

**In the Matter of**  
**an Application to Register**  
**the Merestone Road Recreation Area, Corby, Northamptonshire**  
**as a new Town or Village Green**

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**REPORT**  
**of Mr. VIVIAN CHAPMAN Q.C.**  
**10th April 2014**

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Ref Sunita Makh  
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**Executive Summary**

**This report recommends that the application land should be registered as a new green with the exception of the footprint of the sales portacabin and car park which formerly stood on part of the application land.**

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## **1. The Merestone Road Recreation Area**

[1] Corby is a town in the northern part of Northamptonshire. It had a long history as a centre for the iron and steel industry. That industry has greatly declined but has now been replaced by other sources of employment which have led to a great expansion of the town.

[2] From the centre of Corby, Oakley Road (A6014) leads in a south-westerly direction to join the A6003 road towards Kettering. For much of its length, Oakley Road is a wide road with generous grass verges. On both sides of the Oakley Road, there has been a great amount of modern residential development. Along Oakley Road, there are several roundabouts which give access to the various estates comprised in this development. Oldland Road exits in a south-easterly direction from one of these roundabouts. Oldland Road leads to another roundabout near a modern shopping centre and public house known as Oakley Vale. Turning in a south-westerly direction at that roundabout, one enters Butland Road, which runs parallel with Oakley Road until it reaches a roundabout junction with Lyveden Way. Turning in a north-westerly direction, Lyveden Way re-joins Oakley Road at another roundabout. Within the rectangle formed by Oakley Road, Oldland Road, Butland Road and Lyveden Way, there are three distinct areas of housing, all self-contained. The most northerly, and by far the largest, of the three areas, is the Merestone Road estate. The next estate to the south is the Dumble Close estate, which is divided by a green strip of land from the Merestone Road estate. There is no direct vehicular access between the Merestone Road estate and the Dumble Close estate.

[3] Merestone Road curves through the Merestone Road estate. One end gives onto Oldland Road and the other onto Butland Road. Eight closes lead off Merestone Road:

- Cantle Close
- Catchpole Close
- Ridding Close
- Berneshaw Close
- Forstal Close
- Bourne Close
- Keld Close
- Applegarth Close

Applegarth Close gives access to Snatchill Close, at the far eastern corner of the estate. Snatchill Close is noticeably more modern than the rest of the estate and is only a year or two old. The only vehicular access to the closes is from Merestone Road. There is also pedestrian access to Butland Road from Snatchill Close, which provides a useful short cut from the estate to the Oakley Vale shops and public house. Geographically, and in street layout, Merestone Road and the nine closes form a distinct and self-contained housing estate.

[4] There are no built communal facilities on the Merestone Road estate, such as shops, a post office, a public house or a community centre. The estate is not really large enough to support such facilities.

[5] In the centre of the estate, and adjoining Merestone Road, there is a large open mown grassy area, with a few small trees and bushes, about 1.3 hectares in area. It is not absolutely flat but is somewhat rolling, with a tendency to slope down from north to south. It is crossed

by a number of paved footpaths. Towards the highest point there are a few dilapidated pieces of children's play equipment standing on a small soft surfaced area typical of the surface of a children's playground. Some of the boundaries of the open grassy area are formed by the fences of houses on the estate, but there is free and unfenced access to the open grassy area from Merestone Road, Applegarth Close and by a footpath from Cantle Close. This open area is the Merestone Road Recreation Area. It has all the appearance of being a recreational area for the residents of the Merestone Road estate.

[6] This recreational area is in divided ownership although this is not represented by any physical feature on the ground:

- A large part of the recreational area to the north is owned by YJL Homes Limited (YJL) which is registered proprietor under title no. NN107570. This title originally comprised the whole extent of the Merestone Road estate (including the site of Snatchill Close) although most of it has since been sold off. The land appears to have been purchased by Corby District Council in 1985 and sold on to Lovell Homes Limited in 1987. The 1987 Conveyance contained a covenant not to use the land conveyed other than for the purpose of a residential estate development
- A smaller part of the land to the south-west is owned by Greenbelt Group Limited (Greenbelt) which is registered proprietor under title no. NN287797
- A rectangle of land to the south-east is owned by Corby Borough Council.

The parts owned by YJL and Greenbelt have a total area of just over 1 hectare.

## **2. The TVG application**

[7] Northamptonshire County Council (NCC) is the commons registration authority (CRA) for Northamptonshire. As such, it deals with applications to register land as a new town or village green (TVG) under s. 15 of the Commons Act 2006 (CA 2006).

[8] On 20<sup>th</sup> April 2013, Mr. Lewis Michael Folkes, of 17, Applegarth Close, applied to NCC to register part of what was described as the Merestone Road Recreation Area as a new TVG. The application was received by NCC on 22<sup>nd</sup> April 2013. The application was made in prescribed Form 44 and verified by a statutory declaration made by Mr. Folkes. The following are the important points in the application:

- The application was made under CA 2006 s. 15(2) (Box 4)
- The application land was delineated on a plan attached to the statutory declaration and did not comprise the whole of the Recreation Area: it included the land owned by YJL and Greenbelt but excluded the rectangle of land to the south-east which is owned by Corby Borough Council (Box 5).
- The locality or neighbourhood within a locality in respect of which the application was made was shown edged blue on the same plan. It included Merestone Road and all the closes leading off it. It also included what appears on the plan as a blank area in the eastern corner of the estate but which now comprises Snatchill Close. (Box 6)
- The justification for the application was, in summary, that the application land had been used as of right for recreation by a significant number of inhabitants of the locality/neighbourhood for more than 20 years and that the use was continuing. (Box 7)

[9] NCC publicised the TVG application in accordance with the relevant regulations, and two objections were received:

- The first objection was made by YJL as owner of the larger part of the application land. In short, YJL objected that the application failed to meet any of the requirements of CA 2006 s. 15(2).
- The second objection was made by NCC in its capacity as local highway authority. NCC said that parts of the application land, namely a strip of land alongside Merestone Road and the footpaths crossing the land, were public highway and therefore should not be registered as a new TVG. It said that it would withdraw its objection if the applicant amended its application to exclude the highway land.

No objection was made by Greenbelt.

[10] I was appointed by NCC as an inspector to hold a public inquiry into the application and to report whether NCC, as CRA, should accede to the TVG application or not. I gave written Directions on 16<sup>th</sup> January 2014. The public inquiry was held in Northampton on 19<sup>th</sup> and 20<sup>th</sup> March 2014. Mr. Folkes represented himself. Miss Knowles of counsel, instructed by Schofield Sweeney solicitors, represented YJL. Mr. Fowler of NCC Highway Department appeared for NCC as local highway authority. Nobody appeared for Greenbelt. Mrs. Sunita Makh and Mr. Phil Watson of NCC gave me invaluable administrative support in making all practical arrangements for the public inquiry, for which I am very grateful. I visited the application land unaccompanied on the afternoon of 18<sup>th</sup> March and held a formal accompanied site visit on the afternoon of 20<sup>th</sup> March.

### 3. New TVGs: law and procedure

[11] It is convenient at this stage to summarise my understanding of the relevant law and procedure relating to the registration of new TVGs.

#### Law

[12] At common law a TVG could only be created by custom. This required use since time immemorial. The Commons Registration Act 1965 (CRA 1965) introduced the concept of a new TVG created by 20 years' use. The definition of a new TVG in the CRA 1965 was:

*“land...on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than twenty years”.*

The requirements for registration of a new TVG were relaxed by s. 98 of the Countryside and Rights of Way Act 2000 (CRoW Act 2000). The new definition was:

*“land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either –*

- (a) continue to do so, or*
- (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.”*

No order was ever made implementing para. (b).

[13] The previous legislation was replaced by the current law to be found in s. 15 of the CA 2006, which further relaxed the requirements for registration of a new TVG. The section contains the following material provisions for the registration of new TVGs:

***“Registration of greens***

15 (1) *Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2)...applies.*

(2) *This subsection applies where –*

(a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*

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

The meanings of the various expressions used in CA 2006 s. 15 have been the subject of numerous court decisions.

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

[14] “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>1</sup>. In my view, use must not be merely trivial or sporadic. It must be enough to signify to the reasonable landowner that a right is being asserted and ought to be resisted if the right is not recognised.

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

[15] The legislation provides for the recreational users of the application land to be a significant number of the inhabitants of **either**

- “any locality” (limb (i)) **or**
- “any neighbourhood within a locality” (limb (ii)).

[16] A locality means an administrative district or an area with legally significant boundaries. See the *Paddico* case at first instance<sup>2</sup>.

[17] A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood<sup>3</sup>. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness<sup>4</sup>. In the *Trap Grounds* case<sup>5</sup>, Lord Hoffmann pointed

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<sup>1</sup> *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) at para. 77

<sup>2</sup> *Paddico (267) Ltd. v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch) at para. 97(i)

<sup>3</sup> *McAlpine*

<sup>4</sup> *R (Cheltenham Builders Ltd) v South Glos. DC* [2004] 1 EGLR 85 at para 85, *Leeds Group plc. v Leeds City Council* [2011] Ch 363

out the “*deliberate imprecision*” of the expression. The statutory test is fulfilled if the applicant can prove that a significant number of qualifying users come from any area which can reasonably be called a “neighbourhood” even if significant numbers also come from other neighbourhoods<sup>6</sup>. I do however consider that it must be possible to identify persons as inhabitants of the claimed neighbourhood because only the inhabitants of the relevant neighbourhood have recreational rights over the land<sup>7</sup>. A neighbourhood may lie either within one locality or within more than one locality: *Trap Grounds* para. 27.

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

[18] Although the statutory creation of a new green by 20 years’ use does not depend on the inference or presumption of a grant or dedication, the expression “as of right” echoes the requirements of prescription in relation to easements and public rights of way. In both cases, qualifying use must be “as of right” because the inference or presumption of a grant or dedication depends fundamentally on the long acquiescence of the landowner in the exercise of the right claimed<sup>8</sup>. The subjective intentions of the users are irrelevant<sup>9</sup>. The traditional formulation of the requirement that user must be “as of right” is that the user must be without force, secrecy or permission (or in the Latin phrase *nec vi, nec clam, nec precario*).

[19] “Force” does not just mean physical force. Use is by force in law if it involves climbing fences or gates or if it is contentious or under protest<sup>10</sup>.

[20] Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner.

[21] “Permission” can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but not by inaction or acts of encouragement by the landowner<sup>11</sup>. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

[22] Use pursuant to a legal right is use “by right” and not use “as of right”<sup>12</sup>.

**...in lawful sports and pastimes on the land...**

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<sup>5</sup> *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (usually called the *Trap Grounds* case to distinguish it from other cases involving Oxfordshire)

<sup>6</sup> *R (Oxfordshire & Bucks. NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) (usually called the *Warneford Meadow* case)

<sup>7</sup> *Trap Grounds*: para. 69(i), *Warneford Meadow*

<sup>8</sup> *Dalton v Angus & Co.* (1881) 6 App. Cas. 740 at 773 as cited by Lord Hoffmann in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 at p. 351B and by Lord Walker in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at para. 76

<sup>9</sup> *Sunningwell*

<sup>10</sup> *R (Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 7 *per* Lord Rodger at paras. 88-90 and see the *Warneford Meadow* case.

<sup>11</sup> *Beresford*

<sup>12</sup> *Barkas v North Yorkshire County Council* [2013] 1 WLR 1521 (An appeal has been heard by the Supreme Court but no judgment has yet been delivered. It is not thought that this general proposition is being challenged but rather the specific application of it to housing legislation)

[23] The words “lawful sports and pastimes” (LSP) form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play<sup>13</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>14</sup>.

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

[24] In the case of an application under CA 2006 s. 15(2), the period of 20 years is normally the period of 20 years immediately before the making of the application<sup>15</sup>. It is immaterial that the statutory test for qualifying user may have changed during the 20 year period<sup>16</sup>.

### **Procedure**

[25] In non-pioneer authorities in England (of which NCC is one), procedure on applications to register new greens under the CA 2006 is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007 Regulations closely follow the scheme of the Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under s. 13 of the CRA 1965. Those regulations proved quite inadequate to resolve many disputed applications and CRAs have had to resort to procedures not contemplated by the Regulations to deal with such applications.

[26] The prescribed procedure is fairly simple:

- anyone can apply to the relevant CRA in prescribed Form 44 to register any land within the CRA area as a new TVG (reg. 3)
- unless the CRA rejects the application on preliminary consideration on the ground that it is not “duly made”, the CRA proceeds to publicise the application in prescribed form 45 inviting objections (reg. 5)
- anyone can submit a statement in objection to the application,
- the CRA then proceeds to “further consideration” of the application and any objections and decides whether to grant or reject the application (reg. 6).

[27] The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The regulations seem to assume that the CRA can determine disputed applications to register new TVGs on paper. A practice has grown up, repeatedly approved by the courts, whereby, in an appropriate case, the CRA appoints an independent inspector to conduct a non-statutory public inquiry into the application and to report whether it should be accepted or not. A non-statutory public inquiry has no power to summon witnesses, order disclosure of documents or award costs. The CRA is not bound by the inspector’s recommendation.

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<sup>13</sup> *Sunningwell* at pp 356F-357E

<sup>14</sup> *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 (the *Trap Grounds* case in the High Court) at paras 96-105

<sup>15</sup> This may be different where CA 2006 s. 15(7)(b) applies.

<sup>16</sup> *Redcar*: Lord Rodger at paras. 120-121, *Leeds* at paras 108-110.



[28] 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 TVG, it is no trivial matter for a landowner to have land registered as a TVG, and all the elements required to establish a new TVG must be “properly and strictly proved”<sup>17</sup>. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.
- **Defects in Application Form.** The House of Lords has held in the *Trap Grounds* case that an application is not to be defeated by drafting defects in the application form. Subject to the overriding requirement of fairness to the parties, the issue for the CRA is whether or not the application land has become a new TVG
- **Part registration.** The House of Lords also held in the *Trap Grounds* case that the CRA 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. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness<sup>18</sup>.

[29] The Growth and Infrastructure Act 2013 reformed the law relating to the registration of new TVGs in England by providing for planning considerations to trump TVG applications in certain circumstances. This does not apply to applications, such as the present application, which were made before the relevant section of the 2013 Act came into effect. There are various other reforms. The 2013 Act does not affect the law applicable to the present application.

#### 4. Evidence in support of application

[30] I now turn to consider the evidence in support of the application. I will first consider the evidence of witnesses who gave oral evidence in the public inquiry and were cross examined. This is the most important evidence. Then, I will consider the evidence of witnesses who submitted written evidence to the public inquiry. I attach less weight to this evidence because I have not seen the witnesses and their evidence was not tested by cross examination. Finally, I will consider the evidence of members of the public who gave oral evidence to the public inquiry. They spoke for no more than five minutes and were not cross examined. For convenience, I will deal with each class of witness in alphabetical order rather than in the order in which they gave evidence.

#### Witnesses who gave oral evidence

##### Mr. Aubrey Bass

[31] Mr. Bass produced an undated letter and an evidence questionnaire dated 4<sup>th</sup> April 2013. He and his wife moved to 16, Applegarth Close in April 2004. The whole of the Merestone Road estate was then complete except for the area now occupied by Snatchill

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<sup>17</sup> *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *Beresford* at para. 2

<sup>18</sup> Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

Close which was then just vacant land. In 2004, there was no access from Merestone Road to Butland Road. Snatchill Close was built, with access from Applegarth Close, about two years ago. There are about 30 houses in Snatchill Close

[32] He has made two main uses of the recreation area. First, the Basses had a dog for four or five years after they moved to Applegarth Road. Mr. Bass used to walk the dog around the paths on the recreation area twice a day. Second, they have three grandchildren, now aged 10, 13 and 19. They used to visit at weekends once or twice a month and stay for a week or so in the summer. He used to take them onto the recreation area to play football. Until recently, he had assumed that the recreation area was owned by Corby Borough Council. When the grass got long, he used to ring Corby Borough Council to get it cut, although it used to cut only part of the land (presumably the part it owned). The grass was usually kept short in the summer holidays.

[33] Mr. Bass saw the recreation area used for informal recreation such as walking, with or without dogs, and children's play, for example, informal games of football and flying kites. The children's play equipment has gradually been removed over the years until it remains as a shadow of its former self.

#### **Mr. Michael Garlick**

[34] Mr. Garlick produced and adopted a letter dated 3<sup>rd</sup> April 2013 from his wife, Margaret Garlick. He also produced an evidence questionnaire of the same date. Mr. Garlick moved to 3, Cantle Close in March 1995 with his wife and two children, then aged 9 and 10. Although his house is not adjacent to the recreation area, he has a distant view of it along a footpath. The application land was always laid out as grassy recreation area and used as such. He thinks that the paths crossing the land and the children's play equipment were all in place in 1995 and, although some people just used the paths, the whole of the land was used for informal recreation such as walking, with or without dogs, and children's games including football and kite-flying. He named 5 or 6 neighbours in Cantle Close who used the land for recreation. He used the land occasionally for walking and playing with his children. The children often played there on their own as it was close and safe, since they did not have to cross roads to get there. His son, in particular, played football with friends from Merestone Road. At the age of 13, their daughter used the land to train for carrying a pack at an international guide camp. He never saw any signs granting permission to use the recreation area or forbidding its use.

[35] When he first moved to Cantle Close, there was a portacabin and car park for 3-4 vehicles on the application land adjacent to Merestone Road, which was used as a sales office. It was not there for long. At my request, Mr Garlick attended the site view and drew his best recollection of the footprint of the portacabin and car park on my copy of map Y14<sup>19</sup>.

#### **Mr. Derek Martin**

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<sup>19</sup> Yellow Bundle page 14

[36] Mr. Martin submitted a letter dated 7<sup>th</sup> April 2013 and an evidence questionnaire of the same date. He moved into 4, Forstal Close in October 1992 with his wife and 4 month old son, Daniel. His second son, Ryan, was born in 1995.

[37] When the Martins moved into Forstal Close, the Merestone Road estate was only partly built. The neighbouring Dumble Close estate had not yet been built. There was access to Merestone Road from Oldland Road, which terminated at the entrance to Merestone Road. There was no access from Merestone Road to Butland Road, which had not yet been built. Houses in Merestone Road had been built although not for its full length. Catchpole Close and Riding Close were complete. Berneshaw Close was not complete. Forstal Close had houses only on one side. Cantle Close, Bourne Close, Keld Close and Applegarth Close were not yet built up although some of the roads were in place. There was not much building for 12-18 months after they moved in. It took about 6 to 8 years for the whole estate (excluding the modern Snatchill Close) to be built.

[38] In October 1992, the application land was laid out and maintained as a grassy recreation area. He thought that the paved paths were already laid out. He could not remember a portacabin on the land. The children's play equipment was installed in about 1995/96. Originally it was fenced with a gate for access. Over the years, the fence disappeared and the play equipment was gradually removed as it fell into disrepair. The grass was well maintained until the estate was completed and then was less well maintained. He originally thought that the recreation area was a public open space and that it was maintained by Corby Borough Council. The existence of the recreation area influenced his decision to purchase his house, although he did not suggest that he was given any assurances or representations about the land.

[39] He and his family have used the recreation area since they moved to Forstal Close. When the children were young, they played with them on the land. When they got older the children were allowed to play there on their own and with friends. Mr. Martin has joined his sons in games of football on the land and has used the land to practice his golf swing. On warm summer evenings, Mr and Mrs Martin have strolled around the paths. He has seen other people enjoying similar informal recreational activities on the land. The most popular use is for children's informal games of football. His youngest son still plays football on the land.

[40] Mr. Martin has never been prevented from using the recreation area and has never seen any signs either forbidding or restricting use of the land or granting permission to use the land.

[41] There is now another recreational area with a football pitch on the other side of Butland Road. His children have played there when they were older although he has not been there. However, this area was just waste land in 1992. It was not until the mid-2000s that Merestone Road was opened to Butland Road.

**Mr. John McGee**

[42] Mr. McGee is a Corby Borough Councillor. He produced an email dated 26<sup>th</sup> February 2014. He was called to give evidence in support of the application and also spoke as a member of the public. He attended to give his moral support to the application and to say that he had seen the application land being used for recreation and thought that the application land should be preserved as a recreational open space

**Mr. Bryan Moody**

[43] Mr. Moody produced a letter dated 3<sup>rd</sup> April 2013 and an evidence questionnaire of the same date. He purchased and moved into 14, Applegarth Close in April 2003. At that time, the whole of the Merestone Road estate had been built (except for Snatchill Close). He calls his neighbourhood “the Merestone Road area”. His house was built in 1997 and he thinks that it was one of the last houses to be built on the estate. His house backs onto the recreation area and he can see into that area from his back garden although he has no direct access to it. He was told by the estate agent for the vendor that the recreation area was a public open space. He assumed that it was owned by Corby Borough Council. He has only recently learned that most of it is privately owned.

[44] For as long as he has known the application land, it has been an open grassy area, the whole of which has been used for informal recreation, such as walking, with or without dogs, and children’s play, such as kicking a ball about. He has seen people flying kites and model aeroplanes on the land. The grass has been cut, although sometimes it was left to get quite long. Mr. Moody has used the land since he moved in. He is interested in astronomy and walks on the land several times a months to look at the stars. He also walks the dog on the land. He does not stay on the paths.

[45] He has never been given permission to use the land or been forbidden to use it.

**Witnesses who gave written evidence**

[46] I summarise the written evidence in support of the application as follows:

<b>Name</b>	<b>Address</b>	<b>Evidence</b>	<b>Claimed user period</b>	<b>Comment</b>
Surinder S & HK Bhoday	14, Cantle Close	Letter 8 <sup>th</sup> April 2013 Evidence questionnaire 2 <sup>nd</sup> April 2013	December 1993 onwards	Recalls portacabin on land in August 1993
I Brindle	21, Merestone Road	Letter 7 <sup>th</sup> April 2013 Evidence questionnaire 7 <sup>th</sup> April 2013	2005 onwards	
David Canham	17, Catchpole Close	Letter 17 <sup>th</sup> April 2013 Evidence questionnaire 17 <sup>th</sup> April 2013	2001 onwards	

<b>MK Cheng</b>	28, Merestone Road	Letter 18 <sup>th</sup> April 2013 Evidence questionnaire 19 <sup>th</sup> April 2013	May 1993 onwards	
<b>C Patrick Connell</b>	61, Bluebell Close, Corby	Letter 25 <sup>th</sup> March 2013 Evidence questionnaire 1 <sup>st</sup> April 2013	2003 onwards	Does not live in claimed neighbourhood
<b>Peter Forest</b>	49, Bluebell Close	Letter 25 <sup>th</sup> February 2014	April 2003 onwards	Does not live in claimed neighbourhood
<b>Andy Garlick</b>	Formerly of Cantle Close	Letter (undated)	"Nearly 20 years"	Son of Michael Garlick
<b>Sonia Latta</b>	34, Berneshaw Close	Letter 11 <sup>th</sup> April 2013 Evidence questionnaire 11 <sup>th</sup> April 2013	September 1993 onwards	
<b>James Brian McCaveny</b>	13, Merestone Road	Letter 7 <sup>th</sup> April 2013 Evidence questionnaire 7 <sup>th</sup> April 2013	1995 onwards	
<b>W Melvin</b>	32, Merestone Road	2 letters (undated) Evidence questionnaire 5 <sup>th</sup> April 2013	1994 onwards	
<b>Susan Miller</b>	8, Keld Close	Evidence questionnaire 10 <sup>th</sup> April 2013 Letter 2 <sup>nd</sup> March 2014	2003 onwards	
<b>RG Morey</b>	202, Butland Road	Letter 3 <sup>rd</sup> March 2014	8 ½ years	Does not live in claimed neighbourhood
<b>Dominica Mary Neale</b>	33, Berneshaw Close	Letter 13 <sup>th</sup> April 2013 Evidence questionnaire 13 <sup>th</sup> April 2013 Letter 28 <sup>th</sup> February 2014	1992 onwards	
<b>K Passfield</b>	14, Applegarth Close	Letter 3 <sup>rd</sup> March 2014	2003 onwards	
<b>Anthony Saunders</b>	30, Merestone Road	Evidence questionnaire 2 <sup>nd</sup>	2004 onwards	

		April 2013		
<b>William Veasey</b>	23, Cattle Close	Evidence questionnaire 5 <sup>th</sup> March 2013	2004 onwards	
<b>EJ Wilkinson</b>	18, Cattle Close	Letter (undated) Evidence questionnaire 6 <sup>th</sup> April 2013	1994 onwards	
<b>Laureen Woodhead</b>	1, Ridding Close	Letter (undated)	5 years	
<b>Alan &amp; Carole Woodward</b>	20, Applegarth Close	Letter 23 <sup>rd</sup> March 2013 Evidence questionnaire 5 <sup>th</sup> April 2013 Letters 1 <sup>st</sup> March 2014	1998 onwards	

## **Members of the public**

### **Mrs. Edna Bass**

[47] Mrs. Bass is the wife of Mr. Aubrey Bass, who gave oral evidence in support of the TVG application. She said that she had lived at 16, Applegarth Close for 10 years. Her grandchildren played on the recreation area when they came to stay. Her husband used to walk the dog on the land and she sometimes went with him. There were no signs on the land such as “No Ball Games”.

### **Mr. John McGee**

[48] As mentioned above, Mr. McGee spoke as a member of the public as well as being called as a witness in support of the applicant. I have summarised his evidence above.

### **Mrs. Carole Woodward**

[49] Mrs. Woodward had submitted written evidence (identified above). She said that she and her husband moved into 20, Applegarth Close in May 1998, when it was newly built. They were assured by the developer and by their own solicitor that the recreation area would never be built on. Until recently, they believed that it had been adopted by Corby Borough Council. After they moved into their house, her husband had a heart attack and they bought a dog to give him exercise. He walked the dog on the recreation area for 13 years. He met a lot of other dog walkers there. The land was used summer and winter. In the snow people sledged and had snowball fights. In the summer they played rounders. She recalls a barbeque on the land. People gathered on the land to watch the annual Corby fireworks display from a distance. Their stepson played on the land. Their grandson now plays on the land. Her elderly parents walk on the land.

## **Comments on the evidence in support of the application**

[50] I am satisfied that all the witnesses who gave oral evidence in support of the application were honest, reliable and trustworthy witnesses who were giving their evidence to the best of their recollection. I thought that they gave their evidence with care and moderation and that their evidence stood up to Miss Knowles's firm but fair cross examination. Although I did not see the witnesses who gave purely written evidence and were not cross examined, it is fair to comment that their evidence was consistent with that of witnesses who gave oral evidence. As for the members of the public who gave oral evidence, I bear in mind that their evidence was not subject to cross examination, but again, their evidence was consistent with that of the oral witnesses who were cross examined.

[51] Miss Knowles rightly cautioned me that these witnesses may have had an ulterior motive, i.e. to prevent the development of the application land, and that this might affect the weight of their evidence. I have borne that caution firmly in mind in reaching my view on the reliability of the witnesses in support of the TVG application.

## **5. Evidence in support of first objection**

[52] The first objector, YJL, called one witness to give oral evidence and submitted five written witness statements.

### **Oral evidence**

#### **Mr. David John Lynch**

[53] Mr. Lynch is an experienced Chartered Surveyor. In 2009, he was employed by Renew Holdings plc. (Renew), the holding company of YJL, to review the development potential of the application land along with others around the country. He visited the land on two occasions, one in May 2009 and one in September 2011. Both were weekdays. On each visit he spent 15-20 minutes on site. He did not see any use of the site and formed the view that it was little used for recreation.

[54] Renew maintained and repaired the children's playground as a term of the planning permission which applied to the land when YJL purchased it. It was common knowledge that the playground was under the control of Renew and it was sensible to assume that residents were aware that they were using the land with the owner's permission. When asked about this assumption, Mr. Lynch said that the only evidence of permission was the fact that Renew maintained the play equipment.

[55] I accept Mr. Lynch's evidence about his visits to the site, but I consider that his two short visits on weekdays are scant material on which to form a view about the extent of recreational use of the site. I will consider his permission point in more detail below as it involves issues of law.

### **Written evidence**

#### **Mr. Patrick Aitken**

[56] Mr. Aitken is Property Manager at Renew. He visited the Merestone Road Recreational Area on or around August 2011 with his colleague, John Samuel, for a general inspection. He was on site for around 30 minutes. He does not recall any activity on the site. I have no reason to doubt Mr. Aitken's evidence but I cannot place much weight on a recollection of a short visit over two years ago.

**Mr. James Alan Robinson**

[57] Mr. Robinson is a self-employed Grounds Maintenance Contractor trading as Chilcote Garden Services. He has worked for Renew for over 10 years, maintaining various parcels of land in Birmingham and Corby. He now just maintains that part of the application land which is owned by YJL. It is, unfortunately, not clear from his statement whether he has maintained the application land for the whole, or only part, of the 10 year period. It is therefore unclear whether his evidence relates to the relevant 20 year period at all.

[58] Mr. Robinson attends the application land every two weeks from March to November, cuts the grass, prunes the hedges, maintains the two flower beds and shrubs, clears away broken branches, sprays path edges and removes litter and broken bottles. While working on site, Mr. Robinson occasionally sees people walking their dogs and playing on the playground equipment. Dogs foul the grass.

[59] I see no reason to disbelieve Mr. Robinson's evidence although it is regrettable that his statement is not clearer about the period for which he has maintained the land. The application land clearly has been maintained and the grass cut, although the evidence of the applicant's witnesses suggests that the grass has not always been cut as often as fortnightly. This may well have been before Mr. Robinson took over maintenance of the YJL part of the application land. I note that Mr. Robinson does not suggest that recreational use of the land which he maintained was restricted to use of the paved paths.

**Mr. John Samuel**

[60] Mr. Samuel is Group Finance Director at Renew. He visited the site for about 30 minutes on or around 23<sup>rd</sup> August 2011. The visit was an inspection for development purposes. He says that the site was "very quiet" (although he does not say that there was nobody on the site). He walked around the "parameters" (perimeter?) of the site and does not recall seeing signs of wear to indicate regular use of the land.

[61] I have no reason to doubt that Mr. Samuel is giving his best recollection of his visit over two years ago but it does not seem to me that it carries a great deal of weight. It was a short visit and he was visiting to consider development potential and not to record recreational use of the land.

**Mr. Keith Smith**

[62] Mr. Smith is employed by Nationwide Data Collection. He and a colleague carried out a survey of recreational use of the application land and of the Butland Road Recreational Area on Wednesday 21<sup>st</sup> August 2013 and Saturday 31<sup>st</sup> August 2013 from 8am to 7pm.

[63] Dealing first with the Merestone Road recreational area:

- On 21<sup>st</sup> August, they saw four children and two adults using the play equipment, one child walking a dog in the central grassy area and a child and adult playing on the grass near Merestone Road.
- On 31<sup>st</sup> August, they saw 6 children using the play equipment, 2 children playing football and one adult with a pushchair on the central grassy area, one adult with a pushchair on the grassy area owned by Corby Borough Council and one adult with a pushchair on the grassy area near Merestone Road.



[64] Turning to the Butland Road Recreational Area:

- On 21<sup>st</sup> August, they saw 652 adults and 783 children
- On 31<sup>st</sup> August, they saw 603 adults and 798 children

[65] I see no reason to doubt any of these observations. However, as Mr. Smith says, the Butland Road Recreation Area is a very much larger recreational area with grassy open spaces, football pitches and a large children's playground with attached basketball court with a seating area. Understandably, many fewer people used the Merestone Road Recreational Area than used the Butland Road Recreational Area. However, the observations confirm that Mr. Smith and his colleague saw some people using the Merestone Road Recreational Area for recreational purposes.

**Mr. David John Turner**

[66] Mr. Turner is managing director of DT Leisure (UK) Limited, which is a playground installation company. For about six years, his company has had a contract with Renew to maintain and repair the play equipment on the YJL land. If notified that maintenance work was required, he visited the site to prepare a quotation. If the quotation was accepted, his staff would attend the site to carry out the work. Repair work normally took one or two days and the playground was closed off while works were in progress for health and safety reasons. Works were carried out by his company in or about March 2008, October 2011, April 2012, July 2013 and December 2013. When he has visited the site, he has seen parents and children using the play equipment. He does not say whether or not he saw recreational use of the rest of the application land.

[67] As Mr. Turner did not give oral evidence, and his written statement is rather brief, it is hard to give much weight to it. I accept that his company carried out some works on the playground equipment, and, indeed, some of his company's invoices were attached to YJL's objection statement. The evidence of the applicant's witnesses was to the effect that maintenance was limited to removing unsafe play equipment. The invoices suggest that the work went beyond that. However, the sadly dilapidated state of the equipment when I saw it on the site view suggests to me that the maintenance work was very limited indeed. It is to be noted that the last two occasions mentioned by Mr. Turner are after the date of the TVG application.

[68] As for the closing off of the playground while works were in progress, Mr. Turner does not say that he was present when the works were carried out and the source of his evidence that the playground was closed off during works is wholly unspecified in his witness statement. None of the applicant's witnesses who were cross examined on the point said that they has seen the play area cordoned off for works. I suspect that Mr. Turner's evidence about closing off the playground is speculation about what should have happened rather than firm evidence about what did actually happen.

**6. Evidence in support of second objection**

[69] NCC, as local highway authority, did not call any witnesses or submit any witness statements in support of their objection. However, they produced some documents, the authenticity of which was not challenged at the public inquiry.

## **1990 Agreement**

[70] The principal document was a copy of an Agreement dated 30<sup>th</sup> December 1990 and made between Corby District Council and Lovell Homes Limited. The Agreement recited that the company owned land at Snatchill in Corby, shown edged pink on the annexed plan, which it proposed to develop as a building estate, and that it intended to make roadways together with footpaths and verges as indicated on the plan and coloured grey, yellow and green respectively and desired that the said roadways should on completion become highways maintainable at public expense. The land edged pink on the annexed plan comprises the Merestone Road estate excluding the site of Snatchill Close. The roadways shown on the plan are the roads that became Merestone Road and the eight closes leading off Merestone Road. Snatchill Close was not shown. The paved footpaths that now cross the application land are shown coloured yellow, as is a footpath along the whole boundary between Merestone Road and the application land. The plan shows the proposed position of housing on about half of Merestone Road and on Cantle Close, Catchpole Close, Ridding Close and Berneshaw Close but not on Forstal Close, Bourne Close, Keld Close or Applegarth Close.

[71] By clause 1 of the 1990 Agreement, the company dedicated the land edged grey yellow and grey as public highway. The word “edged” is an obvious mistake for “coloured”. The rest of the Agreement bound the company to lay out and construct the ways within five years.

## **1990 Completion Certificate**

[72] NCC produced a completion certificate also dated 30<sup>th</sup> December 1990, from which it appears that part of Merestone Road, and the whole of Cantle Close, Catchpole Close, Ridding Close, Berneshaw Close “and Footpaths” had been completed. It is not clear exactly which footpaths were included in the certificate.

## **Highway plan**

[73] NCC also produced a very helpful plan showing coloured green which parts of the application land were dedicated as public highway under the 1990 Agreement. There are three paved footpaths crossing the application land which were dedicated by the 1990 Agreement. There is also a stretch of land, the same width as the other paths, running along the eastern side of Merestone Road, which was dedicated by the 1990 Agreement. When I inspected this land on site, it was grassed and not paved, although there were traces of stones lining the rear of the path. It looks as though the path was originally laid out to be paved but that it was decided to grass it instead.

## **7. Planning documents**

[74] Mr. Phil Watson of NCC produced to the public inquiry some copies of planning documents relating to the Merestone Road estate. The authenticity of these documents was not challenged at the public inquiry.

## **1987 Outline Planning Permission**

[75] On 20<sup>th</sup> November 1987, outline planning permission pursuant to application CO/87/240 was granted to Lovell Homes (Midland) Ltd. by Corby District Council for

residential development at Snatchill, Corby. Condition 3 provided that an area or areas of not less than 1.6 hectares within the application area should be landscaped and planted for use as public open space. It seems clear that the application land is part of that public open space.

### **1988 Planning Application**

[76] On 8<sup>th</sup> March 1988, Lovell Homes Midland Limited applied to Corby District Council by application no. CO/88/86 for planning permission to erect 238 dwellings on a 25 acre site off Oakley Road, Snatchill. This seems to have been an application in respect of reserved matters under the 1987 outline planning permission.

[77] Drawing no. 62540/01 dated February 1988 appears to be a drawing which accompanied the 1988 planning application. It shows the proposed Merestone Road estate (excluding Snatchill Close) laid out as an estate with 238 dwellings. The application land together with the land owned by Corby Borough Council is marked "Public Open Space".

### **1988 Planning Permission**

[78] On 9<sup>th</sup> August 1988, Corby District Council, pursuant to application no. CO/88/86 granted approval of reserved matters under permission CO/87/240.

### **1990 Planning Permission**

[79] On 10<sup>th</sup> May 1990, Corby District Council granted planning permission to Lovell Homes Midlands Ltd. pursuant to application no CO/90/30 for the erection of 72 dwellings off Oakley Road, Corby.

### **1991 Planning Permission**

[80] On 4<sup>th</sup> September 1991, Corby District Council, pursuant to application no. CO/91/63, granted to David Wilson Homes (South Midland) Ltd. planning permission for residential development off Oakley Road, Corby. Attached to this planning permission is a copy of a map which shows the parts of the Merestone Road Recreational Area not owned by YJL marked as "public open space". The map shows part of the application land but it is not annotated. However, it looks as though the application land was also part of the public open space as shown on the 1988 drawing, although not the subject of the plan.

### **1992 Planning Permission**

[81] On 3<sup>rd</sup> September 1992, Corby District Council granted planning permission, pursuant to application no. CO/92/C106 to Lovell Homes Ltd. for the erection of 27 dwellings at land at Oldland Road, Corby.

### **1994 Planning Permission**

[82] On 1<sup>st</sup> March 1994, Corby Borough Council (as it had now become) granted planning permission, pursuant to application no. CO/94/C016, to Stamford Construction for the erection of 58 dwellings at land at Merestone Road, Snatchill, Corby.

### **1996 Planning Permission**

[83] On 23<sup>rd</sup> September 1996, Corby Borough Council granted planning permission, pursuant to application no. CO/96/C193, to McLean Homes South Midlands for the erection of 50 dwellings at land off Merestone Road, Corby.

### **Effect of planning evidence**

[84] I approach this planning evidence with some caution since I have not seen all the plans and drawings attached to the various applications. However, I think that one can draw three inferences from it:

- The building of the estate cannot have commenced before the 1988 approval of reserved matters
- The development of the estate (excluding Snatchill Close) cannot have been completed before the 1996 planning permission
- The application land was part of the public open space required by the 1987 outline planning permission.

### **8. Findings of fact**

[85] I now turn to make findings of fact based on all the evidence submitted to the public inquiry, together with my observations on my site views.

#### **The Merestone Road estate**

[86] I find that the Merestone Road estate, comprising Merestone Road and the eight closes leading off it (excluding the site of Snatchill Close) was a defined building estate with a clear boundary and a dedicated layout of roads and paths by the time of the 1990 Agreement. That Agreement shows the estate with its boundary defined by reference to land ownership and the dedicated road and path layout on the estate. The same picture is shown by the 1988 drawing.

[87] I find that the construction of the estate started sometime after the 1988 Approval of Reserved Matters. By the time of the December 1990 Completion Certificate a number of the roads (but not necessarily the houses on those roads) on the estate had been completed, i.e. part of Merestone Road and the whole of Cantle Close, Catchpole Close, Ridding Close and Berneshaw Close. By the time Mr. Martin moved into the estate in October 1992, houses had been built on part of Merestone Road, on the whole of Catchpole Close and Riding Close, and on part of Berneshaw Close and Forstal Close. According to Mr. Martin there was not much more building for 12-18 months after he moved in. I find that by the start of the relevant 20 year period in April 1993 about one third of the estate (excluding Snatchill Close) had been built. Cantle Close was being built by December 1993 (Mr. Bhoday). The estate (excluding Snatchill Close) was complete by 1997 (Mr. Moody). Snatchill Close has only been built in the last two years.

[88] Witnesses were questioned about the name they used for the area in which they lived. They gave various answers and it was plain that the expression "Merestone Road estate" was not in general use. However, it seems to me that, objectively, the estate can be so described, in the sense that any person who lived on the estate would understand what area was being referred to, i.e. Merestone Road and the eight closes leading off it. With the recent construction of Snatchill Close, I find that the Merestone Road estate has expanded to take in

the new close. However, it remains a distinct and coherent estate, comprising Merestone Road and the closes to which the only vehicular access is by way of Merestone Road and lying within the defined exterior boundaries of:

- Oakley Road,
- Oldland Road
- Butland Road and
- The green belt between the Merestone Road estate and the Dumble Close estate.

### **Corby**

[89] I find that the Merestone Road estate is situated in the town of Corby. According to the planning documents, Corby was a district council until at least September 1992 and was a borough council by March 1994. Whether it acquired borough status before or after the start of the relevant 20 year period in April 1993 is unclear on the evidence. However, there is no evidence that the award of borough status involved any change in the boundaries of the council area.

### **The Merestone Road Recreation Area**

[90] I find, on the evidence of Mr. Martin, that the application land was laid out and maintained as a grassy recreational area by October 1992. Taking the evidence of the applicant's witnesses as a whole, I find that the application land has been laid out and maintained as a grassy recreational area throughout the relevant 20 year period. This was not seriously disputed by the objectors.

[91] This general proposition requires three qualifications:

- There was a sales portacabin and associated car parking area on the application land near Merestone Road from at least August 1993 (Mr. Bhoday) until March 1995 (Mr. Garlick). The best evidence of the footprint of the portacabin and car park is Mr. Garlick's drawing on Map Y14.
- The application land is crossed by paved footpaths. Nobody spoke of a time before those paved footpaths were in place, they look long-established and I find that they were in place for the whole of the relevant 20 year period.
- A small children's playground with play equipment was installed on the application land in about 1995/96 (Mr. Martin). Originally it was fenced with an access gate but the fence disappeared and the play equipment became more and more dilapidated over the years.

[92] There is no evidence that there has ever been any sign on the Merestone Road Recreational Area which has forbidden, restricted or permitted recreational use of the land by local people.

### **Recreational use of application land**

[93] On the evidence of the applicant's witnesses, I find that the whole of the application land has been used for recreational purposes by residents of the estate throughout the relevant 20 year period. It is true that very few witnesses go back to the beginning of the 20 year period. This is not entirely surprising, given that most of the estate was built after the start of the 20 year period and the mobility of modern life. However, Mr. Martin's evidence went

back to October 1992 and I consider that the thrust of his evidence, which I accept, is that the application land was being used for recreation since he moved to the estate. Since the application land was laid out and maintained as a public open space at the centre of the Merestone Road estate before the start of the relevant 20 year period, it would be most surprising if it was not used for recreation by inhabitants of the estate.

[94] As for the first objector's witnesses:

- Mr. Lynch, Mr. Aitken and Mr. Samuel only paid very brief visits to the land and those visits were not for the purpose of assessing recreational use of the land
- Mr. Robinson (if his evidence relates to the relevant 20 years at all) did see dog walkers and users of the playground equipment and does not suggest that recreational activities were restricted to the paths
- Mr. Turner saw people using the playground equipment and does not say what other recreational use he saw on the application land
- Mr. Smith, on his two one day observations, did see some recreational use of the play equipment and the grassy area of the application land.

I do not see anything in the evidence for the first objector which causes me to doubt the evidence of the applicant's witnesses that the application land was in general recreational use.

[95] I find that the recreational use of the application land falls into two classes:

- There has undoubtedly been use of the paved paths for walking, with or without dogs, and cycling. This has both been use as a route from A to B and also as a convenient paved circuit around the recreation area. The paved paths are also suitable for children's games based upon cycling or scooting.
- However, I find that the application land has also been used generally for recreation, mostly walking, with or without dogs, and children's play. The land is not suitable for formal organised sports but is highly suitable for informal recreation such as children's games of kick-about football, of which many witnesses spoke.

[96] There is no evidence that recreational use of the application land has ever been challenged by the landowner or anyone else or that the landowner or anyone else has purported to give express permission to anyone to use the application land for recreation. This is not surprising since the land was laid out as public open space as a condition of the 1987 outline planning permission.

### **Maintenance of the application land**

[97] I find that the application land has been maintained by the landowner throughout the relevant 20 year period. This has mostly involved summer grass cutting. At times this was not done as frequently as the residents would have liked but the land does not seem ever to have been wholly unusable for informal recreation.

[98] I find that the landowner constructed and maintained the small children's playground on the application land. Maintenance seems to have been mostly work to address health and safety issues with the equipment and the equipment has become very dilapidated over the years. I am not satisfied that there is adequate evidence to establish that the playground was fenced off while repair and maintenance works were being effected.

## 9. Applying the law to the facts

[99] I now turn to apply the legal requirements of CA 2006 s. 15(2) to the facts that I have found.

### Neighbourhood

[100] I begin with the question of “neighbourhood”.

[101] The neighbourhood put forward by the applicant is the Merestone Road estate, including Snatchill Close, as shown edged blue on the plan attached to the application. I have no difficulty in finding that the Merestone Road estate, including Snatchill Close, is a neighbourhood. It is a geographically coherent area consisting of Merestone Road and the closes that can only be accessed by vehicle from Merestone Road. Equally, I have no difficulty in finding that the Merestone Road estate, before the construction of Snatchill Close, was a neighbourhood for the same reason. However, Snatchill Close is a recent development of the last two years which was not part of the original plan for the estate. Can a neighbourhood expand during the course of the relevant 20 year period?

[102] Then the question arises whether the Merestone Road estate can have been a neighbourhood in law throughout the relevant 20 year period when it was only about one third built at the beginning of the 20 year period in April 1993 and not completely built out (excluding Snatchill Close) until 1987.

[103] There is some, highly generalised, guidance in the decided cases on the meaning of “neighbourhood” in CA 2006 s. 15:

- In the House of Lords in the *Trap Grounds* case, Lord Hoffmann remarked that the expression any neighbourhood within a locality “is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries” (para. 27).
- In the *Cheltenham Builders* case, Sullivan J. said that he did not accept that a “neighbourhood” was any area of land that the applicant chose to delineate on a plan. The area alleged to be a neighbourhood had to have a sufficient degree of cohesiveness.
- In the *Warneford Meadow* case, HH Judge Waksman QC said that a neighbourhood is a more fluid concept than a locality and connotes an area which may be much smaller.
- In the *Paddico* case at first instance, Vos J. summarised the position by saying that a neighbourhood is understood as being a cohesive area which must be capable of meaningful description in some way.

[104] Applying this guidance, it seems to me that the Merestone Road estate (recently expanded to include Snatchill Close) is, and was throughout the relevant 20 year period, a neighbourhood. It is a building estate which was planned and partly built before the beginning of the 20 year period in 1993 and the original scheme was completed by 1997. It was not just an arbitrary line drawn on the map, but a single building estate which had a boundary and a dedicated internal network of roads, footpaths and verges under the 1988 drawing and 1990 Agreement. It is to be noted that the site originally purchased in 1987 by Lovell Homes for residential development included the Snatchill Close land. The building estate had the following cohesive elements:

- a boundary defined by the developer’s land ownership and by the surrounding features of:
  - Oldland Road,
  - Butland Road,
  - Oakley Road, and
  - the green space dividing the estate from the Dumble Close estate
- a plan (partly implemented by 1993) involving a single spine road, Merestone Road, with eight closes leading off that road.

It is and was capable of meaningful description, i.e. the Merestone Road estate, although that was not a description in general use by its inhabitants.

[105] Bearing in mind the imprecision and fluidity of the expression “neighbourhood”, I consider that the Merestone Road estate can reasonably be regarded as being a neighbourhood during the relevant 20 year period. I do not think that the fact that it was only partly built at the beginning of the relevant 20 year period prevents the whole of the planned residential estate being a neighbourhood: it was a neighbourhood in course of construction.

[106] Further, I do not think that the fact that the estate has been a little expanded in the last two years to include the new Snatchill Close prevents the estate from being a neighbourhood. It was and still is a geographically coherent residential estate consisting of Merestone Road and the closes accessed from it. The estate has simply expanded to take in a piece of land on its borders but still within the geographical area bounded by Oakley Road, Oldland Road, Butland Road and the green corridor between the Merestone Road and Dumble Close estates. It is commonplace for the boundaries of a local authority administrative area such as a parish or district to be slightly redrawn to incorporate expansion by new building and no one would suggest that, as a result, the parish or district was no longer the same “locality” for the purposes of CA 2006 s. 15.

[107] It is true that there are no built community facilities on the Merestone Road estate. In my view, the existence of such facilities may be evidence of the existence of a neighbourhood, but they are not a necessary ingredient of every neighbourhood.

### **Locality**

[108] In my view, the Merestone Road estate (as a neighbourhood) has at all material times been situated within the locality of Corby, which is an administrative division of the country with legally defined boundaries. I do not think that it matters that Corby might have been awarded borough status shortly after the beginning of the 20 year period.

### **Lawful sports and pastimes**

[109] I consider that the predominant use of the application land by local people has been for walking, with or without dogs, and children’s games. These activities are lawful sports and pastimes as that expression was explained in *Sunningwell*. I bear in mind the need carefully to distinguish between, on the one hand, the use and occasional excessive use of public rights of way and, on the other hand, general use of the whole of the application land for lawful sports and pastimes. Although there has been much right of way type use of the application land, I am quite satisfied that there has also been general recreational use of the



application land which cannot be explained as use, or excessive use, of the rights of way that cross the application land.

### **Has all the land been used?**

[110] There is evidence that part of the application land was used to position a sales portacabin and associated car park from at least August 1993 to March 1995. During this period, it seems to me that use of the footprint of the portacabin and car park could not in practice have been used by local people for recreational purposes. This is a small area, but it does appear to me that it is a discrete area at the edge of the application land which has not been used for recreation for a material part of the relevant 20 years. I do not consider that it can be described as *de minimis*. It is true that land can be registered as a new green notwithstanding that not all the land has been accessible to local people for recreation: *Trap Grounds*. As Lord Hoffmann explained in that case, land may be used as a green although parts are inaccessible, such as the scrub on the Trap Grounds or the flower beds in Lord Hoffmann's example of an ornamental garden at para. 67. There is no mathematic test: it is necessary to stand back, to look at the factual position as a whole and apply the words of the statutory test. Having done so, I take the view that the statutory test does not permit inclusion of the footprint of the portacabin and car park. I think that the footprint, as drawn by Mr. Garlick on plan Y14, must be excluded from any registration of the application land as a new green.

[111] There was also a suggestion that the playground area had been temporarily fenced off on a number of occasions for a day or two while repair works were carried out. I do not consider that there is any case for excluding the playground area from registration for the following reasons:

- I am not satisfied on the evidence before the public inquiry that there was any fencing off
- Even if there was, it was *de minimis* and simply for the purpose of facilitating recreational use of the playground equipment.

### **Significant number**

[112] I am satisfied that the application land has been used by a significant number of the inhabitants of the Merestone Road neighbourhood. No doubt, the number of users has grown as the Merestone Road estate has been built. However, it seems to me that the right test is whether recreational use of the application land has been by a significant number of the inhabitants for the time being of the estate, in the sense of being general use by the local community from time to time living on the estate rather than occasional acts of trespass by individuals. I am satisfied that there has been general recreational use of the application land by the local community.

[113] It is true that there has been, in more recent years, an alternative play area on the other side of Butland Road, which is clearly very well used. On Mr. Smith's evidence (which I see no reason not to accept) it is much more used than the Merestone Road Recreation Area. However, I do not see how this is evidence that the application land is not used for recreation by a significant number of residents of the Merestone Road estate. The Butland Road Recreation Area is much larger, with formal sports facilities. The Smith observations did not include identifying where the users of the Butland Road Recreation Area came from: it may

well have a much larger catchment area than the application land. There is nothing to stop people using both recreation areas if they wish to do so. The Merestone Road Recreation Area is a quiet, safe and convenient place for estate residents, both adults and their children, to enjoy informal recreation, and it would be extraordinary if they did not do so.

### **Twenty years**

[114] Miss Knowles pointed out that there was only one live witness, Mr. Martin, who went back right to the start of the relevant 20 year period. She submitted that his evidence about his own initial use of the application land was of pushing a pram on the footpath and was explicable as highway type use. However, Mr. Martin gave evidence about seeing other people use the application land for various types of recreation and it was not suggested to him that this started after the beginning of the 20 year period. Mr. Martin's evidence (which I accept) was that when he moved to the estate in 1992, the application land was a well-maintained public open space. There were also written witnesses who went back all or nearly all of the full 20 years, i.e. Mr. Bhoday (December 1993), Mr. Cheng (May 1993), Mrs. Latta (September 1993), Mrs Neale (1992). It accords with common sense that an open grassy area laid out and maintained as a public open space in the middle of a housing estate would be used by residents of the estate for informal recreation.

[115] I am therefore satisfied that the application land (excluding the sales portacabin and car park) has been subject to qualifying recreational use for the whole of the relevant 20 year period.

### **As of right**

#### **Force**

[116] I am satisfied that local people have never had to use force to enter onto the application land since it has at all material times been open and unenclosed. The playground area was, for a while, fenced, but that was to keep children safe and there was a gate allowing unrestricted entry. There is no evidence that the landowner, or anyone else, has ever taken any steps to prohibit or restrict use of the land by notice or otherwise. Recreational use of the application land has, therefore, never been by force, even in the extended sense of being contentious.

#### **Secrecy**

[117] There was no suggestion at the public inquiry that recreational use of the application land was in any way secret.

#### **Permission**

[118] There was no evidence that the landowner, or anyone else on its behalf, had ever expressly given permission to local people to use the application land for recreation, whether by notice or otherwise.

[119] As for implied permission, it was said by the House of Lords in *Beresford* that it is possible for permission to be granted impliedly, but that the grant of permission cannot be inferred from acts of encouragement or facilitation. In the present case, YJL arranged for the maintenance of the application land, e.g. mowing the grass, picking litter and repairing the play equipment. I see nothing in this that can have amounted to the implied grant of

permission to local people to use the application land for recreation. I should add that even if YJL had fenced off the play area temporarily for repair works (and I am not satisfied that it did) I do not consider that that could give rise to an implication that YSL was granting permission to local people to use the application land for recreation. The only sensible inference was that it was fencing the area for health and safety reasons while works were effected.

[120] Miss Knowles submitted that there was evidence that most users knew that the application land was owned by the Renew Group and that the application land was public open space provided under a planning condition and that gave rise to an inference that recreational use of the land was permissive. There was certainly some evidence that a number of residents had learned of the ownership of the application land when enquiries were made in the run-up to the TVG application. Previously most residents appeared to have been ignorant of ownership or assumed that the land was owned by Corby Borough Council. There was also evidence that some purchasers of new houses on the estate were told by the selling agents that the Recreation Area was a facility of the estate and that this had influenced their decision to purchase (although none seemed to have been aware of the precise planning status of the land). I cannot see how any of this gives rise to an inference that recreational use of the application land was permissive:

- The fact that users know who owns the application land is not the same as being given permission to use the land
- The fact that some users had been told that the Recreation Area was a facility of the estate is not the same as giving them permission to use it. In any event, as *Beresford* established, permission must be revocable or time-limited
- Equally, even if any users knew of the planning condition (of which I am not satisfied) a planning condition is not the same as permission by the landowner. Equally, it is not revocable or time-limited.

[121] Miss Knowles submitted that the exclusion of local people from the footprint of the sales portacabin and car park from 1993 to 1995 amounted to the implied grant of permission to use the rest of the application land. Now, it is true that an inference of permission may arise where the landowner excludes local people from part of the application land unless they pay an admission fee, e.g. the beer festival tent in *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin). I must confess that I cannot understand the reasoning in *Mann* and doubt whether it would have been upheld by the Court of Appeal (an appeal was compromised). I believe that my doubts are not just sour grapes because I was on the losing side. Of course, the decision in *Mann* is the law for the time being and must be loyally followed and applied. However, I cannot see how use of the portacabin and car park to facilitate sales of houses on the estate can, in the real world, give rise to any inference that the landowner was thereby giving local people permission to use the rest of the application land for recreation. I think that the better analysis is that the footprint of the portacabin and car park were not available for recreation for a material part of the relevant 20 year period and should be excluded from registration.

#### Use “by right”

[122] In my view, the fact that it was a planning condition that the application land should be landscaped and planted for use as public open space did not, in itself, give local people

any statutory or other legal right to use the application land for recreation. It simply exposed the landowner to enforcement action if it did not comply with the condition.

### **Continuing use**

[123] I consider that qualifying use of the application land was continuing as at the date of the TVG application.

### **Exclusion of highway land**

[124] Mr. Fowler explained to the public inquiry that it was the duty of NCC as local highway authority to protect public highways and that they felt obliged to object to registration of public highway land as a new TVG since it was unclear whether highway rights or TVG rights would prevail where highway land was registered as a new TVG.

[125] Mr. Fowler referred me to Highways Act 1980 s. 161(3) which provides that it is an offence to play any game on a highway to the annoyance of a user of the highway. However, I heard no evidence that recreational use of the application land has ever caused any annoyance to users of the public highways on the application land.

[126] There is nothing in the legislation which precludes the registration of public highway land as a new TVG. Nor do I consider that there is any reason of principle why public highway land should not be registered as a new TVG in appropriate circumstances. It is true that it is necessary to distinguish between the exercise of highway rights and the general use of land for recreation. Where the application land is wholly public highway, the use of the land for recreation may well be explicable as the exercise of highway rights under the principle in *DPP v Jones* [1999] 2 AC 240. However, in the present case, I am satisfied that the whole of the application land (leaving aside the special case of the sales portacabin and car park) was used for lawful sports and pastimes throughout the 20 year period and that such use cannot be explained as being the exercise (or even excessive exercise) of highway rights referable to the public rights of way on the application land.

[127] Looking in more detail at the public rights of way on the application land, they fall into two classes:

- First, there are the paved paths which cross the application land. I am satisfied that the whole of the application land (bar the portacabin and car park) including the paved paths were used for recreation throughout the relevant 20 year period.
- Second, there is the path alongside Merestone Road. Although it can be seen that this was originally intended to be a roadside pavement, it is in practical terms indistinguishable from the rest of the application land and I am satisfied that it has at all material times been grassed and used for recreation as part of the application land as a whole.

## **10. The application to amend**

[128] At the start of the public inquiry, Mr. Folkes said that he wished to amend his application to exclude the public highway land. The first objector objected to the proposed amendment on the grounds:

- That the application was made too late

- That the amendment would divide the green into four parts
- That the remaining green would be disjointed
- That there was no rationale for the amendment other than to remove the objection of the second objector.

[129] I consider that the legal position is as follows:

- It is not for me as inspector but for the CRA, after considering my advice, to decide whether to allow any amendment of the application
- An applicant has no automatic right to amend a TVG application because such an application is not just private litigation but involves the interest of the public in ensuring that land that is properly registrable as a TVG is so registered
- A CRA can allow the amendment of a TVG application where it is fair and reasonable to do so.

I think that this analysis is supported by the reasoning of Lord Hoffmann in *Trap Grounds* at paras. 60-62, when read in conjunction with the passages in the judgment of Carnwath LJ in the court below to which Lord Hoffmann referred and the approach taken in my Report as inspector in that case to which Lord Hoffmann also refers.

[130] Applying these principles, I consider that the proposed amendment should not be allowed. In my view there is no good reason, on the facts or in law, to exclude the public highway land from registration as part of the new TVG. It would be prejudicial to the public interest if land which was properly registrable as a new TVG and was included in the TVG application should be excluded from registration. Further, it would be inconvenient and productive of uncertainty if the status of the public highway land was not determined. It would be open for someone else to make a fresh application to register the highway land as a new TVG.

## 11. Conclusion and recommendations

[131] I conclude that a significant number of the inhabitants of the neighbourhood of the Merestone Road estate (as shown edged blue on the application plan) within the locality of Corby have indulged as of right in lawful sports and pastimes on the application land (with the exception of the footprint of the sales portacabin and car park as drawn by Mr. Garlick on plan Y14) for a period of at least 20 years and continued to do so at the time of the TVG application.

[132] For the reasons discussed above, I recommend that the CRA should refuse Mr. Folkes's application to amend his application by the exclusion of public highway land

[133] I recommend that NCC as CRA should accede to the TVG application of Mr. Folkes except in relation to the footprint of the sales portacabin and car park as drawn by Mr. Garlick on plan Y14.

[134] I recommend that NCC as CRA should reject the TVG application of Mr. Folkes in relation to the footprint of the sales portacabin and car park as drawn by Mr. Garlick on plan Y14 on the ground that it was not subject to qualifying use for the whole of the relevant 20 year period.

[135] It is necessary under reg. 9(2) of the 2007 Regulations for the CRA to give the applicant written reasons for partial rejection of his application. I recommend that the reasons are stated to be “the reasons set out in the inspector’s report dated 10th April 2014”.

A handwritten signature in black ink, appearing to read 'V. Chapman', with a horizontal line underneath.

Vivian Chapman QC  
10<sup>th</sup> April 2014  
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Lincoln’s Inn,  
London WC2A 3NN