by members of the public on to this sports field provided always that all persons comply with the following conditions. This permission may be revoked at any time.

You must:

- Respect the environment and walk on existing pathways only
- Keep dogs on a lead and clean up after your dog and take any waste with you
- Comply with any instructions relating to your use of the land given to you by the Owner or the Owner's employees
- Encourage others to respect these conditions.

You must not:

- Drive cars or ride motorcycles or any other motorised vehicle on any part of the land
- Use metal detectors
- Dig on or cause any damage to the land
- Leave any rubbish or litter on the land
- or undertake any other activity which may be considered detrimental to this environment.

Whilst the Owner permits public access, the land is not maintained to the standards of a formal recreation ground and all persons coming on to the land do so at their own risk. The Owner will not accept responsibility for loss or damage to property or responsibility for injury unless it is caused directly by the Owner's negligence."

### ***The various accesses to the land***

#### ***Access 1***

- 13.26. O171E, which was sent to Mr Durham as an attachment to an email dated 20<sup>th</sup> March 2007, shows Access 1 after the erection by the City Council of the new silver palisade fence to the south of Mill Dam Pond. The new fence appears to be joined to the brick pillar onto which the pedestrian gate is hinged. The pedestrian gate is open in the photograph.
- 13.27. O171A shows Access 1 before the new gates were constructed but after the erection of the new silver palisade fencing to the south of Mill Dam, which Mr Durham said in evidence, and I accept, was erected by the City Council in February and March 2006. A double vehicular gate is visible between two brick pillars. The double gate is padlocked. There is a gap or an open gateway to the left of the left-hand brick pillar. The silver palisade fencing to the north of Mill Dam which was present at the time of my site visit is visible in the background.
- 13.28. Mr Durham's evidence was that part of the fencing around Access 1 was removed when the trench was dug to alleviate the flooding and was not replaced until the fencing works were carried out by the City Council in 2006. He accepted that, until 2006, there was a gap to the north of the northern pillar of the pedestrian gate through which access could be freely obtained. This evidence was supported by the presence of a worn path, visible in the photograph at O171E in that position.

### *Access 2*

- 13.29. The gate at Access 2 became seized at some time before August 2007, and could not be used, even though it was not locked. Access was available through the fence line, where the fence had fallen down, to the side of the gate until the City Council erected its silver palisade fencing around the Mill Dam Pond. Mr Topley remembered a fresh padlock being put on the gate at some time during the relevant period, and there was some evidence to corroborate the suggestion that it was locked at some time during the relevant period (Sainty, Salter (possibly – not clear whether post or pre 2007), Smith, Smart).

### *Access 3*

- 13.30. It was difficult to get a clear picture of the changes to Access at 3 over the whole of the relevant period. The Objector's photograph of the Access, taken before the erection of the silver palisade fencing at O150 a metal five bar gate, with, to its western side a space between the gatepost and the beginning of the wooden post and rail fencing which was wide enough for a pedestrian to pass through. The annotation on the photograph "stile removed" suggested that at some time there had been a stile in this position. I was not told who the author of the annotation was.
- 13.31. Mr Topley's evidence, which I accept, was that at the beginning of the relevant period there was no gate at Access 3, but in about 1993 or 1994 a gate was put up, and about 12-18 months after the gate was put in it was padlocked. Mrs Bousie's evidence, which I accept, was that in 2000, when she started using Access 3 the gate was off its hinges and was laid against the fence. The gate must have been put back on its hinges at some time between 2000 and 2007 or replaced as the gate in the Objector's photograph is on its hinges.
- 13.32. Mr Durham's evidence was that there was a stile at Access 3 for some time after he started his employment with the University, although he was not clear when the stile was present. Some of the Applicant's witnesses who said that they had used Access 3 did not remember a stile (Bousie, Topley, Salter), but most who had used the access regularly said that they did. Mr Lomas said that he did remember a stile before the gate was erected and Ms Smith described a wooden step, a ramblers' step that you could climb over, which was changed later to a space where you could walk between two fences and a farmer's gate. Similarly Mr Rogers remembered a stile, followed by an overlapping fence which you could walk around. Mr Baker remembered a stile being present when he first started using the application land in 1991. Mrs Webber remembered a stile and a gap. Mrs Hyde remembered a stile. Mr Mackervoy thought there was a stile there going back in time. Mr Williamson remembered either a stile or a gap to the side of the gate. Many of the Applicant's witnesses remembered there being a gap to the side of the gate.
- 13.33. Mr Durham reported a conversation with Mr Lowe about the access at Access 3. Mr Lowe could have given a statement to the Inquiry and did not. I cannot be sure that Mr Durham's account of what Mr Lowe said was accurate, and, to the extent that Mr Durham did give an accurate account of what Mr Lowe said, there was no opportunity to test Mr Lowe's recollection by cross-examination. I think it extremely unlikely that the small pedestrian gate which Mr Lowe was

said to remember was at the side of the vehicular gate was padlocked and opened as required for marking for the primary school when the University acquired the land, as he was reported to have said. That would have left no means of access for the school. It seems inherently much more likely to me that the gate which was padlocked was the vehicular gate, particularly by reference to the reported anxiety of Mr Lowe being access by travellers.

- 13.34. I am satisfied that there was access available at Access 3 next to the vehicular gate in some form throughout the relevant period. On balance, I think it most likely that the access took the form of a pedestrian gate, which disappeared at some point, and thereafter a gap. There was no reliable evidence from the Objector that the gap or stile to the side of the gate providing pedestrian access to the land was ever obstructed, and Dr Choongh on behalf of the Objector stated that its position was that it was unable to say that the pedestrian gate at Access 3 was locked, or that there was a sign there which prohibited access. I prefer the evidence of the Applicant's witnesses that access was available at that point until August 2007, when the new fencing was erected, and am satisfied that the access which was there would have not appeared to be contentious.

#### *Access 4*

- 13.35. The new bridge at Access 4 was constructed by the University in 1999. It replaced a historic bridge slightly further to the north, but there was no evidence that the historic bridge had survived into the beginning of the relevant period. Initially when the bridge was constructed it did not have gates on it. Some time after 16<sup>th</sup> December 2002 double vehicular gates were constructed on the bridge. These gates were generally kept locked, unless they were left open to provide access for vehicles working on Field A. There was a Highways Act sign on the gates, but no other signage.
- 13.36. In 2007 the original gates at Access 4 were changed to provide a vehicular gate with a pedestrian gate to the side. Mr Durham stated in his written evidence that this change was effected in the early part of 2007, and that thereafter access was permitted during daylight hours, but in oral evidence he said that there was no small gate there until after the application was made. Ms Joanna Jennens' evidence was that she remembered going through a pedestrian gate at Access 4 before she moved house in February 2007. I prefer Mr Durham's written evidence to his oral evidence, and am satisfied that it is likely that the change to the gates at 4 was effected, as he originally said, in the early part of 2007. However, having regard to the rest of the evidence before the inquiry, I am not satisfied that the pedestrian gate was locked overnight before the end of the relevant period. The Highways Act sign was removed from the original gates and affixed to the new gates. The other signs were erected in August 2007.

#### *Access 6*

- 13.37. A bridge was constructed across Markeaton Brook to give access to the Scout Hut when the Scout Hut was constructed in about 1973. At this time, the Scout Hut fence and gates were located nearer the bank of Markeaton Brook than they are at present, and access was not available to the application land at



Access 6 along the bank from Mundy Pleasure Ground. Access could be obtained from Watson Street, but this involved climbing the rails on the side of the bridge to the Scout Hut or squeezing between the end of the rails and the fencing (Smith). The Scout Hut fence butted onto the bridge.

- 13.38. The Markeaton Brook Walkway was constructed from Ford Street as far as Mackworth Road between 1988 and 1993 using money from the Inner Area Programme. In the mid 1990s, a further section from Mackworth Road to Watson Street, funded under a different budget, was constructed.
- 13.39. The Registration Authority was able, helpfully, during the course of the Inquiry, to produce the planning permission granted on 5<sup>th</sup> January 1993 for the construction of a footpath, the installation of a footbridge and the refurbishment of an existing vehicular bridge at Mundy Pleasure Ground. Mr Ray Brown of the Registration Authority made inquiries of colleagues who worked for the Council at the time, and was told that the path was built not long after planning permission was granted<sup>116</sup>. The description of the proposal stated that the application related to the construction of a footpath along the bank of the Markeaton Brook within the Mundy Pleasure Ground as an extension of the Brook Walk from Ford Street to Mackworth Road. Where the Pleasure Ground abutted on houses on Watson Street, the path was to cross the brook to run on the opposite bank. The footpath was then to extend northwards across an existing timber footbridge towards the grounds of the former Sturgess School.
- 13.40. The plan accompanying the permission shows the fence and access gates to the Scout hut site being relocated further to the south on the southern bank of the Brook to allow for the construction of the path, and the path entering the application land at access 6, and running along the bank of Markeaton Brook to the point where the drainage ditch which runs between Mackworth Brook and Markeaton Brook meets Markeaton Brook, following the line of the drainage ditch for a little way in a south westerly direction before crossing that drainage ditch and continuing to meet the path leading to the footbridge across Markeaton Brook which provided the former pedestrian access to Sturgess School from Kedleston Road. The footbridge to the Scout hut from Watson Street is also shown on the plan as to be refurbished. The officer opinion refers to the application as proposals to improve the leisure facilities in this part of the city and extend the pedestrian route to the grounds of the former Sturgess School and thence to Markeaton Park.
- 13.41. This description and plan so far as it concerned that part of the path which fell within Mundy Pleasure Ground corresponded to the layout of the path, including the footbridge within the Pleasure Ground, as it appeared on my site visit. The description and plan of the path beyond the northernmost boundary of the Pleasure Ground also corresponded with the layout of the path as I found it on my site visit, save that the bridge shown on the plan as crossing the drainage ditch within the application site was no longer present, and although the path was evident along the bank of Markeaton Brook within the application

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<sup>116</sup> A53

site, it petered out before it reached the position where the bridge might have been. I am able to conclude on the basis of the evidence on site that the path for which planning permission was given on 5<sup>th</sup> January 1993 was constructed at least in part, and I accept Mr Cash's evidence that the path as constructed continued into the application site to the bridge at point 9.

- 13.42. However, in my judgment that part of the path which led from Mundy Pleasure Ground to and into the application site was not completed as early as 1989, as contended on behalf of the Applicant in opening. Rather, it appears that work on it did not start until at least 5<sup>th</sup> January 1993. The path and Access 6 were completed before the University purchased the land at the end of 1993. The construction of the path involved the relocation of the northern boundary fence and gates for the Scout Hut. Once the path was constructed access could be obtained freely to the application land both along the path from Mundy Pleasure Ground, and also via the Scout Hut bridge from Watson Street.
- 13.43. Following completion of the path, access was freely available at Access 6, until the erection of the fence and gate in July 1995. I deal with this incident in detail below. After the gate and fence at Access 6 were removed in August 1995, there was again no barrier to entry at this point until August 2007, when the new silver palisade fencing and gate were erected.
- 13.44. I am satisfied that a finger post was erected within the application land, signposting the Markeaton Brook Walk. At the time of my site visit the finger post had one finger, pointing away from the application land. The post is visible in the Objector's photograph of access 6 taken before the silver palisade fence and gate currently at Access 6 were erected<sup>117</sup>. Some of the Applicant's witnesses and Mr Willgoose suggested that the finger post located had been altered, so that the finger which originally pointed in the direction of the application land was removed. This was corroborated by Mr Harper's video, taken on 8<sup>th</sup> April 1995<sup>118</sup>, which showed the sign post with two fingers on it, one pointing towards the application land, and the finger which remains, pointing away.
- 13.45. The letters between Councillor Laxton and Mr Hall and Mr Norman dating from June 1995 and produced by the Objector<sup>119</sup> spoke of removal of the signpost, rather than of the removal of a finger on the signpost.
- 13.46. When I examined the post on my site, I could see no remains of a finger the end of which had been removed, however, it is possible that might be possible to remove a finger, for instance by taking off the top of the post and removing the finger, then replacing the top, in a way which would not leave any sign of the previous presence of the additional finger. There was space at the top of the post for an additional finger. The alternative is that the whole sign was removed in June 1995, and was replaced by a post with no finger pointing towards the application land, although this seemed reasonably unlikely, as the post matched the one in Mundy Pleasure Ground. I therefore conclude that it is

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<sup>117</sup> O169

<sup>118</sup> A85C

<sup>119</sup> O19/1-2

more likely than not that in June 1995 the signpost was altered by the removal of the finger.

- 13.47. I am satisfied that from the completion of the Markeaton Brook Walkway from Mundy Pleasure Ground to and into the application land, there was a signpost on the application land near Access 6 which signed the Walkway and which had two fingers, one pointing away from the land towards Mundy Pleasure Ground, and one pointing further onto the land, along the path along the southern bank of Markeaton Brook. In June 1995 the finger pointing into the land was removed, but the signpost was not removed.
- 13.48. It remains the Council's ambition as expressed in policy T15 of the City of Derby Local Plan Review, adopted in January 2006, to secure an extension of the Markeaton Brook Walkway towards Markeaton Park.

*Access 8*

- 13.49. There was no evidence that the path from Field B to the bridge at Access 8 or from the Kedleston Road and Watson Street to the bridge at Access 8 was ever blocked while the bridge remained open. There was no evidence that access to the bridge at Access 8 was blocked at any time before about July 1995, when the University was advised that it was structurally unsafe. I am satisfied that it is likely that the bridge was blocked off soon after this. It seemed from Mr Durham's evidence that the bridge was removed during the time that he was employed by the University (from June 2003), that it was not removed for some considerable time after it was blocked off.

*Access 11*

- 13.50. The gate from the Allotments was kept locked by the Allotment Association throughout the relevant period.

*Access across Markeaton Brook to the application land*

- 13.51. I am also satisfied that some local residents obtained access to the application land at times during the year when the Brook was shallow across Markeaton Brook from Watson Street or from the Kedleston Road. From time to time materials were placed in or across the Brook to assist such crossings. A piece of corrugated iron was used to cross the bridge for a number of years from at least the 1970s, and on the balance of probabilities remained useable into the beginning of the relevant period.

*Access between Fields B and C*

- 13.52. It seems likely that, historically, there must have been a bridge over the drainage ditch providing access between Fields B and C, because otherwise there would not have been a formal access from Field B to Field C available to the pupils of Sturgess School, and afterwards Woodlands School. It seems unlikely that the schools would have relied on a bridge at point 9, as that would have involved taking pupils a long way around. However, if there was such a formally constructed bridge, there was no evidence to suggest that it survived into the beginning of the relevant period.

- 13.53. I am satisfied that some users of the land jumped the drainage ditch between B and C, and that, from time to time, materials were placed in and over the ditch to assist people in crossing. I am also satisfied that at all times during the relevant period there was access between the two areas available at the southern end of Fields B and C, near to Access 1, by climbing over the top of the culvert. No attempt was ever made to prevent people using this route.

*Access between Fields A and C*

- 13.54. It seems likely that, historically, there must have been a bridge over the drainage ditch providing access between Fields A and C. The railings alongside the path leading from Access 1 to Access 8 are designed to allow access towards the drainage ditch. Some of the witnesses referred to the bridge constructed as part of the Markeaton Brook Walkway works having replaced an earlier bridge at the same point. However, there was no evidence that any historic bridge survived into the beginning of the relevant period. I am satisfied, having regard to the witness evidence, that in 1993 a bridge was erected at point 9 as part of the Markeaton Brook Walkway works, which matched the bridge currently at the northern end of Mundy Pleasure Ground. I am also satisfied that the path which was constructed led to that bridge, and thereafter onto the path between Access 8 and Access 1. The bridge washed away some time after it was installed. None of the Applicant's witnesses were able to put a clear date on when the bridge washed away. Mr Smart spoke of taking a route around the fields across the bridge as though this was something that he had done for a while, but it may be that he was also referring to using a previous bridge in the same place. On balance, I accept Mr Willgoose's evidence that the bridge was washed away during the winter of 1993-1994.

*Use by the University*

- 13.55. I was not satisfied that the University made any substantial use of the application site in the early years of its ownership of the site. Field A was used for sport for some part of the relevant period, but in my judgment only the later years, from about 2000. I am satisfied that there were rugby/American football posts on Field A between about 2000 and about 2007.
- 13.56. The Applicant's case was that Field C was not prepared as a playing field until September 2008, after the end of the relevant period. The Field was not in use as a playing field when any of the aerial photographs were taken. It is clear from the photographs taken by Mr Browne in May 2008 that it was not prepared as a playing field in May 2008. I prefer the Applicant's witnesses' evidence to Mr Durham's evidence. I was not satisfied that Field C was used for sport by the University at all during the relevant period.
- 13.57. There was also some evidence that the University had made some use of the application land in connection with its Ecology and Surveying courses. I was not satisfied that any use of the land had been made during the relevant period for the Ecology module, but I accept the Objector's case that it was used for the Surveying courses within the relevant period.

*Use by the University's licensees or those who might have been the University's licensees*

- 13.58. There was some evidence that use of the application site by the Council and by other groups had taken place with the permission of the University within the relevant period, but there was no evidence to suggest that other users of the site were excluded at these times.
- 13.59. A right for Markeaton Primary School to continue to use the site for 35 football games a year and for nature studies was reserved in the contract for sale of the land to the University. The University produced only an extract from the contract, not including the plan, and it was not therefore possible for me to verify Mr Durham's evidence that the access at A referred to was Access 3, but I accept this evidence as likely.
- 13.60. I am satisfied on the balance of probabilities that Markeaton Primary School did continue to use Field A for home matches after the purchase of the application land by the University. Mrs Bousie stated that her younger son began playing in the school team in 1993 or 1994, and played on Field A. There was no evidence to support Mr Durham's suggestion that Markeaton Primary School used Field C for sport, either before or after the sale of the land to the University, and I reject that suggestion.
- 13.61. In about March 1994 the University paid for work to be carried out at Markeaton Primary School. Mr Norman's letter of 17<sup>th</sup> March 1994 to the contractor states that the University was assisting the County Council to undertake the work as part of the Sturgess School site development. Mr Sykens said that the Markeaton Primary School used Field A whilst his daughter was at the school between 1991-98, but not for the whole time she was at the school. It seems likely that use of the application land by Markeaton Primary School for football ceased after this work was completed, and therefore that the use of Field A by the school for football continued until 1994, but probably not thereafter. Markeaton Primary School continued to use the application land for other purposes, including an annual early morning bird-watching field trip until at least 1998 (Rogers), and (since at least 2001) for geography, science and art projects, and for afternoon fun games of cricket and rounders which the school field cannot accommodate (Edge).
- 13.62. Some of the Applicant's witnesses remembered that Field C had been used by Derby County Football Club for training its junior squad, possibly in about 2000, for a season (Alan Williamson, Warren, and others). Mr Durham's evidence was that the University gave permission for this use, although he did not specify when the Club used the application land, other than to say that it was prior to the development of their current football academy in July 2003. He provided no documentary evidence to support his statement. He stated that Field C was leased to the Club for two seasons, but the use during the second season was not as intense as during the first season. Mr Durham also stated that the University allowed the Club to use Area A on occasion, because there were problems with water at the southern end of Area C. This tends to suggest that the use was in or before 2000, because of Mr Willgoose's evidence that flooding had continued up to about 2000, but there had been no further

problems since then. On the balance of probabilities I am satisfied that use was permissive and took place in about 2000.

- 13.63. Ms Smith stated that the Derby Rugby Club had used Field A for a season in 2006 when its own ground was flooded. Mr Durham did not deal with this and there was no evidence as to whether the University gave permission for this use.
- 13.64. There was also evidence that the Scout groups based at the Scout Hut on Watson Street had used the land for activities, and no evidence that they had sought or secured the permission of the University to do so.
- 13.65. There was some evidence of use by local football teams, including a pub team, but no evidence as to whether this use was by permission of the University or not.

***Use of the application land by local inhabitants***

- 13.66. There was a substantial amount of evidence to support the Applicant's case that the whole of Field A and the whole of Field C had been used by local residents throughout the whole of the relevant period for lawful sports and pastimes including walking, dog walking, children's play, family and group ball games, nature observation, playing and fishing in the brooks, kite flying, sledging, cycling (including BMX riding in the woods), picnicking, relaxing, some overnight camping and blackberry and raspberry picking. The tennis courts on Field C were used for tennis, learning to bicycle, and playing with remote control cars.
- 13.67. I was not satisfied that the whole of Field B had been used for lawful sports and pastimes throughout the whole of the relevant period. Until July 1989 a substantial part, more than half, of the field was covered by the former Sturgess School. At the beginning of the relevant period, August 1987, the buildings had just been vacated by Derby College of Higher Education. They were not used again for any purpose before they were demolished in 1989. The buildings, whilst empty, were subject to vandalism, and in particular the windows were smashed.
- 13.68. Those parts of the school site which were covered with buildings were not used for lawful sports and pastimes whilst the buildings remained standing. Although parts of the school site were not covered by buildings, for instance play areas and car parking area, there was no evidence at all that local inhabitants went to these areas specifically to play or for any other purpose. There was evidence that the occasional person went to look at the old school buildings out of curiosity (Topley, Sainty children, Salter), but this is not evidence of use for lawful sports and pastimes.
- 13.69. So far as the rest of Field B is concerned, there was some limited evidence of use of that part of the field which was not occupied by the school site by local inhabitants after the school closed and before it became derelict. Ms Burnett gave evidence that when driving past after the school closed but before it was demolished she had seen dog walkers and children playing on Field B. Mr

Peter Williamson stated that the remainder of Field B was used by local people for recreation from when the school closed until it became derelict. There was some evidence from users to support this. Mr Adkin stated that he sometimes walked around the school, but kept away from the buildings. Mr Salter walked the perimeter of Field B. Mr Sainty, his sons and dog took a path through Field B out onto Queensway. Mr Cash also took a route with his dog through Field B both to gain access to Field A, and to exit at Markeaton Street (Access 1) and Queensway (Access 2). However, both Mr Sainty and Mr Cash's use of Field B at this time appeared to me to have the character of a right of way-type user, rather than a village green-type user and do not evidence use of the land for lawful sports and pastimes. I considered when evaluating this evidence the fact that in my judgment was inherently likely that only a proportion of those witnesses who gave evidence would have used the land at the beginning of the relevant period, as some of the original users will have moved away or died over the last 26 years. However, I was not satisfied that there was any substantial use of Field B while the school buildings remained on site and before they became derelict.

- 13.70. As the buildings became derelict, users kept away from them (Adkin, Salter, Topley – did not go there with his dogs but went there on his own to look at the buildings, Smart) or used their route through Field B less frequently because of the risk of cuts to their dogs' paws from the glass (Cash). None of the Applicant's witnesses claimed to have used the site whilst the school was being demolished. Mr Sainty said that he was keeping his sons away at that time because it was obviously a dangerous place to be. Mr Adkin specifically said that access to the school site was blocked at that time.
- 13.71. Mr Willgoose's evidence that the whole of Field B would have been secured during the demolition of the school was speculation: he had no personal knowledge of how the site was fenced at the time. I accept the evidence of Mr Adkin who said that during the demolition works access to the school site was blocked at Access 1. I am satisfied that it is likely that substantially the whole of Field B would have been unavailable for use during the period of the works, and that, to the extent that there was the opportunity for access to its margins, local inhabitants did not take that opportunity, but avoided Field B for the duration of the demolition works.
- 13.72. I am satisfied, however, that once the school buildings had been demolished and the site had begun to grow over, Field B was used in the same way as Fields A and C, for informal recreation. Whilst the hardstanding area in Field B was used between September 2005 and February 2007 as a works compound there was no access to the hardstanding area, but the remainder of Field B continued to be accessible. There were a number of the Applicant's witnesses who claimed to have continued using Field B whilst the works compound was in place, and I accept their evidence on this point (Browne, Bousie). Mrs Bousie's evidence, which I accept, was that there was no barrier to those coming onto the site from Access 1, although she had to wait whilst the construction vehicles passed along the drive before passing through.

***The University's awareness of the use being made of the land by local inhabitants and action taken in relation to that use***

- 13.73. It is clear from the Grimley JR Eve Report dated July 1993 that the University was aware when it bought the land that the playing fields were being used informally by local inhabitants. The report stated "We understand that the playing fields, although used informally by the local populous, are not used by the Education Authority."

***The 1994/1995 signs***

- 13.74. Mr Durham's evidence was that the University had erected signs following its acquisition of the land at Access 3. On the site visit the stumps of two metal poles such as might have held a sign were visible at Access 3, but it was not possible to tell from when the stumps dated. One or two of the Applicant's witnesses seemed to remember a sign at Access 3. The University did not contend that the signs purported to grant the public a right of access to the land or to restrict the public's access to the land. It seemed likely that the signs were a statement of the University's ownership. In my judgment such signs have no effect on whether the use of the land was as of right.

***Correspondence in 1995***

- 13.75. The correspondence between Mrs Bolton and Mr Norman dating from June and July 1995<sup>120</sup> would have alerted the University to use of the land by the Cubs and by Mrs Bolton, at least. Mr Norman's response does not include a denial of Mrs Bolton's right to go onto the land. He describes the University as having "only recently acquired this particular site and ... beginning to take control".

***The erection of a gate and fencing at Access 6 in 1995***

- 13.76. On about 10<sup>th</sup> July 1995 the University erected a fence and gate at access 6, and locked the gate, preventing access to the application land at that point. Although Mr Willgoose's statement contained no information at all about this incident, he gave his recollection in evidence in chief, and I accept it as consistent with the contemporaneous documentary evidence, and likely to be reasonably accurate.
- 13.77. There was no evidence that other accesses to the land were blocked at the same time, and the evidence of the Applicant's witnesses, which I accept, was that access to the land remained available via other accesses.
- 13.78. Local residents protested both to the University directly, and to their local Councillor<sup>121</sup>. Mr Landon's evidence, which I accept, was that there was outrage from the local public at the blocking of the access. There were two principal protests: that the gate and fence contravened planning legislation in that it was of such a height that it would have required planning permission but none had been sought, and that it blocked a right of way across the land, along the Markeaton Brook pathway.

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<sup>120</sup> O19/3-5

<sup>121</sup> O19/6-12



- 13.79. Mr Willgoose's evidence that his first step was to arrange for the gate to be unlocked, before arranging for its removal was corroborated by the Applicant's witnesses (Adkin, Landon). I am satisfied that the fence and gate were unlocked on Mr Willgoose's instruction on his return from holiday and were removed shortly after 14<sup>th</sup> August 1995, following a meeting between Mr Willgoose and a planning officer. The gate and fence were up, therefore, for a period of about 5 weeks.

*Post 1995*

- 13.80. The newspaper article from the Derby Evening Telegraph published on 24<sup>th</sup> May 1997 relating to the University's application for outline planning permission made in 1997 stated that the land "is a popular spot for dog walkers and for local youngsters to play". The University's spokesperson comment is reported. Notably in my judgment, the University's spokesperson did not assert that local people were not entitled to use the land.
- 13.81. The only document produced by the Objector dated after 1995 in which the University made it clear that access by the public to the application land is contentious is an email dated 18<sup>th</sup> December 2006 written by Mr Durham to a Mr Mark Bennett. No evidence was given as to who Mr Bennett is, and his email to which Mr Durham was responding was not produced. The request in Mr Durham's email for confirmation as to what involvement or knowledge Derby College has in any of the matters referred to, suggests perhaps that Mr Bennett was employed by Derby College. Mr Durham wrote:

"The suggestion that there is already public access on to this site is totally incorrect. Every year we secure our boundary only to find within days (sometimes hours) our efforts are destroyed."<sup>122</sup>

I note however that Mr Durham did not in his witness evidence state that the University secured its boundary every year. The assertion of fact contained in this email was not supported by the evidence and it was conceded by the Objector's counsel in closing that, on the evidence, he was unable to make a submission that the University had secured its boundaries at any time during the relevant period.

*Were the gates locked overnight and during the University Christmas holidays and if so from what date?*

- 13.82. There was no gate at access 6 during the relevant period, apart from during the brief period in 1995 dealt with above. Having regard to the state of the fencing, and to the University's concession that it was unable to prove that it improved the fencing between the time it acquired the land and the City Council's works 2006, locking the pedestrian gates at Access 1 would have been a symbolic gesture only. The Applicant's witnesses' evidence was that access was available freely at Access 1. Many of the Applicant's witnesses specifically remembered a pedestrian gate, which they said was never locked (Cash, Smith, Wroe, Kim Yeoman, Joanna Jennens, Rogers, Smart) but some said that they could not remember whether access was obtained through the gate or through a

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<sup>122</sup> O19/35

gap. I can well understand that those who obtained access through a gap between the end of a line of fencing and a gatepost might not be sure whether they were obtaining access through a gateway or through a gap next to the gateway where the fencing had been removed. However, every witness for the Applicant who gave evidence on this point was clear that there was no obstruction to access at Access 1 before the new gates were erected.

- 13.83. Mr Willgoose's evidence was that from the time he took over responsibility for the site, the University was happy to allow the public access to the land. His evidence, from which he resiled in cross-examination and which I reject, was that the wicket gate at Access 1 alone was locked at Christmas from 2000, but I accept the corollary as likely, which was that the University did not lock any of the other access gates to the land at this time. This is consistent with the Applicant's witnesses' reported experience that they did not find the pedestrian gates to the land locked at all during this period.
- 13.84. The only evidence which supported the Objector's case that the pedestrian gate at Access 1 was locked before August 2007 was Mr Frearson's 21<sup>st</sup> July 2000 letter, in which Mr Frearson stated that the wicket gate, along with the main entrance gate, remained locked. The context of the letter is important: it appears to have been a letter written to Mr Willgoose following a joint site inspection by Mr Willgoose and Mr Frearson. It does not seem therefore that Mr Frearson was intending to inform Mr Willgoose of anything which he did not already know, as he too had been present on the site visit. The phrasing of this letter suggested a permanent locking, rather than regular locking and unlocking. Mr Frearson stated that the access currently used by the public was through where a section of the fence had been removed. According to Mr Willgoose's evidence, the locking of the gate at this time would not have been consistent with his policy that access to the land should be available to the public. In my judgment in the absence of any other evidence to support the statement in Mr Frearson's evidence, the Objector has not proved on the balance of probabilities that the pedestrian gate was locked at this time.
- 13.85. Mr Durham's evidence was that in 2004 he instructed the University's security manager to lock the gates to the application land overnight and at Christmas, and that he gave the instruction again, shortly afterwards, when there was a change in security manager. In cross-examination, it transpired that the only gate to which this instruction could have related at this time was the pedestrian gate at Access 1. At this date there was a substantial gap to the north of the pedestrian gate at Access 1, as a result of a section of fencing having been removed in 1995 and not replaced. I think it inherently unlikely that an instruction would have been given to lock the gate in these circumstances. I was not satisfied Mr Durham's evidence that that the pedestrian gate at access 1 was locked overnight and at Christmas from 2004 was reliable. I was not satisfied that the gate was locked at all before the new fencing and signs were erected by the University on the site in August 2007.
- 13.86. Mr Durham's evidence was that the gates at 1, 2, 4 and 6 have been locked overnight and at Christmas since the new fencing was erected in 2007. I was not satisfied, even if it is right that he gave this instruction, that this instruction

was carried out. This point is not strictly relevant to the issues before the inquiry, but I consider that my finding on it supports my conclusions above in relation to the reliability of Mr Durham's evidence as to the locking of the gates during the earlier time, within the relevant period.

- 13.87. I considered carefully whether Mr Durham's evidence that the gates were locked at these times could be consistent with the Applicant's witnesses' evidence that they had not found the gates to be locked, the explanation being that the gates were locked at time when the Applicant's witnesses were not using the land and therefore whether it was possible that the old gates were regularly locked during the relevant period.
- 13.88. However this explanation was not consistent with the Applicant's witnesses' evidence, which I prefer on this point. Ms Burnett had found the gate at Access 4 to be locked at Christmas 2009, and at one or two other times before that. At Christmas 2009, access 6 was open, and all the others were locked: she did a perimeter walk on that occasion. Ms Bousie found access 1 locked at Christmas 2009. Ms Smith found all accesses apart from Access 6 locked on recent New Year's Eves, but Access 6 remained open, including at New Year 2010. Mr Browning had found Access 1 locked at Christmas 2009, and it remained locked until a day or two after New Year's Day. He did not remember Access 1 being locked at Christmas 2008.
- 13.89. Having regard to all the evidence before the Inquiry, I am not satisfied that any of the gates were locked at Christmas before Christmas 2009. Furthermore, contrary to Mr Durham's evidence Access 6 was not locked at Christmas 2009.

*Cessation of use as of right*

- 13.90. I am satisfied that as a result of the erection of the new fencing, gates and signs by the University in August 2007, use of the land ceased to be use as of right. For a couple of days after the new gate was erected at Access 6, it was locked. There was some confusion when the witnesses gave evidence in relation to a locked gate at Access 6 as to whether their evidence related to the 1995 gate or the 2007 gate. I was satisfied that Mr Cash, Mrs Cotton and Mr Clasby's evidence all related to the 2007 gate.

14. **Applying the law to the facts**

*a significant number of the inhabitants of any locality or of any neighbourhood within a locality...*

- 14.1. I am satisfied that the West End is a neighbourhood within the locality of the City of Derby and that a significant number of the inhabitants of the West End have used the application land. The number of local inhabitants using the land has been sufficient to alert the landowner to the fact that his land was in general use by local inhabitants, rather than occasional use by individual trespassers.

*...have indulged as of right ...*

- 14.2. There was no evidence at all to suggest that Derbyshire County Council objected to the use being made of the application land by local people between

the beginning of the relevant period and the sale of the land to the University in December 1993. I am satisfied therefore that for the first 6 years or so of the relevant period, use of the application land was as of right.

- 14.3. I am satisfied that as a result of the erection of the new fencing, gates and signs by the University in August 2007, use of the land ceased to be use as of right. I therefore turn to consider whether use between December 1993 and August 2007 was as of right, as required by the statutory test.
- 14.4. I accept Dr Choongh's submission that the owner may destroy the peaceable nature of the local inhabitants' use of the land by showing that he contested their use of the land. Lord Roger's remarks on the question of forcible use in *Redcar*<sup>123</sup> show that use is not only *vi* when it is gained by employing some kind of physical force against the owner, but also if the user had done something which he was not entitled to do after the owner had told him not to do it<sup>124</sup>. If use continues despite the landowner's protests and attempts to interrupt it, it is treated as being *vi*, and so does not give rise to any right against the landowner. A landowner is entitled by continuous and unmistakeable protests to destroy the peaceable character of the user, without actual interruption, and so to annul one of the conditions upon which the presumption of right is raised. Use is only peaceable (*nec vi*), if it is neither violent nor contentious. The unifying element in the three vitiating circumstances: *vi*, *clam* and *precario*, is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.
- 14.5. Dr Choongh also sought to persuade me that use of the application land was impliedly permissive, by reason of the fact that the University regulated use of the land. I accept Dr Choongh's submission that use as of right may be disproved by showing that the owner of the land regulated access to the land on occasion during the relevant period. The effect of such regulation was characterised as showing implied permission in *Beresford*, because that was the point which was being argued, but is considered more generally as part of the question whether use was as of right in *Redcar*. I accept Dr Choongh's submission that if the University had closed the land to all-comers on occasion during the relevant period, that would suffice: in *Beresford* Lord Walker characterised such overt conduct as giving rise to an implied or inferred permission, because it is an assertion of title by the landowner which has an impact on members of the public and demonstrates that their access to the land, when they do have access, depends upon the landowner's permission<sup>125</sup>. Lord Bingham in *Beresford* stated that a licence may be implied where a landowner so conducts himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission, for example by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days. The landowner in this way asserts his right to exclude, and so

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<sup>123</sup> Lord Roger agreed with Lord Walker and gave his own reasons for his decision. Lords Hope and Kerr agreed with everyone else's reasons, as well as giving reasons of their own. Lord Roger's reasons were therefore concurred in by 3 out of 5 of the Supreme Court judges.

<sup>124</sup> *Redcar* at paragraph 88-91.

<sup>125</sup> *Beresford* at paragraph 83.

makes plain that the inhabitants' use on other occasions occurs because he does not chose on those occasions to exercise his right to exclude, and so permits such use. In *Redcar* Lord Walker explained a situation where there have been successive periods when recreational users are first excluded and then tolerated as the owner decides as destroying the necessary "as of right" character of the user<sup>126</sup>.

- 14.6. On the facts of this case I am not satisfied that the University did close the whole of the land to the public (or endeavour to do so) at any time after its acquisition of the land in December 1993 and before August 2007. Although I accept that the July 1995 letters do suggest that the University (in the person of Mr Norman)'s future intention was to secure the boundaries of the land and take control of it, that intention did not come to fruition. The boundaries of the land were not secured until August 2007.
- 14.7. Had I been satisfied that it was possible to close the land and that it had been closed overnight or at Christmas during the relevant period, I would have considered that this defeated the Applicant's claim that use had been as of right, but on the evidence I was not so satisfied. Before July –August 1995 when the gate and fence were erected at Access 6, there was open access at that point. By the time the gate and fence were erected at Access 6, the trench had been dug across the old school drive at Access 1, and a section of the fencing to the north of the gate had been removed. The fencing was not replaced until 2006, a long time after the gate at Access 6 had been removed. In my judgment it was not physically possible at any time before August 2007 to close the land. Further, and in any event, I was not satisfied that the University's evidence that it did lock the gates before August 2007 was reliable.
- 14.8. I turn next to consider whether any of the actions of the University short of closure of the whole of the land were sufficient to put the use of the land by local residents in contention. It is not necessary for a landowner to take all possible steps to prevent access to his land in order to cross the threshold of this test: he is not required to turn his land into Fort Knox in order to make it clear that use of his land by local inhabitants is contentious. Rather he must take reasonable steps, having regard to the nature of the land, to draw to the users' attention the fact that he does not wish them to use his land. Such steps might involve physically impeding access by securing the fencing and blocking access points, erecting notices, leafleting the local neighbourhood and/or statements in the local press.

*The changes in the available accesses*

- 14.9. During the period from the beginning of the relevant period until December 1993, what would have appeared to be uncontested access was available to the land at the following points: Access 1, Access 8, and Access 3. There was no evidence that any of these Accesses were blocked at this time.

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<sup>126</sup> At para 27

- 14.10. During the period after the University purchased the land and before 2007, what would have appeared to be uncontested access was available to the land at the following points: Access 1, Access 3, Access 8 (until 1995), Access 6 (from 1993, and with the exception of a period of 5 weeks in 1995).
- 14.11. At all times during the relevant period, although other accesses may have been locked from time to time, access was freely available at these points. There was also no physical barrier at any time to obtaining access by fording or using stepping stones over Markeaton Brook. In my judgment (with the possible exception of the 1995 erection of fencing at gates at Access 6, which I deal with in detail below), the changes that the University made to the other accesses to this land would not have been sufficient to alert users to the fact that their use was contentious or to render their continuing user impliedly permissive. The changes to these accesses were not nearly sufficient to amount to continuous and unmistakable protests against the local inhabitants' use of the land so as to destroy the peaceable character of their user.
- 14.12. I am satisfied that a reasonable owner would not have considered that the installation and locking of the vehicular gate at Access 3 in about 1993 or 1994 whilst a gap sufficient to accommodate a pedestrian or a stile next to it provided pedestrian access to the land would be sufficient to communicate that access at that point was contentious. Access 8 was blocked off during the relevant period, but a reasonable person would have understood that it was blocked because the bridge over Markeaton Brook at that point had become unsafe, rather than because the owner was seeking to control use of his land. I do not think the fact that the University installed a bridge and vehicular gates at Access 4, which were generally kept locked, communicated a desire on the part of the University to exclude people from the land: the gate was a vehicular gate, and like the gates at Access 1, one would have expected a vehicular gate to be kept locked, to ensure that travellers' and other unauthorised vehicles could not gain access to the land.
- 14.13. The 1995 erection of fencing and a locked gate at Access 6 would, in my judgment, had the fencing and gate been maintained, have been a sufficiently positive and assertive step by the landowner to put use of the land into contention. A reasonable landowner would conclude that the majority of users would, as a result, be aware that the University objected to their use of the application land, even though the other accesses to the land were not secured at the same time. I am supported in this view by the evidence of the actual reaction of local residents: their reaction was one of outrage and protest.
- 14.14. A number of objections were raised to the gate and fence, including a claim that there was a right of way through the application land, and a claim that the gate and fence contravened planning legislation because of its height. Had the University maintained the gate and fence in the face of these protests then, in my opinion, then any continuing use of the land after that time would have appeared to the University to have been use by force, in disregard of the University's known opposition to the use of the land being made by local people, rather than use as of right.

14.15. However, the University decided to in the first instance to unlock, and then to take down the gate and fence, and had taken it down within a matter of weeks of its erection. It did not apply for planning permission to re-erect the fencing and gate, and nor did it erect an alternative at a lower height. It did not seek to fence in the alleged footpath, so as to prevent access to the remainder of the land. In my judgment the analogy that Mr Petchey drew with the *Cheltenham Builders* case was apposite: it seems to me that this would appeared to the local residents effectively to be an acceptance by the University that it should not have erected the gate and fence at all. The landowner would have appreciated that local users would have felt vindicated in their belief that they had a right to go onto the application land. A landowner who wishes to stop the acquisition of prescriptive rights over his land must not acquiesce and suffer in silence.<sup>127</sup> In these circumstances a reasonably alert owner would have understood that the user by the local inhabitants “was the assertion of a right, and would mature into an established right unless the owner took action to stop it”<sup>128</sup>.

14.16. In my judgment therefore, although the gate and fence prevented access to the application land via Access 6 for about 5 weeks in 1995, use of the land as of right was not interrupted by the erection of the gate and fence.

14.17. Looking at the situation as a whole from the point of view of the landowner, in my judgment, a reasonably alert owner of the land could not have failed to recognise that the user by local inhabitants was the assertion of a right which would mature into an established right unless the owner took action to stop it. It may well be correct that the University chose not to continue to challenge the local inhabitants’ assertion of a right for political reasons, because it wanted to avoid conflict with the local people, rather than because they were in fact content to have local inhabitants using the land for recreation, but nevertheless it is clear in my judgment that the University did choose not to challenge the use by local inhabitants.

*The carrying out of various works on parts of the land*

14.18. Dr Choongh sought to persuade me that it could be implied that the owner gave the public permission to use the land because it regulated the public’s use of the land by excluding them from various parts of the land whilst works were being carried out to those parts. I do not accept Dr Choongh’s submission that all that is required in order to negative use as of right is a temporary exclusion from any part of the land. I am not satisfied, as a matter of law, that such a submission survives the decision of the Supreme Court in *Redcar*: Lord Walker<sup>129</sup> draws a distinction between concurrent competing uses of land, and successive periods where users are first excluded and then tolerated as the owner decides, and says that the latter situation is the explanation for Lord Hoffman’s dicta about *Laing Homes in Oxfordshire*<sup>130</sup>. Lord Hope<sup>131</sup> deals

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<sup>127</sup> Per Lord Walker at para 77 of *Beresford*

<sup>128</sup> Per Lord Walker at para 36 of *Redcar*

<sup>129</sup> Lord Walker gave the leading opinion, and all the other Supreme Court judges agreed with him.

<sup>130</sup> *Redcar*, paragraph 26 and 27.

<sup>131</sup> Lord Hope agreed with Lord Walker and gave his own reasons for his decision. Lord Brown agreed with Lords Walker, Hope and Kerr. Lords Hope and Kerr agreed with everyone else.

with the question of rights post-registration on the assumption that registration is possible where use for recreation has co-existed with the owner's use of the land and states that in his opinion "the question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist"<sup>132</sup>. Lord Brown similarly viewed the effect of registration as being "to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights, but not at the expense of the owner's own continuing entitlement to use the land as he has been doing"<sup>133</sup>, and said that as Lords Hope, Walker and Kerr made plain, "the focus must be on the way the land has been used by the locals, and, above all, on the quality of that user"<sup>134</sup>.

14.19. I was satisfied that an area around the school buildings would have been fenced off during the school's demolition in 1989, that a trench was dug across the former school drive in 1995, that part of Field A in the vicinity of Access 4 would have been affected by the works of construction for the bridge at Access 4 in about 1999, that the digging of the trench for the network cables in 2000 would have necessitated some localised fencing around the area where the trench was being dug, and that the hardstanding area in Field B was used as a construction compound in connection with the University's Markeaton Street development between late 2005 and early 2007.

14.20. However, I do not consider that the restriction of access to parts of the land where works were being carried out is the type of conduct from which permission to use the land can be implied. In my judgment, such temporary exclusions from parts of the land for reasons which would be obvious to a user (the danger which would be posed to him if works were not fenced off and the need for security for dangerous and valuable construction equipment), fall within the category of activities in respect of which one might expect give and take between owner and user, and do not show that the owner of the land was regulating its use, so as to render use at other times permissive. The obvious purpose of the digging of the trench was to alleviate flooding. Although the University expected and desired to achieve by digging the trench a side-benefit that it would be more difficult for local inhabitants to access the land, this intention was not communicated to users, and in my judgment would not have been objectively obvious.

*...in lawful sports and pastimes ...*

14.21. The land was used for lawful sports and pastimes including walking, dog walking, children's play, family and group ball games, nature observation, playing and fishing in the brooks, kite flying, sledging, cycling (including BMX riding in the woods), picnicking, relaxing, some overnight camping and blackberry and raspberry picking. The tennis courts on Field C were used for tennis, learning to bicycle, and playing with remote control cars.

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<sup>132</sup> Redcar, paragraph 72, 74 and 75.

<sup>133</sup> Redcar, paragraph 100.

<sup>134</sup> Redcar, paragraph 107.



*...on the land...*

14.22. The application land has been sufficiently clearly defined to constitute “land”.

*...for a period of at least 20 years and they ceased to do so before the time of the application but after the commencement of this section; and the application is made within the period of two years beginning with the cessation.*

14.23. The date on which it is claimed that qualifying use of the land ceased in this case is August 2007. This date is a date after the commencement of section 15 of the 2006 Act. The application was made within 2 years of this date. The relevant 20 year period in relation to the application is therefore August 1987 to August 2007.

14.24. I was satisfied that the whole of Field A and the whole of Field C have been used by local residents for lawful sports and pastimes throughout the whole of the relevant period.

14.25. I was not satisfied that the whole of Field B had been used for lawful sports and pastimes throughout the whole of the relevant period. I was satisfied that once the school buildings had been demolished (1989), and after the site began to grow over, Field B began to be used by local inhabitants for informal recreation, although my impression was that it was less well used than Fields A and C, with much of the use being right of way-type user rather than village green-type user. However, there was scant evidence that that part of Field B which was not occupied by the school buildings was used for lawful sports and pastimes at the beginning of the relevant period when the school buildings were unused but before they became derelict, and I was not satisfied that there was any use of Field B for lawful sports and pastimes whilst the demolition of the school buildings was in progress.

14.26. I do not consider that Mr Petchey’s submission that the presence of the school buildings fell into the category of something in relation to which there could be give and take, was correct. It is clear in my judgment that the presence of buildings on a site prevents any use of the land for lawful sports and pastimes for the period that they are present. There is no question during that time of any give on the part of the landowner.

14.27. Similarly, I do not accept Mr Petchey’s submission, based on *Oxfordshire*, that I should draw an analogy between the fact that in *Oxfordshire* only 25% of the land was accessible, but the whole was found to have been used, and the fact that in the instant case, the building was present on the site for 2 years out of 20 (10% of the time), and therefore it could be said that the site had been used for the whole of the period. Each element of the statutory test has to be properly and strictly proved, and the test requires 20 years’ use. 18 years’ use is simply insufficient.

**15. Conclusion and Recommendation**

- 15.1. I therefore conclude, in relation to Field B, that the Applicant has failed to satisfy the statutory test, because he has failed to show 20 years user of Field B for lawful sports and pastimes.
- 15.2. The statutory test is satisfied in relation to Fields A and C.
- 15.3. I recommend that the Registration Authority should accede to the application in part and should register Fields A and C as a town green. I recommend the boundaries of the area to be registered dividing those areas from Field B should be, so far as Field A is concerned, the southern bank of Mackworth Brook, and, so far as Field C is concerned, the western bank of the drainage ditch between Mill Dam Pond and Mackworth Brook.
- 15.4. The Registration Authority is required by Regulation 9 of the 2007 Regulations to give written notice of its determination to the Applicant, to every person whose address is known and who objected to the application and to every concerned authority and, where the Registration Authority has granted the application, details of the registration, and where it has rejected the application, the reasons for its decision. I recommend that the reasons are stated to be “the reasons set out in the Inspector’s Report dated 10<sup>th</sup> July 2010”.

LANA WOOD

10<sup>th</sup> July 2010

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