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Public Rights of Way Committee

Agenda

Date:	**Monday 13th June 2016**
Time:	**2.00 pm**
Venue:	**Committee Suite 1,2 & 3, Westfields, Middlewich Road, Sandbach CW11 1HZ**

The agenda is divided into 2 parts. Part 1 is taken in the presence of the public and press. Part 2 items will be considered in the absence of the public and press for the reasons indicated on the agenda and at the top of each report.

PART 1 – MATTERS TO BE CONSIDERED WITH THE PUBLIC AND PRESS PRESENT

1. **Apologies for Absence**

2. **Declarations of Interest**

   To provide an opportunity for Members and Officers to declare any disclosable pecuniary and non-pecuniary interests in any item on the agenda.

3. **Minutes of Previous meeting** (Pages 1 - 10)

   To approve the minutes of the meeting held on 14 March 2016

4. **Public Speaking Time/Open Session**

   Member of the public may speak on a particular application after the Chairman has introduced the report, provided that notice has been given in writing to Democratic Services by 12 noon one clear working day before the meeting. A total of 6 minutes is allocated for each application, with 3 minutes for objectors and 3 minutes for supporters. If more than one person wishes to speak as an objector or supporter, the time will be allocated accordingly or those wishing to speak may agree that one of their number shall speak for all.

For any apologies or requests for further information, or to give notice of a question to be asked by a member of the public

Contact: Rachel Graves
Tel: 01270 686473
E-Mail: rachel.graves@cheshireeast.gov.uk

Also in accordance with Procedure Rule No. 35 a total period of 10 minutes is allocated for members of the public to address the Committee on any matter relevant to the work of the body in question. Individual members of the public may speak for up to 5 minutes but the Chairman will decide how the period of time allocated for public speaking will be apportioned where there are a number of speakers. Members of the public are not required to give notice of the intention to speak, however as a matter of courtesy, a period of 24 hours notice is encouraged.

Members of the public wishing to ask a question at the meeting should provide at least three clear working days' notice in writing and should include the question with that notice. This will enable an informed answer to be given.

5. **Terms of Reference and Membership** (Pages 11 - 12)

To note the Committee's Terms of Reference and membership as appointed at Council on 11 May 2016:

Councillor Martin Hardy (Chairman)
Councillor Dorothy Flude (Vice Chairman)
Councillor Rhoda Bailey
Councillor Stan Davies
Councillor Toni Fox
Councillor Les Gilbert
Councillor John Wray

6. **Village Green Applications - Delegation of Powers from Rochdale Borough Council** (Pages 13 - 15)

To consider whether to accept a delegation of powers from Rochdale Borough Council to determine two village green applications on that Council's behalf

7. **Village Green Application - Land to the Rear of Gorsey Bank Primary School, Wilmslow** (Pages 16 - 111)

To consider the report of the Independent Expert

8. **Village Green Application - Banky Fields, Congleton** (Pages 112 - 143)

To consider the report of the Independent Expert

9. **Village Green Application - Land Bell Avenue, Sutton in Macclesfield, Cheshire** (Pages 144 - 166)

To consider the report of the Independent Expert

10. **Village Green Application - Land Adjacent to Chelford Road and Black Firs Lane, Somerford** (Pages 167 - 170)

To consider the outcome of the Judicial Review on the decision to refuse to register land at Black Firs Lane, Somerford as a village green and consider how to proceed with the village green application

11. **Public Rights of Way Annual Report 2015-2016 and Work Programme 2016-2017** (Pages 171 - 201)

To consider report on the achievements of the Council in terms of its public rights of way functions during the year 2015-16 and the proposed work programme for the year 2016-17

12. **Wildlife and Countryside Act- Part III, Section 53: Application to Upgrade Public Footpaths Nos. 8 Marbury cum Quoisley and no. 3 Wirswall to Bridleways** (Pages 202 - 220)

To consider the application for the upgrading of Public Footpaths No.8 Marbury cum Quoisley and No.3 Wirswall to Bridleways

13. **Highways Act 1980 s.119: Application for the Diversion of Public Footpath No. 12 (part), Parish of Goostrey** (Pages 221 - 263)

To consider the application to divert part of Public Footpath No.12 in the parish of Goostrey

14. **Highways Act 1980 s.119: Application for the Diversion of Public Footpath no. 5 (part), Parish of Broomhall** (Pages 264 - 269)

To consider the application to divert part of Public Footpath No.5 in the parish of Broomhall

15. **Highways Act 1980 s.119: Application for the Diversion of Public Footpath no. 5 (parts), Parish of Prestbury** (Pages 270 - 275)

To consider the application to divert parts of Public Footpath No.5 in the parish of Prestbury

16. **Town and Country Planning Act 1990 Section 257: Application for the Diversion of Public Footpath no. 9 (part), Parish of Arclid** (Pages 276 - 284)

To consider an application to divert part of Public Footpath No.9 in the parish of Arclid

17. **Public Inquiry to Determine Cycle Tracks Act 1984 The Cheshire East Borough Council (Crewe Footpath Nos. 3 (part) and 11 (also known as Footpath No. 36)) Cycle Tracks Order 2014** (Pages 285 - 288)

Information report on the outcome of a Public Inquiry to Determine Cycle Tack Order on Crewe Footpath Nos. 3 (part) and 11 (also known as Footpath No. 36)

Agenda Item 3

CHESHIRE EAST COUNCIL

Minutes of a meeting of the **Public Rights of Way Committee**
held on Monday, 14th March, 2016 at Committee Suite 1,2 & 3, Westfields, Middlewich Road, Sandbach CW11 1HZ

PRESENT

Councillor M Hardy (Chairman)
Councillor D Flude (Vice-Chairman)

Councillors Rhoda Bailey, W S Davies, M Deakin, T Fox and J Wray

Officers
Mike Taylor, Public Rights of Way Manager
Jennifer Tench, Definitive Map Officer
Marianne Nixon, Public Path Orders Officer
Patricia Evans, Planning Lawyer
Rachel Graves, Democratic Services Officer

24 **APOLOGIES FOR ABSENCE**

There were no apologies for absence.

25 **DECLARATIONS OF INTEREST**

No declarations of interest were made.

26 **MINUTES OF PREVIOUS MEETING**

RESOLVED:

That the minutes of the meeting held on 7 December 2015 be confirmed as a correct record and signed by the Chairman.

27 **PUBLIC SPEAKING TIME/OPEN SESSION**

Two members of the public had registered to speak in relation to Item 5. The Chairman advised that he would invite them to speak when the application was being considered by the Committee.

28 **HIGHWAYS ACT 1980 S.119 AND S25: APPLICATION FOR THE DIVERSION OF PUBLIC BRIDLEWAY NO 5 AND PUBLIC FOOTPATH NO 9 (PARTS) AND CREATION OF A NEW PUBLIC FOOTPATH, PARISH OF MARTHALL**

The Committee considered a report which detailed an application from Mike Walker (a Public Rights of Way Consultant) on behalf of Mr R Brighouse of Mount Pleasant, Marthall, Knutsford, requesting the Council

to make an Order to divert part of Public Bridleway No.5 and part of Public Footpath No.9 and create a new Public Footpath in the parish of Marthall.

In accordance with Section 119(1) of the Highways Act 1980 it was within the Council's discretion to make an Order to divert a public path if it appeared to the Council to be expedient to do so in the interests of the public or the owner, lessee or occupier of the land crossed by the path. In accordance with Section 25 of the Highways Act 1980 the Council can enter into a Creation Agreement with the owner of the land to create a new public footpath.

Mr John White, North and Mid Cheshire Ramblers, addressed the Committee and asked about the informal consultation process as the comments he had submitted had not been included in the Report. He was concerned about the nature of the surface on the proposed diversion route and that drainage would need to be improved.

Mr Brighouse, the Applicant, addressed the Committee and stated he would work with the Council to solve any surface and drainage issues.

The Applicant owned the land over which the current and the proposed diversions ran. Mount Pleasant Farm had been demolished and had permission for the erection of a substantial new single residential dwelling to occupy the site, together with garaging, stables, a manege and small golf course. Both public rights of way passed very close to the property.

The existing section of Public Bridleway No.5 Marthall to be diverted passed across the frontage of the property and directly crossed, what would be, dual access roads to the house and its facilities. Diverting the path to a new route would offer greater privacy and security to the property as well as increasing the safety for users by removing potential conflict with vehicles crossing at two separate points in front of the property. The new route would have a width of 4 metres with no requirement for any gates and for part of its length would have a stone based surface.

The existing section of Public Footpath No.9 Marthall to be diverted ran through fields and passed adjacent to the northern side of the new dwelling and then across fields behind. Diverting this section would also afford greater privacy. The new section of public footpath would have a width of 3 metres and would have kissing gates rather than stiles along its route.

A new section of footpath would be created linking from point M of the proposed new route for Public Footpath No.9 and would run north westerly to join Public Footpath No.6 at point J. This path would have a width of 3 metres.

The Committee noted that no objections had been received during the informal consultation and considered that the proposed routes would not be substantially less convenient that the existing routes. Diverting the

Bridleway and Footpath would be of benefit to the landowner in terms of privacy and security to their property and the creation of a new direct link to Public Footpath No.6 Marthall would be a useful addition to the local public rights of way network. It was therefore considered that the proposed routes were a satisfactory alternative to the current routes and that the legal tests for the making and confirming of the diversion order were satisfied.

The Committee unanimously

RESOLVED: That

1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert parts of Public Bridleway No.5 and Public Footpath No.9 in the parish of Marthall by creating new sections of each path and extinguishing the current path sections, as illustrated on Plan No.HA/108, on the grounds that it is expedient in the interests of the owner of the land crossed by the paths.

2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

4 An agreement under Section 25 of the Highways Act 1980 be entered into with the landowner, Mr R Brighouse, to create a length of public footpath as detailed in the report and as illustrated on Plan No.HA/108.

29 **HIGHWAYS ACT 1980 S.119: APPLICATION FOR THE DIVERSION OF PUBLIC FOOTPATH NO. 24 (PART), PARISH OF BOLLINGTON**

The Committee considered a report which detailed a joint application from Mr & Mrs Earl of Sycamore Quarry and Mr Beardmore of Endon Quarry, Windmill Lane, Kerridge, Macclesfield, requesting the Council to make an Order to divert part of Public Footpath No.24 in the parish of Bollington.

In accordance with Section 119(1) of the Highways Act 1980 it was within the Council's discretion to make an Order to divert a public footpath if it appeared to the Council to be expedient to do so in the interests of the public or the owner, lessee or occupier of the land crossed by the path.

The land over which the section of current path to be diverted and the proposed diversion ran belonged to the Applicants, with the exception of

approximately 10 metres of the current route which belonged to Mr D Tooth, who had provided his written consent to the diversion.

The current definitive line of the section of Public Footpath No.24 to be diverted was partly not available on the ground. Part of the route was extremely steep and went through a wooded area and a post and wire fence. A further section ran through the actually working quarry and the route had been quarried away. The southern section also had a very steep gradient and was in close proximity to the edge of the working quarry and large earth moving machinery.

The proposed route of the diversion was currently being used as a permissive path, although improvements would need to be made with steps being installed and the path resurfaced as required. The new route would have a width of 2 metres and would be enclosed for approximately 75 metres of its length between post and wire fences and would be a stone/earth surface.

The Committee noted the comments received from Bollington Town Council Cllr Ken Edwards and East Cheshire Ramblers, and the complaint from Mr G Williams along with the Public Rights of Way Unit response.

The Committee considered that the proposed route would not be substantially less convenient that the existing route and that diverting the footpath would be in the interest of the landowners as it would allow them to continue with their current quarrying permissions. It was considered that the proposed route would be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order were satisfied.

The Committee unanimously

RESOLVED: That

1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert part of Public Footpath No.24 Bollington by creating a new section of public footpath and extinguishing the current path, as illustrated on Plan No.HA/104, on the grounds that it is expedient in the interests of the owners of the land crossed by the path.

2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

30 **HIGHWAYS ACT 1980 S.119: APPLICATION FOR THE DIVERSION OF PUBLIC FOOTPATH NO. 3 (PART), PARISH OF ALPRAHAM**

The Committee considered a report which detailed an application from Clare Goodman (Public Rights of Way Consultant) on behalf of Carol Hutchison, Elm Tree Cottage, Alpraham, requesting the Council to make an Order to divert part of Public Footpath No.3 in the parish of Alpraham.

In accordance with Section 119(1) of the Highways Act 1980 it was within the Council's discretion to make an Order to divert a public footpath if it appeared to the Council to be expedient to do so in the interests of the public or the owner, lessee or occupier of the land crossed by the path.

The land over which the current path and the proposed diversion ran belonged to the Carol Hutchison. Diverting the path would enable the applicant to better manage land, livestock (horses) and operations within the grounds of their stables whilst providing users with a more convenient route as it would have less path furniture to negotiate and also eliminate the need to negotiate the livestock. The entire length of the new route would have post and rail fencing installed along one side and be bounded by an existing hedge along the other.

The pedestrian gate on the new route, at point F, would be set back from the lane to give users an area of verge from which to stand and view oncoming traffic. It would also be graded sufficiently so that there was no steep drop onto the area of verge.

The Committee noted that no objections had been received during the informal consultations and considered the proposed route would not be substantially less convenient than the existing route. Diverting the footpath would be of benefit to the landowner in terms of aiding with land management, livestock and offered enhanced security and privacy to their property. It was considered that the proposed route would be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order were satisfied.

The Committee unanimously

RESOLVED: That

1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert part of Public Footpath No.3 Alpraham by creating a new section of public footpath and extinguishing the current path, as illustrated on Plan No.HA/107, on the grounds that it is expedient in the interests of the owner of the land crossed by the path.

2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order

be confirmed in the exercise of the powers conferred on the Council by the said Acts.

3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

31 **TOWN AND COUNTRY PLANNING ACT 1990 SECTION 257: APPLICATION FOR THE DIVERSION OF PUBLIC FOOTPATH NO. 24 (PART), PARISH OF PRESTBURY**

The Committee received a report which detailed an application from J Hinds (agent) of Savills UK Ltd on behalf of Kings School, Cumberland Street, Macclesfield, requesting the Council to make an Order under Section 257 of the Town and Country Planning Act 1980 to divert part of Public Footpath No.24 in the parish of Prestbury.

In accordance with Section 257 of the Town and Country Planning Act 1980, the Borough Council, as Planning Authority, could make an Order diverting a footpath if it was satisfied that it was necessary to do so to enable development to be carried out in accordance with a planning permission that had been granted.

A planning application had been submitted for the construction of a new school comprising classrooms, libraries and supporting facilities together with additional playing fields and various associated outbuildings, infrastructure, car parking and access – Planning reference 15/4286M. Planning permission had not yet been granted and therefore any Order made would be only made operable on condition that planning permission was granted.

The existing alignment of Public Footpath No.24 would be obstructed by the proposed new school building and therefore a public footpath diversion would be required to preserve public access around the school. The length of footpath proposed to be diverted was approximately 210 metres of which 60 metres would be directly affected by the development. The proposed new route would be 3 metres wide with a 1.2 metre wide stone surface with timber edging, laid within the 3 metre width. Either side of the stoned surface would be grass. A post and three rail sawn fence with sheep netting would be installed to the west of the footpath to prevent interaction between school personnel and path users such that security and privacy for both would be enabled. Agricultural gates would be installed within the fence for use by school staff to access the footpath and surrounding land for maintenance and other operational requirements.

Prestbury Parish Council had been consulted on the proposed diversion and had registered objection on the basis that is was not justifiable at this time. However, after discussion to explain that the path would need to be diverted if the development was granted planning permission and that the diversion need to be considered at this time the Parish Council agreed to

reconsider the proposal again. It was reported that the Parish Council would not be meeting until after the Committee had considered the application.

Other than Prestbury Parish Council, no other objections had been registered, although the East Cheshire Group of the Ramblers made this conditional on granting of planning permission.

The Committee considered the application and concluded that it would be necessary to divert part of Public Footpath No.24 Prestbury if planning permission was granted to allow the development to be carried out. It was considered that the legal tests for the making and confirming of a Diversion Order under section 257 of the Town and Country Planning Act 1990 were satisfied.

As Prestbury Parish Council had indicated that they would respond to the informal consultation and to allow for their response to be considered, the Committee was therefore asked to delegate the decision to the Public Rights of Way Manager, in consultation with the Chairman and Vice Chairman to allow the response to be considered in reaching a final decision.

The Committee unanimously

RESOLVED: That

1 the decision be delegated to the Public Rights of Way Manager, in consultation with Chairman and Vice Chairman.

2 If an Order is made, Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council be the said Acts.

4 In the event of objections to the Order being received and not resolved, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

32 **TOWN AND COUNTRY PLANNING ACT 1990 S257: APPLICATION FOR THE EXTINGUISHMENT OF PEDESTRIANS ROUTES, FORMER VICTORIA COMMUNITY HIGH SCHOOL, WEST STREET, CREWE**

The Committee considered a report which detailed an application from IBI Group acting as Agent for the Crewe Engineering and Design TC, requesting the Council to make an Order under Section 257 of the Town and Country Planning Act 1980 to extinguish four lengths of pedestrian routes that crossed the site of the former Victoria Community School on West Street, Crewe.

In accordance with Section 257 of the Town and Country Planning Act 1980, the Borough Council, as the Planning Authority, can make an Order extinguishing a pedestrian route that it considers to be a public right of way if it is satisfied that it was necessary to do so in order to enable development to be carried out in accordance with a planning permission that had been applied for or granted.

Planning permission had been granted for the demolition of former Newdigate and Meredith Buildings and the erection of a 3622 sqm. new educational building and associated car parking and landscaping work, alongside the refurbishment of the Oakley Building for use by the UTC former Victoria Community High School and the Oakley Centre, West Street, Crewe - Planning Application 15/4389N. The paths to be extinguished currently passed through the proposed new college building and also passed through the area of the site which was to be defined by a secure perimeter, ensuring the safeguarding of pupils.

The history of the site dated back to the late 1970s when sections of the existing streets were stopped up by Magistrate's Court Order to prepare the way for the development of the new Victoria Community High School. No formal access provision was set out through the school site; however it was not enclosed and remained highly permeable effectively allowing rights of access for pedestrians to develop. The School stopped being an educational site in about 2009/2010 when it merged with another school and moved to a new site to become the Sir William Stanier Community School. Since that time two of the buildings have been derelict and the Oakley Centre had been used by Cheshire East Council as a Community Centre.

When the current development was in the planning stage, the Public Rights of Way department was approached for their comments on the status of the routes through the site. It was considered that public rights of way had probably accrued. Signs located on the site by Cheshire County Council stating 'Private Property, Right of Way' gave a strong indication that access had been acknowledged by the County as landowner. On this basis it was recommended to the partnership working in conjunction to develop the University Technology College, that the routes should be formally closed.

At the same time it was agreed that one pedestrian route through the site was essential requisite in designing the new layout. The route along the frontage of the site running east to west was a strange anomaly as it fell mostly within the school site landholding and yet also effectively served as the northern footway for West Street. It was therefore essential that this route was retained for the public.

The pedestrian routes were currently the subject of a temporary closure order whilst site preparation works were underway and asbestos was removed from the buildings. The order came into force on 7 December 2015 and expires after 6 months. If the developer wished to extend this

period of closure, an application must be made to the Department of Transport at least 4 weeks before the current expiry date.

The Committee considered the application and concluded that it was necessary to extinguish the sections of pedestrian routes, as illustrated on Plan No. TCPA/027, to allow for the demolition of existing buildings and the construction of a new educational building and associated car parking and landscaping. It was considered that the legal tests for the making and confirming of an Extinguishment Order under section 257 of the Town and Country Planning Act 1990 were satisfied.

The Committee unanimously

RESOLVED: That

1 An Order is made under Section 257 of the Town and Country Planning Act 1990 to extinguish the pedestrian routes, illustrated on Plan No. TCPA/027, on the grounds that the Borough Council is satisfied that it is necessary to do so in order to enable development to be carried out.

2 Public Notice of the making of the Order is given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

3 In the event of objections to the Order being received and not resolved, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

The meeting commenced at 2.00 pm and concluded at 3.20 pm

Councillor M Hardy (Chairman)

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PUBLIC RIGHTS OF WAY COMMITTEE

1. The Council will appoint a Public Rights of Way Committee which will be a politically balanced body of 7 Councillors.

2. The Public Rights of Way Committee shall discharge all the functions of the Council in relation to all matters relating to public rights of way.[1] Specifically, it shall discharge those functions set out in Part I (1) of Schedule 1 to the Local Authorities (Functions and responsibilities) (England) Regulations 2000 (SI2000/2853) (and any subsequent amendments thereto) that are not specifically delegated to officers namely[2]:-

   2.1 To authorise the creation of footpaths, bridleways and restricted byways by agreement (s25) and by order (S26)

   2.2 To authorise the making of applications to Magistrates' Court for the stopping up of public rights of way (S116)

   2.3 To determine applications and authorise the making of all public path extinguishment orders (S118, S118ZA, S118A, S118B & S118C; S294 of the Housing Act 1981; S257 & 258 Town and Country Planning Act 1990; S32 of the Acquisition of Land Act 1981)

   2.4 To determine applications and authorise the making of all public path diversion orders (S119, S119ZA, S119A, S119B, S119C, S119D & S135A; S257 Town and Country Planning Act 1990)

   2.5 To determine that an applicant for a special diversion order shall enter into an agreement in respect of costs (S119C)

   2.6 To decline to determine certain applications (S121C)

   2.7 To keep the Definitive Map and Statement under review. (S53 Wildlife and Countryside Act 1981) Including the determination of applications for modification orders whether by direction of the Secretary of State or otherwise.

   2.8 To include modifications in other orders. (S53A Wildlife and Countryside Act 1981)

   2.9 Power to designate footpaths as cycle tracks. (S3 Cycle Tracks Act 1984)

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[1] Being all highways as defined by the Highways Act 1980 and permissive ways that are not within the remit of the Head of Environmental Services. These include Footpaths, Bridleways, Restricted Byways and Byways Open to All Traffic and are often known collectively as "public paths". This effectively amounts to all highways and paths other than metalled or surfaced "all purpose" public carriageway highways (roads) and most urban paths.

[2] Correct as at 16.1.09. Note: Section numbers in brackets refer to the Highways Act 1980 unless otherwise stated.

2.10 Power to enter into agreements with respect to means of access. (S35 Countryside and Rights of Way Act 2000)

2.11 Power to provide access in absence of agreement. (S37 Countryside and Rights of Way Act 2000)

2.12 To determine applications for the making, variation or revocation of Gating Orders relating to public paths. (Part 8A)

3 To discharge the authority's functions in respect of Commons and Village Greens.

4 To be apprised of, approve, and comment on a range of policies, programmes and practices relating to rights of way, Commons and Village Greens and countryside matters including but not limited to:-

4.1 Annual Report and Work Programme

4.2 Progress reports on implementation of the Rights of Way improvement Plan (part of the Annual Progress Review for the Local Transport Plan)

4.3 Statements of Priorities

4.5 Enforcement Protocols

4.6 Charging Policy for Public Path Order applications (Annual)

4.7 Proposals for changes to legislation

4.8 Commencement of legislation

4.9 Significant case law

4.10 Corporate policies affecting PROW

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13 June 2016
Report of:	Director of Legal Services
Subject/Title:	Village Green Applications – Delegation of Powers from Rochdale Borough Council

1.0 Report Summary

1.1 This report asks the Public Rights of Way committee to accept a delegation of powers from Rochdale Borough Council to determine two village green applications on that Council's behalf.

2.0 Recommendation

2.1 That the Committee accepts the delegation from Rochdale Borough Council, made under Section 101 of the Local Government Act 1972, of its powers to determine the following two village green applications:-

a) Land at Swift Road, Bamford

b) Heritage Green, Norden

3.0 Reasons for Recommendations

3.1 Rochdale Borough Council has approached Cheshire East Council with a request that it accepts from it a delegation under S101 of the Local Government Act 1972, with the effect that Cheshire East Borough Council assumes the functions of Commons Registration Authority for Rochdale Borough Council in respect of those two matters.

3.2 This represents an excellent opportunity for this Council to utilise the expertise it has gained over recent years to assist a fellow council and Commons Registration Authority in the determination of two village green matters, and to build its reputation for excellence in this field.

4.0 Background

4.1 Rochdale Borough Council owns the land subject to both of the applications. In the interests of transparency, it is that Council's preference that another authority determines the applications on its behalf. Recognising its expertise in these matters, Rochdale Borough Council has approached Cheshire East Council with a request that it determines these two matters on its behalf.

4.2 Under S101(1)(b) of the Local Government Act 1972, a local authority may arrange for the discharge of any of its functions by any other local authority.

The function of determining village green applications under the Commons Registration Act 2006 is one such function.

4.3 As noted above, Rochdale Borough Council has received these two applications in its own right as Commons Registration Authority for the relevant area. That Council owns the land subject to both applications. In the interests of transparency, that Council has taken the view that it would prefer those two applications to be determined by a different authority. Accordingly, it has asked Cheshire East Borough Council's Public Rights of Way Committee to accept a delegation of its powers for that purpose.

4.4 It is proposed to determine those two applications using the same process that the Council would use to determine applications made to it in its own right. That is to subject the same to consideration by a suitably qualified practitioner who would produce reports containing recommendations to be taken back to this committee for determination.

4.5 Rochdale Borough Council has agreed to meet the reasonable costs properly incurred by this council in determining those two applications on its behalf.

5.0 Wards Affected

5.1 N/A

6.0 Local Ward Members

6.1 N/A

7.0 Financial Implications

7.1 Cheshire East Council will recover its operational costs and disbursements incurred in the determination of these two matters from Rochdale Borough Council. Consequently there are financial implications that flow from the recommendation.

8.0 Legal Implications

8.1 The Council will follow its usual practice in this matter, which is designed to ensure a fair consideration of the matter and so eliminate potential grounds of challenge to any decision it ultimately reaches.

9.0 Risk Management

9.1 This is dealt with in the legal implications section of the report.

10.0 Alternative Options

10.1 The alternative option is to decline to accept the delegation. That would be unfortunate in terms of missing the opportunity to assist a fellow commons

registration authority and the opportunity to cement this authorities expertise in this field.

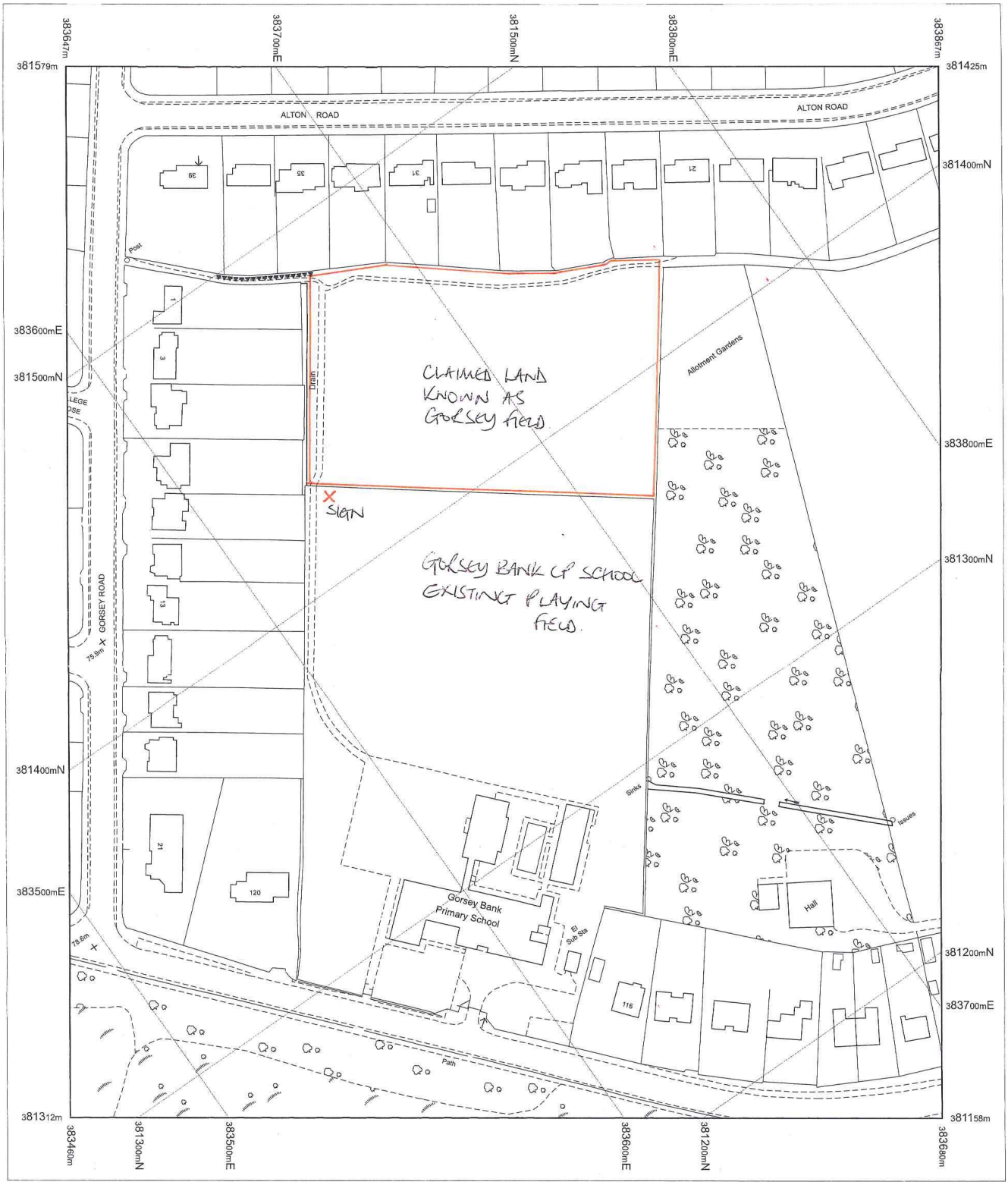
11.0 Access to Information

Background Documents - None

Name: Daniel Dickinson
Designation: Legal Team Manager – Corporate and Regulatory
Tel No: 01270 685814
Email: daniel.dickinson@cheshireeast.gov.uk

Ordnance Survey®

OS Sitemap®



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23-3-09
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CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13 June 2016
Report of:	Director of Legal Services
Subject/Title:	Village Green Application – Land to the Rear of Gorsey Bank Primary School, Wilmslow

1.0 Report Summary

1.1 This report deals with an application made by Mr Chris Stubbs on 23 March 2009 to register land to the rear of Gorsey Bank Primary School, Wilmslow as a Village Green. The application was made under Section 15(3) of the Commons Act 2006. The land in question is shown on the attached plan.

2.0 Recommendation

2.1 That the Committee receive and accept the recommendation contained in the written report (attached) of the Council's appointed independent expert, Mr. Sauvain QC, and refuses the application for the reasons set out therein.

3.0 Reasons for Recommendations

3.1 Mr Sauvain QC recommends that the application should not be accepted and that the land should not be registered as a village green for two reasons.

3.2 Firstly, there is insufficient evidence that the land has been used "as of right" for the requisite period of time by a significant number of inhabitants of the locality or of a neighbourhood within the locality.

3.3 Secondly, that in accordance with the decision of the Supreme Court in *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547, the registration of the land as a village green would be incompatible with the statutory purposes for which the land is held.

4.0 Background

4.1 The Council is the commons registration authority for its area. As such it is responsible for determining applications to register land in its area as common land or as a town or village green.

4.2 This application falls to be determined under Section 15(3) of the Commons Act 2006. For the application to succeed, the applicant must demonstrate, on the balance of probabilities, all of the following. That:-

a) Lawful sports and pastimes have been indulged in on the land for a period of at least 20 years;

b) Those activities have been indulged in "as of right" (i.e. without secrecy, force or permission);

c) Those activities have been indulged in by a significant number of inhabitants of a locality or a neighbourhood within a locality;

d) The claimed use ceased no more than one year before the application.

4.3 In this case, the 20 year period is the period of 20 years immediately preceding February 2009, when a fence was erected to enclose approximately 60% of the claimed land and thereby exclude public use of it.

4.4 Additionally, because in this case the land is held under statute for education purposes, the application must fail if registration of the land as a village green would be incompatible with the statutory purposes for which the land is held *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547.

4.5 In accordance with its usual practice, the Council (following a resolution of this committee) appointed an independent expert to consider the application and prepare a report ("the Report") making a recommendation as to how the application should be determined. The appointed independent expert was Stephen Sauvain Q.C. who held a public inquiry to consider the evidence over the course of 16 to 19 November 2015.

4.6 The Report extends to some 91 pages and is attached hereto. Its findings can be summarised as follows. References in bold are references to paragraph numbers in the report.

4.7 The application was supported by 96 user forms/statements of which 88 came from the identified "neighbourhood" of Pownall Park. (**3**)

4.8 Whilst the overall impression from the evidence is that there has been a level of usage which might have led a reasonable landowner to have realised that a town or village green right was being asserted, that actually only happened over the last 10 years or so of the 20 year period in question (**124**).

4.9 Much of that use (in the latter 10 year period) is attributable to a relatively small number of families mostly living on Alton Road. Accordingly, there is insufficient certainty, on the balance of probabilities, that even during this latter 10 year period there has been sufficient usage by a significant number of the inhabitants of the Pownall Park neighbourhood rather than from the inhabitants of one or two streets that are in the immediate vicinity of the land. (**124**)

4.10 In respect of the earlier part of the requisite 20 year period, evidence of use is taken primarily from user forms only, and Mr Sauvain QC was not content that those forms provide sufficient information to satisfy him, on the balance of probabilities, that sufficient activity took place "as of right" on the land over the

full 20 year period by a significant number of inhabitants of the neighbourhood (**124**)

4.11 The concerns as to the evidence on user forms (**115-123**) is that much of the activity described related to use of the land by right (and not "as of right") or with permission. In particular the uses described were most likely uses attributable to use of the footpath across the land or use in connection with trips to and/or from the school.

4.12 Consequently, Mr Sauvain QC recommends that there is insufficient evidence to support the application in respect of any part of the land, and it should not be registered as a village green.

4.13 In addition, Mr Sauvain QC found that registration of the land as a village green would be incompatible with the statutory purposes for which the land is held (education). As such the application must fail on those grounds alone. *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547. (**127 to 147**)

4.14 For completeness Mr Sauvain QC clarifies that for both of these reasons, the application must fail in respect of all of the land which, for the avoidance of doubt, includes the land that was not enclosed in 2009 (**148**).

4.15 Mr Sauvain QC's report has been sent to the applicant and objector for comment. The objector has confirmed that it has no observations on the content of the same. The Applicant, whilst not making any observations on the content of the report, has expressed a desire to understand, and for the committee to understand, why it has taken so long for this matter to be resolved.

4.16 The answer to that question is no more sophisticated than there having been a period of uncertainty as to where responsibility and funding for village green matters rested following local government re-organisation in 2009, in conjunction with a failure of this matter to rank amongst competing priorities. Both of those difficulties have subsequently been addressed.

5.0 Wards Affected

5.1 Wilmslow West and Chorley

6.0 Local Ward Members

6.1 Councillors Gary Barton and Ellie Brooks

7.0 Financial Implications

7.1 There are no immediate financial implications that flow from the recommendation.

8.0 Legal Implications

8.1 In accordance with its standard practice, the Council appointed one of the foremost acknowledged experts in this field to act as an independent expert in this matter. The recent high court decision in the Somerford matter has confirmed that this is an appropriate procedure to follow in the determination of village green applications.

8.2 The appointed expert held a public inquiry over the course of 4 days. Through that process he very carefully considered and tested all of the evidence, including submissions on all relevant matters made by the applicant, the council (as objecting landowner) and all other interested parties.

8.3 Whilst the Council is not obliged to follow the independent expert's recommendation, if it chose not to do so it would need a very clear and full explanation of the reasons for that decision, addressing all of the areas where it considered the independent report to be in error. Otherwise, a decision that did not follow the recommendation would be susceptible to challenge by judicial review.

9.0 Risk Management

9.1 This is dealt with in the legal implications section of the report.

10.0 Alternative Options

10.1 This is dealt with in the legal implications section of the report.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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THE COMMONS ACT 2006: SECTION 15

APPLICATION FOR THE REGISTRATION OF LAND TO THE REAR OF GORSEY BANK COUNTY PRIMARY SCHOOL, WILMSLOW AS A TOWN OR VILLAGE GREEN

INSPECTOR'S REPORT

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1. I have been appointed by the Registration Authority (Cheshire East Council) to hold a public inquiry into an application for the registration as a town or village green (TVG) of land at the rear of Gorsey Bank CP School, Wilmslow ("the Land") and to report to the Registration Authority with my recommendations as to whether or not the Land should be registered as a TVG.

2. The application for registration was made by Mr Christopher Stubbs of 29, Alton Road, Wilmslow, Cheshire, SK9 5DY on 23rd March 2009 (received on 27th March 2009) under s.15(3) of the Commons Act 2006. The application form indicated that the date on which use as of right had ended was 9th February 2009. The application claimed 20 years or more of usage as of right by a significant number of the inhabitants of the neighbourhood of Pownall Park within the locality of Wilmslow South (the then name of the local government ward within which Pownall Park was situated).

3. The application was supported by 96 users forms/statements of which 88 came from inhabitants of the identified "neighbourhood" of Pownall Park together. The application also contained some analysis of length and frequency of use of the numbers of "households" who had completed forms. This indicated that about 45 had claimed use over the full 20 year period of whom a number claimed usage over much longer periods of time going back in a few cases to the 1950s.

4. The present owner of the Land is Cheshire East Council in its capacity as local education authority, having acquired title from Cheshire County Council on local government re-

organisation in Cheshire in 2009. Cheshire County Council objected to the application - supported by some 88 letters/objections from other persons – most of whom had some present or past connection with the Gorsey Bank School.

5. In view of the length of time which has passed between the submission of the application and the date of the public inquiry, the local government ward in which the Land is located has changed and, as mentioned above, the ownership of the Land has devolved to Cheshire East Council who have taken on the mantle of the objector. The Applicant has now identified the new local government ward (Wilmslow West and Chorley) as the relevant locality – his case still being, however, based on use by a significant number of the inhabitants of a neighbourhood – Pownall Park – within that ward. No objection has been taken to either of these changes.

6. I issued Directions as to the steps to be taken by each party and by the Registration Authority prior to the inquiry. The Registration Authority was late in preparing and distributing its Bundle of Documents and requested an amendment to the timetable. This, in turn led to the Objector asking for an amendment to the timetable and I accordingly issued amended directions. Notwithstanding this extension the Objector was slightly late in delivering its bundle of evidence to the Applicant resulting in the applicant being presented with over 200 pages of evidence shortly before the Inquiry. Initially, the Applicant asked for an adjournment of the Inquiry and I indicated to the parties that I would be sympathetic to such an application. However, on 13th November Mr Stubbs sent an e-mail to the Registration Authority, the Objector and myself indicating that he no longer wished to request an adjournment. In fact, the evidence submitted by the Objector included a great deal of material which had been disclosed previously and which was, indeed, included in the registration Authority Bundle.

7. The Inquiry was held at the Stanley Suite at The Stanneylands Hotel, Wilmslow and sat from Monday 16th November to Thursday 19th November. Mr Stubbs appeared in support of the application. Miss Stockley, of counsel, appeared on behalf of the principal objector – Cheshire East. I visited the site informally in advance of the inquiry and conducted a formal site visit in the company of the Applicant and representatives of the Objector on Wednesday 18th November.

8. After hearing closing submissions, I requested further written submissions in relation to the argument being advanced by the Objector on statutory incompatibility. The further

submissions from the objector were received on Friday 27th November 2015 and the submissions in reply were received on Friday 4th December 2015.

THE LAND

9. The Land forms part of the title registered under Title No. CH519142 described in the Land Registry property register as "being Gorsey Bank Primary School, Altrincham Road, Wilmslow." That registration dates from April 2004 and includes the present school buildings and hard surfaced play areas, a grassed playing field, the Land, an area of woodland and some allotment gardens.
10. To the rear of the school buildings and hard surface play areas there is a school playing field which, before 2009, was separated from the Land by a fence and an intermittent line of bushes/trees. The Land was open to the public and accessible by means of the public footpath which runs across the north eastern edge of the Land and leads from Gorsey Road, continuing past the allotments, to and across a public recreation ground known as the Carnival Field. The path then continues to Broad Walk/Hawthorne Lane passing Park Road with which it has a connection.
11. All the land within Title CH519142, together with some of the land between the allotments and the rear of properties fronting Altrincham Road (subsequently sold off), was purchased by the former Cheshire County Council under a conveyance dated the 6th October 1938. The conveyance does not disclose the purpose of the purchase but accompanying correspondence indicates that the purpose was the construction of a proposed Senior Boys' School. That particular school was not constructed but eventually in 1962 the present school was constructed on the acquired land. It was suggested at the inquiry that the Land might have been intended to be the site of an associated infants school but, in any event, there is no suggestion that the fence-line of the school had historically ever been anything other than that which had existed immediately prior to February 2009.
12. Access into the fenced school grounds is, and at all relevant times has been, possible from a path running down the north west side of the Land and the rear gate. The evidence indicated, and my own observation confirmed, that this entrance is preferred to that at the front of the school by a substantial number of parents.
13. By the side of that gate, on the school side of the fence there was, at all relevant times prior to 2009, a sign which said

"Cheshire County Council
Education Department
PRIVATE PROPERTY
No unauthorised activities
NO GOLF, DOGS, CYCLES,
TIPPING, HORSES
Director of Education"

It appears that for many years the gate was unlocked. However, since 2009, at least, (and probably for a few years previously) the gate has been locked except for a period shortly before and after the times when parents drop of and collect their children from the school.

14. It is a matter of dispute as to what extent the Land might have been used by the school prior to 2009. However, I have no reason to doubt that it was used from time to time for a number of class and small group activities - more so in the years prior to 1996 than more recently.

15. In or about 2008 the School acquired funding to erect new fencing to enclose the majority of the Land within the school grounds. There appears to have been some consultation process involved and it became clear that there would be local opposition. Indeed Mr Stubbs had already begun to collect evidence to support an application for TVG status. The School decided to compromise by erecting the present fence - which still leaves an area of the land owned by the Council outside the fenced grounds of the school.

16. In February 2009 work commenced on the erection of the new fence running across the Land to incorporate between half and two thirds of the Land within the fenced school grounds. The old fence between the Land and the school was removed. The present situation is, therefore, that slightly more than one third of the Land remains accessible to the public and the remainder has now been incorporated within the fenced school grounds. A new sign has been erected on the new fence line. There remains nothing to prevent members of the public from accessing the area of the Land that is outside the fence line and no sign which would suggest that the use of this part of the Land by the public is prohibited or the subject of express permission. It was the commencement of the work to erect the new fence that prompted the current application.

17. On 31st March 2009 Crewe and Nantwich Borough Council, Congleton Borough Council and Macclesfield Borough Council ceased to exist. Those three borough councils combined with the Eastern half of Cheshire County Council to become Cheshire East Borough Council on 1st April 2009.

18. The land and properties of the Cheshire County Council transferred, *inter alia*, to Cheshire East Borough Council as Beneficial Owners pursuant to the provisions of the Local Government and Public Involvement in Health Act 2007, The Local Government (Structural Changes) (Transfer of Functions, Property, Rights and Liabilities) Regulations 2008, the Local Government (Structural Changes) (Transitional Arrangements (No. 2) Regulations 2008 and the Cheshire (Structural Changes) Order 2008.

THE LAW

19. Section 15 of the Commons Act 2006 states:

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.
>
> (3) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the time of the application but after the commencement of this section; and
>
> (c) the application is made within the relevant period.
>
> (3A) In subsection (3), "the relevant period" means—
>
> (a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b) . . ."

20. The current application was made under s.15(3) and so the matters which have to be established are whether or not:

(i) Lawful sports and pastimes have been indulged in on the land for a period of at least 20 years;

(ii) Those activities have been indulged in "as of right";

(iii) The activities have been indulged in by a significant number of the inhabitants of a locality or a neighbourhood within a locality;

(iv) The claimed usage ceased no more than one year before the application.

21. All these elements have to established and the burden of proof in establishing whether or not they are satisfied lies on the Applicant. The standard of proof is the ordinary civil standard of a balance of probabilities.

Lawful sports and pastimes

22. There is no absolute definition of what activities fall within this definition. In *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 Lord Hoffman said at pp. 356-7

> "As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class . . .
>
> . . . I agree with Carnwath J. in *Reg. v. Suffolk County Council, Ex parte Steed* (1995) 70 P. & C.R. 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green."

23. In Gadsden on Commons and Greens (2nd Ed) it is stated, at p.528:

> "Typical activities which often occur today and which would qualify as lawful sports and pastimes include traditional family and children's play (such as hide and seek) informal games of football, cricket and rounders, baseball and the like, and recreational walking with or without dogs. There would also be likely to be some seasonal activities, such as snowball fights and tobogganing in the winter."

Citing early decisions of the Commons Commissioners[1] under the Commons Registration Act 1965 the editors of Gadsden also say

> "the Commons Commissioners accepted that children playing on a piece of open land was sufficient basis to establish a full customary right without any requirement that there should be any sort of formal organisation of the sports or pastimes."

[1] *Re The Village Greens, Addington, Lincolnshire* (1972) 24/D/3 and *Re Bridge Green, Hargrave, West*

24. However, where the use claimed is walking or dog walking some care has to be taken in distinguishing between usage which might be attributable to the use of a public footpath, whether or not that footpath has been formally recorded, and usage of the whole area as a TVG – see Sullivan, J (as he then was) in *R (Laing Homes Ltd) v Buckinghamshire County Council*

> ". . . it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way—to walk, with or without dogs, around the perimeter of his fields—and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.
>
> 103 Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?
>
> 104 The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at 358E of Sunningwell. I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation."

Notwithstanding the reference to the "belief" of the dog walker (which is clearly irrelevant after *Sunningwell*) this expression of caution when dealing with dog walking was referred to with apparent approval by Lord Hoffman (with whom the majority agreed) in *Oxfordshire CC v Oxford City Council* [2006] 2 A.C. 674, at para 69. Furthermore, Lord Carnwath in *Regina (Barkas) v North Yorkshire County Council* [2015] A.C. 195 has also

made in clear that the usage must, viewed objectively, have been sufficient to demonstrate to the owner of the land

"not merely that "a right" is being asserted, but that it is a village green right."

25. The Editors of Gadsden also point out that there may be some conflict between the exercise of rights to engage in sports and pastimes and the rights of the public to use an established public footpath which might, in some limited circumstances, bring into question whether or not usage for those sports and pastimes was lawful.[2]

As of right

26. It is well established that "as of right" is expressed as usage with three negative elements to it - *nec vi, nec clam, nec precario* – i.e. it is usage without force, without secrecy and without permission. The operation of this tripartite test is best described by Lord Hoffman in *Sunningwell*, at pp. 350-351.

"The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right-in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

27. In *Regina (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 A.C. 70 it was confirmed that this tripartite test sufficiently describes usage "as of right". Lord Walker JSC (at para 30) accepted as a "general proposition" that, if a right is to be obtained by prescription, the persons claiming that right

"must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him."

As I have already mentioned, Lord Carnwath JSC in *Barkas* extended this "general proposition" by saying

"in cases of possible ambiguity, the conduct must bring home to the owner, not merely that "a right" is being asserted, but that it is a village green right."

[2] The only activities conducted on the public path that could potentially be unlawful are those which obstruct the use of the path for other users – the range of activity that can be conducted on a public highway is otherwise very wide, see *D.P.P. v Jones* [1999] 2 A.C. 240.

Furthermore, it is well established that the tests must be applied objectively and that the belief of those using the land is not relevant to whether or not the test has been met.

28. In *Barkas* the Supreme Court addressed the issue of whether use of land held by a local authority for the purposes of public use could nonetheless be usage as of right. In holding that the usage in that case was usage "by right" (i.e. by permission) Lord Neuberger made it clear that trespass was the essence of usage "as of right".

> "As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a "tolerated trespasser" is still a trespasser." [para 27 at p.209]

29. The case law on prescriptive rights generally distinguishes between acquiescence in acts of trespass that can lead to the prescription of rights and permissive use which gives rise to the acquisition of no rights against the landowner.

Usage by a significant number of the inhabitants of a locality or a neighbourhood within a locality

30. There has been some caselaw on what may or may not constitute a locality. However, in this case, the issue is whether or not there has been usage by a significant number of the inhabitants of a neighbourhood and no issue was taken at the Inquiry about the locality. In fact, whatever locality is taken, so long as the neighbourhood is geographically entirely within that locality, the precise identity of that locality becomes irrelevant – all neighbourhoods will be within some qualifying locality. In the present case the locality taken was an electoral ward and no issue was taken at the Inquiry about the use of that locality.

31. Issue was, however, taken as to whether the area from which most users lived was capable of being classed as a "neighbourhood" for the purpose of section 15 of the 2006 Act. There is some limited authority on the meaning of the word "neighbourhood". In the *Oxfordshire* case Lord Hoffman said, at para 27,

> "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."

Arden L.J. in *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438 said at para. 56

> "A neighbourhood is not a sub-division of a locality."

However, there is no precise definition and it would appear that all that is required for a physical area to be regarded as a "neighbourhood" is for it to have an element of cohesiveness - an identity. In the *Leeds Group* case Behrens, J., at first instance, accepted that two areas of housing either side of the claimed TVG constituted neighbourhoods for the purposes of section 15. Whilst his decision was the subject of appeal on, *inter alia,* the question as to whether section 22 of the 1965 Act contemplated user by the inhabitants of more than one neighbourhood (the Court of Appeal held that it did and the same approach must also apply to section 15) his decision that each of the two areas constituted a neighbourhood was not the subject of appeal. He said, at para 104,

> "I have come to the conclusion that both The Haws and Banksfield are properly to be regarded as neighbourhoods within the meaning of section 22(1A). I am conscious that there are limited community facilities and no shops within the two neighbourhoods and that estate agents do not sell properties by reference to The Haws or Banksfield neighbourhood. However it was conceded both before the Inspector and by Ms Ansbro that this was no more than a factor to be taken into account in determining whether there was a neighbourhood. She also accepted that many of the streets in Banksfield had the word "Banksfield" in their name and that many of the streets in The Haws have "Haw" or "Hawthorn" in their name. Ms Ansbro very properly conceded that those were factors to be taken into account pointing in favour of a neighbourhood. As the Inspector pointed out there are connecting streets within each neighbourhood and although there are a variety of styles there is a preponderance of post war semi-detached housing within each of the areas. I agree with the Inspector that there is sufficient cohesiveness to justify the description of each area as a neighbourhood."

32. Once a neighbourhood has been identified it is necessary to establish that there has been use of the relevant land for lawful sports and pastimes by a significant number of inhabitants of that neighbourhood. "Significant" does not have any technical meaning – it

must be a matter of judgment. Certainly it seems to me that there must be usage by such a number of the inhabitants as to bring home to a reasonable landowner that a village green right might be being asserted. The use does not have to be predominantly from the inhabitants of the neighbourhood, however, - so that some usage by persons from outside that neighbourhood would not be fatal; see *Oxfordshire and Buckinghamshire Mental Health Trust v Oxford City Council* [2010] EWCH 2010.

Statutory incompatibility

33. In *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547 the Supreme Court held that section 15 of the Commons Act 2006 did not apply to land acquired by a statutory undertaker and held for statutory purposes which were inconsistent with its registration as a town or village green. The Supreme Court based their decision (at para.92) on

> "the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act."

34. It seems clear that this principle is not confined to land held by statutory undertakers and could apply to land held by any public body which has been acquired for a statutory purpose. The question in every case would have to be whether or not the registration of the land as a Town or Village Green would be incompatible with the purpose for which the land has been acquired. The Supreme Court addressed the basis upon which the question of actual incompatibility is to be addressed at para.93 of the judgment in *Newhaven* and made it clear that will be based upon statutory construction.

> "Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (*generalia specialibus non derogant*), which is set out in section 88 of the code in Bennion, Statutory Interpretation , 6th ed (2013), p 281:
>
> > "Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that

the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

While there is no question of repeal in the current context, the existence of a *lex specialis* is relevant to the interpretation of a generally worded statute such as the 2006 Act."

35. It appears, therefore, that the Supreme Court regarded the legislation that had established the port of Newhaven to be a specific provision directed at the particular land in question ("*lex specialis*") and section 15 of the Commons Act 2006 as a general enactment that can apply to all land.

36. It is by no means clear whether the principle established in *Newhaven* applies to land that is acquired for and held for a specific purpose under statutory powers which are by their very nature "general" and not specific to the area of land in question. It was argued on behalf of the Registration Authority in that case that the adoption of a principle of incompatibility could lead to all land held by public bodies for specific purposes which would be incompatible with the use of land as a town or village green being excluded from the ambit of section 15. The registration authority also referred to three cases where the adoption of a principle of incompatibility would have led to a different result.

37. The Supreme Court did not expressly address the argument that all land held for other specific statutory purposes would be incompatible with use as a town or village green but the tone of the judgment does not suggest that they felt that they were opening up the floodgates to a multitude of applications for de-registration. However, there are, I think, some conflicting indicators in the judgment.

38. The reference to, and partial reliance on, the principle *generalia specialibus non derogant* in concluding that the construction of the two pieces of legislation in the *Newhaven* case led to statutory incompatibility suggests that there could be a distinction between land acquired and held under statutory powers specifically applicable to that area of land and land acquired and held under a statute that can be applied generally. The difficulty in identifying powers in a general Act of Parliament that are more specific than other powers in the same Act was considered by the Supreme Court in *Cusack v Harrow LBC*. [2013] 1 W.L.R. 2022.

39. On the other hand, once a local authority actually exercises a power to acquire or appropriate land for a specific purpose then the power has become specific to that area of land and the way in which that land can be used is often governed specifically by the

statutory purpose. Thus, all land held by a local authority for one statutory purpose has to go through a formal appropriation process before it can be used for another purpose or disposed of – see Local Government Act 1972, s.122 and *R. (Malpass) v Durham CC* [2012] EWHC 1934 (Admin); *R. (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin). In the case of land held by a school, section 77(3) of the School Standards and Framework Act 1998 Act states that a local authority (*inter alia*) shall not, without the consent of the Secretary of State, take any action which is intended or likely to result in a change of use of any playing fields—

> "(a) which are, immediately before the date when the action is taken, used by a maintained school for the purposes of the school, or
>
> (b) which are not then so used but have been so used at any time within the period of 10 years ending with that date,
>
> whereby the playing fields will be used for purposes which do not consist of or include their use as playing fields by such a school for the purposes of the school."

The term "playing fields" means land in the open air that is provided for the purposes of physical education or recreation (other than any prescribed description of such land).

40. In rejecting the Registration Authority's reliance on examples from case-law which would have led to a different result if an principle of incompatibility had been adopted the Supreme Court in *Newhave*n said (my emphasis)

(a) At para 98

> "In New Windsor Corpn v Mellor [1976] Ch 380 the Court of Appeal was concerned with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the Commons Registration Act 1965. The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, **it was not acquired and held for a specific statutory purpose**. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

(b) At para. 99

"The Oxfordshire case concerned the trap grounds, which were nine acres of undeveloped land in north Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) "not idyllic". More significantly, **while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility**."

(c) At para 100

"Thirdly, the County Council referred to *R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70* , which concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. **It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded** if the land were to be registered as a town or village green."

(d) At para 101

"The ownership of land by a public body, such as a local authority, **which has statutory powers that it can apply in future to develop land**, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority **throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes** and as part of a working harbour."

41. Whilst these references do not make the point absolutely clear, they do seem to draw a distinction between cases where land is held during the 20 year period for an incompatible statutory purpose and cases where land is proposed to be used for a future statutory purpose which will be incompatible – although in the *New Windsor* case the fact that half of the land was being used for the purposes of a car park and school playground would perhaps suggest that it might have been appropriated for those purposes at some stage. In fact, the real point was that the question of incompatibility had never been raised in any of those cases. And in the *New Windsor* case the TVG was established based on a customary right that clearly pre-dated the use of the land for either of the purposes of car park or school.

42. On the whole, the principle I take from *Newhaven* has to be based on Lord Neuberger's distinction between land held during the 20-year period for statutory purposes that were incompatible with usage as a TVG, and land that is proposed to be used for a future purpose which is so incompatible.

THE APPLICATION AND OBJECTIONS

The application

43. The lawful sports and pastimes identified in the application included playing football, rugby, cricket and rounders, dog-walking, dog training, picnics, cycling, kite flying, ball games, berry picking, running, hide and seek, bird watching, tree climbing, playing with children, walking and general recreation and it was suggested that these activities were undertaken at various times by at least 88 households from within the claimed neighbourhood and 340 inhabitants overall and that they had occurred over a period from 1950 to 9th February 2009.
44. The application stated that inhabitants had free access to the Land via a public pathway, with a small number accessing the Land from their back garden, that their use was open, that some residents had given a positive answer to the question as to whether they had been seen by the Landowner, that there had been no challenges, no signage indicating that usage was prohibited or by permission and that the grass cutting and general maintenance of the Land had further served to re-inforce the impression of the public that their use was of right.
45. There were some 96 user evidence forms and statements accompanying the application. Two pages of analysis helpfully sought to identify the frequency and number of years of usage by households.
46. The neighbourhood relied on was the area known as Pownall Park and a plan was attached to the application indicating that this was broadly identified by the area enclosed by King's Road, Vale Road, Woodlands Road, Carrwood Road, Broad Walk, The Carnival Field Altrincham Road and Priory Road. Two short lengths of Altrincham Road were shown outside the line identifying the neighbourhood. A larger plan indicated the location from which responses on the user forms had come.
47. The application was also accompanied by photographs of the sign and part of the pre-existing fencing between the Land and the school playing field. A second map identified

the houses within the "neighbourhood" from which the evidence of use forms had been provided. This plan excluded Carnival Field, the School and the Land.

The user forms

48. The evidence of use forms all followed a similar format and were accompanied by two maps one showing the Land and the other showing the "neighbourhood". The form asked signatories to confirm that they had signed the reverse of the map showing the Land in order to confirm that their evidence related to that piece of land. It also asked for confirmation of the neighbourhood and asked signatories to identify or confirm the existence of particular community features within that neighbourhood. The fact that the map was signed by those who completed the form – themselves local people – suggests that there really should not be any doubt that the majority were referring to the Land –despite the fact that it was referred to by some as the Carnival Field. Nonetheless, some of the persons who filled in the form appear to have been confused – there are references, for example, to a circus having been held on the Land. These must, I think, be references to the Carnival Field.
49. The format of the evidence of use forms – which are in a standard form – contains a number of questions which relate to the use of the Land. Question 14 asks why the signatory went onto the Land. Question 16 asked what activities he/she took part in. Questions 17 and 18 asked if members of the signatory's family used the Land and, if so, for what purpose. Questions 19-20 asked if any "community activities" had taken place on the Land and whether the signatory had participated in them. Question 23 asked what activities had been observed taking place on the Land and invited the signatory to tick boxes indicating whether specific activities had been observed. Question 10 asks "During the time you have used the land has the general pattern of use remained basically the same?" and Box 36 contains the statement "I have carried on the activities referred to in this questionnaire for . . . years without anybody trying to stop me and I believe the activity should be treated by the law as having a lawful origin." The number of years in Box 36 is left blank for the signatory to fill in.
50. Of these questions, the only one which directly asks the signatory to indicate the frequency of use of the Land is question 15 which refers to the signatory's own use of the Land. This has some significance where there is some ambiguity about the nature of the use of the signatory – for example where the only use described was "walking" -bearing in mind the

existence of a public footpath running through the Land and the fact that the Land has been regularly crossed by persons taking children to school. It also throws some doubt as to the frequency and period of use by members of the immediate family and in relation to the activities observed on the Land. The question relating to the "pattern" of usage also has an element of ambiguity to it – it may be taken to refer to the pattern of use by the signatory, by his/her family or it may relate to activities observed on the Land – or all three.

51. In a number of cases, it is clear that the person signing the form had not participated in the activities that he/she had observed on the Land.

52. Even though the form does seek to exclude usage of the public path, it does so only in relation to the question "How often do/did you use the Land". Despite this, some of the answers also demonstrate that the signatories were still describing usage of the public footpath. Furthermore, the description "walking" or even "dog walking", when given as an activity, may not indicate usage of the Land as a whole.

53. Where a number of activities are described on the user forms it is not clear to what extent the frequency and extent of use is attributable to which set of activities. Also, whilst it is true that many of the signatories refer to members of their family playing games on the Land the forms are often unspecific as to the extent and nature of these activities so that it is difficult to identify whether or not they might have been associated with the use of the footpath or with trips to and from to the school. It was clear from the evidence given at the inquiry that some element of children's play activity was associated with that of younger children after their siblings had been dropped off at school and with school children on their way home after being picked up from school.

54. Whilst the user forms invited signatories to state what activities (by other persons) they had seen on the Land there is no indication as to frequency or regularity of those activities or whether they might have been conducted by a very limited group of people – perhaps associated with trips to the school or by the residents of those properties who had direct access from their gardens onto the Land. For example, whilst the box referring to "kite flying" is frequently ticked, all the evidence at the inquiry suggested that to the extent that this activity has ever taken place on the Land it has been limited to a very few occasions.

55. Of the 88 forms representing the usage of the Land by households within the identified neighbourhood almost half related to persons who claimed to have used the Land themselves only for walking, dog walking or for activities which were potentially ancillary to their use of the footpath for walking such as blackberry picking. Of the remainder, it is

often not possible to be sure to what extent the claimed use of the field was associated with the dropping or collecting children from school or with usage of the footpath.

56. Of the 8 forms submitted by persons who lived outside the defined neighbourhood all but one seemed to have used the Land only for walking.

57. At the inquiry it was suggested that people might have been misled into filling in the forms by a fear that the Land was about to be developed. However, even if this might have provided a motive for completing a form, I have no reason to suppose that the forms would not then have been completed honestly. It is the ambiguity and lack of precision in the questions and answers which seems to me to throw most doubt of the value of the user evidence apparently recorded on the user forms as an aid to determining the extent and frequency of use of the Land as of right for lawful sports and pastimes rather than as part of the use of the footpath or ancillary to a visit to the school.

The Objections

58. In their original objection to the application Gorsey Bank School described the recent history of the proposal to fence the Land, the objections from "neighbours" and the compromise proposal to fence only 60% approximately of the Land. It also explained that shared use was unacceptable – mainly because of safety and security concerns. The statement went on to state that it was recognised that the Land was used by the public from time to time as a recreation area but that such use was on a permissive basis. It also described the need for, and use which would be made of, the Land by the school. This part of the objection was signed by Susan Garrod the then head teacher.

59. The school's objection also included submissions on the statutory test. A set of Legal Submissions was also submitted. These broadly covered the same ground i.e. the various requirements for establishing a town or village green. However, the original submissions submitted by the school appear to have been based on the law prior to the Commons Act 2006. In view of the comprehensive legal submissions made at the Inquiry and the fact that some points had been abandoned or modified at the Inquiry I do not set these out here.

60. The objection documentation also included the registered title to the Land and copies of caselaw and commentary together with information relating to the letting out of the 'school field" to the Round Table.

61. The School's objection was supported by a large number of individual letters of objection. Many of the objection letters were directed at expressing opposition to the Land being

registered as a Town or Village Green rather than being available as an exclusive playing area for the school. Indeed many appear to have been written in response to a request from the School for letters to support the enclosure of part of the Land for school purposes. Whilst the strength of feeling expressed in these letters is understood they are not helpful in determining whether or not the required level of usage for lawful sports and pastimes has actually occurred. Equally, many letters refer to the existence of other areas of open space available for public use within a short distance from the Land. Again this is a factor which is irrelevant to the issue whether there has been the required level and quality of usage to establish town or village green rights on the Land.

62. Where the letters in support of the objection do address the usage of the Land inevitably they are dealing with a negative – i.e. that the writers did not see the Land being used in the ways claimed in the application. There are, however, some contradictions that the letters of objection do not address. For example, several letters of objection refer to the fact that the Land could not have been used safely for lawful sports and pastimes because of the levels of dog excrement to be found there. Also, there is reference to empty beer cans and used condoms and occasionally to hypodermic needles being found on the Land. However, it is not clear over what period of time this detritus had been observed.

63. Other letters of objection have conceded that games were played on the Land but only, or mainly, by children from the school – often associated with the period immediately after they are collected from school. In some cases, occasional usage by the occupants of the properties backing onto the Land has been recognised – sometimes with the suggestion that they were using the Land as an extension to their back gardens. In several cases the use of the Land for dog walking has been recognised – along with the accompanying mess. There are a few specific references to the occasional use of the Land for games, for picnicking, for football training and for dog training.

64. A few letters refer to challenges that have been made to persons using the Land (Ghada Bahsoon, Lynda Taylor, Doreen Penny, Annabelle Eccleston).

65. Letters from Gavin Mendham (Deputy Head from 1983-1990) and Roy Couchman (Head 1959-1990) spoke of use to which the Land had been put by the school for various activities during their tenure at the school. Mrs Garrod referred to the use of the Land by the school and also for giving quad bike rides at the School's Summer Fair in 2002 and 2003.

66. A report prepared by George Garrod provided information as to the use of the unenclosed part of the Land in September 2009 (after the school had enclose part of the Land and

outside the relevant statutory period). This recorded some use of the open part of the site by "a significant number of people" who allowed their dogs to run around the field and by very occasional groups of children for short periods. The overall impression from his observations (if objective) was that incidental use of the Land was made by people on their way to or from the Carnival field.

67. The letters supporting the objection included letters from teachers at the school, the caretaker, lunchtime assistants and people who ran the after–school club as well as local residents. Some of these referred to the Land having been used occasionally by the public – mainly dog walkers and some indicated that they had no seen any use of the Land. Overall the impression is given that there was some occasional use of the Land observed by some but that this was mainly by dog walkers – associated with usage of the public footpath.

Applicant's Response and later objection letters

68. The Applicant submitted a written response to the objections containing a detailed analysis of the various letters of objection. This sought to rebut a number of points made in the objections and, in particular, made the obvious but forceful point that the evidence from teachers and other employees at the school would necessarily be restricted to the times when those persons were working at the school. This response also addressed each of the statutory requirements in section 15.
69. A series of other letters and a petition were also submitted in support of the School's objection in 2014. These, in my view, added nothing of substance to the factual or legal issues.

THE EVIDENCE AND SUBMISSIONS AT THE INQUIRY

The Case for the Applicant

70. In his Opening Statement Mr Stubbs made the following main points.
    (a) The Land as clearly identified on the maps shown, was freely available to all the residents of the neighbourhood of Pownall Park, and indeed to anyone wishing to use it

from at least 1960 to when the area was fenced off in February 2009. The evidence forms submitted with the application illustrated that the Land was used on a frequent basis by a substantial number of the residents of Pownall Park for a wide variety of sporting and other activities. Not one of the evidence forms or witness statements indicated that permission was required to use the Land, nor were there any signs on the Land to suggest that permission was required.

(b) The suggestion that moving the fence would mean that pupils of Gorsey Bank would "lose forever the use of this playing field" was simply untrue. The granting of village green status to the field was in fact the only way to guarantee that the field would be available both to the school (for as long as it lasted in the current location) and the community at large. The potential sale of the Land for residential development has been discussed in the past. The fact that the school is now looking to become an academy only increases the uncertainty around the future of the Land covered by the application.

(c) The availability of other green space close to the Land covered by the application is not relevant to the status of the land that is the subject of the application. The Land had not suffered the same issues with travellers that have been experienced on both the Carnival Field and Jim Evison fields - areas close to the land in question.

(d) The evidence forms provided with the application, and those statements made by witnesses, set out strong evidence to show that the requirements for establishing a TVG have been met. Sadly, some of the people who submitted evidence forms in 2009, and would have provided oral testimony of their own use, and that of others, over many more than 20 years, had passed away. Those with the largest experience were likely to be the oldest and regrettably the inordinate and unexplained delays in the setting up of this inquiry had seen the death or infirmity of some of those with the greatest knowledge - although their contributions had been captured by their evidence forms and could not be ignored.

Locality and neighbourhood

(e) The area of Pownall Park is a recognised and well-known neighbourhood that sits wholly within the locality of the political ward of Wilmslow West and Chorley. During the 20-year period Pownall Park was within the ward of Wilmslow South. A search in Google readily identifies Pownall Park as being the area shown on Map B accompanying the application. This is the area that the vast majority of people would discover if they were to search on-line for a definition of Pownall Park. The area identified as Pownall Park on

Map B1 was taken from a Macclesfield Borough Council issued document "Design Guide for Pownall Park, Wilmslow" and provides a greater level of detail than Map B and allows the wide spread of evidence forms from houses throughout the neighbourhood to be readily identified. Pownall Park has a residents association, tennis club, rugby club, running club, junior football training and an independent school as well as Gorsey Bank school. A Neighbourhood Watch scheme also operates in Pownall Park. There have been several community based events that further support the identification of Pownall Park as a neighbourhood, such as the Jubilee Celebration street parties in both Woodlands Road and Alton Road in 2002, litter picking parties, planting of bulbs/flowers on verges etc . Estate agents identify properties as being "within Pownall Park" - an indicator from the case of *Leeds Group plc –v- Leeds City Council* [2010] EWHC 8 10 (Ch) that an area is a distinct neighbourhood. Lord Hoffman in *Oxfordshire County Council v Oxford City Council* [2006 UKHL 25] has identified that the statutory criteria of any neighbourhood within a locality is "obviously drafted with a deliberate imprecision" so that a housing estate can be a neighbourhood

Use for lawful pastimes over a period of at least 20 years

(f) Work on the new fence commenced on February 9th 2009 when contractors moved on to the Land. General public access was denied from that date.

(g) It appears to be accepted that the Land had been used for ball games, dog walking and other activities – all of which are lawful pastimes. A considerable number of the letters of support, generated by the school, actually identify a number of the activities that meet the criteria for lawful sports and pastimes. Presumably those who worked at the school saw these activities during the school day, further supporting both the general use of the Land and increasing the already significant number of reported users.

(h) The evidence forms submitted with the application also showed that the Land had been used for lawful pastimes since at least 1950, and whilst not every evidence form related to the earliest period, it is clear that the use started more than 20 years earlier than 2009 and that there was regular and consistent use during the period of 20 years before the new fence was erected – as shown on the graph of usage submitted with the application.

(i) The number of evidence forms and the associated usage showed that the lawful pastimes undertaken on the Land were also more than trivial and sporadic, key criteria set out by Lord Hoffman *in R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335.

(j) Even many of the letters of objection identified lawful sports and pastimes – activities that can be informal in nature and include recreational walking, with or without dogs, and children's play (*R v Oxfordshire County Council ex parte Sunningwell Parish Council*).

Usage as of right has been by a significant number of the inhabitants of any locality, or of any neighbourhood within a locality

(k) In relation to "a significant number", the issue was considered in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Counci*l [2002] EWHC 76 (admin), where it was held that the number of people using the Land had to be "sufficient to indicate that it is in general use by the local community for informal recreation". Mr Justice Sullivan held that "significant" is a matter of impression after analysing the evidence and that what is important is that the Land is used by the inhabitants in general rather than a few individuals.

(l) The number of submitted evidence forms from families spread throughout Pownall Park showed that the use was not by a few individuals and that a significant number of inhabitants used the Land. The use of the Land was for general use by the local community for informal recreation rather than occasional use by individuals as trespassers.

(m) It appeared to be accepted by the objectors that the Land was used by children to play games both before and after school. This was precisely the kind of activity that the application was aimed at maintaining. Not only before and after the school day during term time, but at the weekends and during school holidays when the Land is currently unused. Assuming only a third of the school population enters through the rear of the school, then 140 school children (plus younger siblings) were regularly playing on the field in the morning and afternoon – a not insignificant number. Whether this was incidental to their journey to and from school, the children were undertaking lawful sports and pastimes on the Land.

Whether the usage was "as of right"

(n) A potential issue was whether the usage of the Land was as a right of way for access without using the application Land. The submitted evidence forms and the evidence to be called show that this was not the case. When objectors referred to use of the Land as a right of way this may well have been recreational walking – when seen from a glancing view.

(o) None of the witness statements indicated that permission was sought or granted at any time. When Wilmslow Sports football trained on the Land, one of the players' mothers was a member of staff at Gorsey Bank school and had worked there for several years before the fence was erected. During the years that she dropped off / picked up her son / watched the training on the Land, she had not once mentioned that permission was needed from the school, despite there being ample opportunity to raise the issue.

(p) Witness evidence would also show that, even when using the Land during periods when children were on the school playing field, no action was taken.

(q) The school, by its own admission, has not removed people from the Land in question and the objectors who have only seen activity around school times, which is still proof of use, may well not live in Pownall Park or even anywhere close to the school. Unlike the evidence forms for the applicant where maps have been signed to confirm the land in question, there was no certainty in relation to the Land covered by the statements of the objectors, and many seemed to be confused in relation to the Land.

(r) The standard letter signed by lunchtime assistants appeared to refer to the original boundary fence, as do many other of the letters of support to the objection, and the land referred to appears to be the originally fenced area, not that now the subject of this application.

(s) The sign that was in place prior to the fence being moved clearly referred to the area behind the original fence. Had the school wanted to exclude residents of Pownall Park from the Land and/or indicated permissive use, then signage would have no doubt been placed at both entrances to the unfenced area. This was never the case. The limits that the School / Council placed on the Land and sought to enforce are clearly very important. No signs were ever erected to exclude people from the Land that is the subject of this application.

(t) The suggestion that the firework display prevented people from accessing the Land is not correct. After moving from the Carnival Field, the fireworks had generally been released from the school field, not Gorsey Field. Fireworks had only ever been released from the application land twice, and whilst one very small area of the Land was restricted for health and safety reasons, the remainder of the Land was still accessible to the public and indeed residents of Pownall Park watched the display from the area covered by the application. See *R(on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC11 per Lord Walker - "In some cases, the activities of the owner may "in practice" make no difference to the activities of the local inhabitants in the sense that

they will not need to adjust their activities to allow for the use of the owner. In such cases, provided that the use has been *nec vi, nec clam, nec precario*, it is likely that it will be held that the activities of the local inhabitants have the necessary appearance of asserting a right against the owner". There was no indication to users that permission had been granted and residents had not needed to adjust their use of the Land.

(u) The objector's reliance on *Mann v Somerset County Council* may be misplaced given the facts in this application compared with those in *Mann*. Firstly the Land is publicly owned, not privately owned as in *Mann*, secondly no fee was charged for residents of Pownall Park to be on the Land and thirdly residents were not excluded, they were advised of the health and safety issues caused by the release of fireworks in one small corner of the Land – something that lasted for around 20 minutes. See also *R (Goodman) v Secretary of State for Environment Food & Rural Affairs* EWHC 2576 (Admin). The Applicants have not needed to adjust their use of the Land and, therefore, the use is "as of right"

(v) Whilst not directly related to whether the criteria for TVG registration had been met, given the time it has taken for the inquiry to be held, a number of the concerns raised at the time by the parents of pupils at Gorsey Bank are no longer an issue. At the time the fence was moved, the school was undergoing a period of development with a large portion of playing area used to house temporary classroom facilities. The drainage of the remaining sports area was poor and one corner was prone to being water logged. In the period since the fence was moved, the temporary classroom accommodation has been dismantled and the drainage of the playing field has been dramatically improved.

(w) It should also be noted that the newly fenced area was still not marked out as a sports field and, whilst it does receive some use, it was so far away from the main buildings that access has been restricted for children in reception and years 1-2 There are also no formal games of football being played by any local football team (there are no pitch markings and the ground is too uneven – as agreed by Mrs M Swindells when she visited the newly fenced area – and nothing has been changed in the intervening period) , and the limited use that is made of the newly fenced area could easily be continued on a newly registered TVG.

Incompatibility with statutory purpose

(x) The Objectors have not clearly identified the statutory purpose that they rely upon. Gorsey Bank School is clearly not a senior school for boys, but a mixed primary school.

If the statutory function of the Land is for educational purposes, then this does not seem to be incompatible with TVG registration. In the Planning Inspectorate's decision by Alison Lea: Application Ref COM 493 where the facts are very similar to those in this inquiry, she found that there was no clear incompatibility between the County Councils statutory functions and registration of a TVG.

(y) The granting of TVG status would no doubt allow greater use of the Land and allow children, both from the school and Pownall Park, to use it for educational purposes and spend more time being active and playing games . There does not appear to be a conflict in having a village green that could also be used for educational purposes. The school and residents have co-existed peacefully and successfully on Gorsey Field for generations before the fence was erected in 2009.

71. The Applicant called 11 witnesses including himself.

(a) Susan Lees, 4 College Close, Wilmslow

Mrs Lees had known the Land since before 1997 (her mother's cousin had lived on Broadwalk) but she hadn't used the Land at that time. In 1997, at the time of the birth of her first son, she was living in Alderley Edge and became friendly with another mother who lived on Gorsey Road backing onto the Land She became a regular user of the path at the top end of the Land going from Gorsey Road to and past Carnival Field. In 1998 she and her friend both had second children and continued use the path. They would regularly stop at the Land whilst the two older children played on the field and the younger children watched from their prams. Both parents felt that the Land was a safer area for the children to play in and, because of its smaller size, easier to keep an eye on their toddlers. They would take rugs and sit on the field.

She would walk along the path across Carnival Field and then on into Wilmslow. There were always people walking down the path but also people doing other things

In May 2001, she and her family moved to College Close and thereafter she and her sons would use the Land several times (at least 3 times) a week for different activities after school sometimes to play football or cricket but often just for a chase around the field. Her children went to school in Alderley Edge. The younger son went to Wilmslow Methodist Church pre-school. Both boys learnt to ride bicycles on the field and they occasionally flew "wind up" model panes and kites. In school holidays they would invite friends to the house and go to the field for football, rugby or cricket. Sometimes she would join them on the field. When using the field she and her family would often be sharing the space with others – people walking or playing with their

dogs, children playing with balls or toys, people flying kites or small model aeroplanes.

For two consecutive years for her younger son's 6th and 7th birthdays a "mini sports day" was held on the Land involving about 20 children involving races, a mini high jump and party games. Other children paying on the field joined in.

As her children grew older they would go to the Land by themselves and meet up with other children from the Pownall Park area and play football or rugby. She would go to the Land at dusk to call the children home and could find up to 10-12 children playing there. Once her boys went to secondary school in 2008 they used the Land less frequently and stopped after the fence was erected in 2009.

She described the fence separating the Land from the school field. This was in a dilapidated state and had been trodden down in one place where people had clearly tried to get over the fence to get onto the school field – probably to collect balls that had gone over. Similarly there was one small area where there were signs that someone had scraped the ground away so that a small child could get under the fence. On occasions, when playing on the field, a ball would go over the fence and she would ask a dinner lady to return it. She was aware of the sign but understood it to refer to the school field on the other side of the fence. She had never been excluded from using the Land. She had never seen the School using the Land.

So far as Pownall Park being a "neighbourhood" was concerned - estate agents recognised it as a distinct area, it had a school, a tennis club, a running club, a rugby club and a residents association (of which she was the founding Chairman). There had been neighbourhood events held at Pownall Park School and street parties. Macclesfield Council had issued planning guidance for Pownall Park. She regarded Gorsey Bank School, the Land and the Carnival Field as being within neighbourhood area. She had been part of a group that had planted hundreds of daffodils in the Land and Carnival Field. The area covered by the Residents Association was going to include the row of properties on Altrincham Road and the flats at the top of Kings Road but they didn't respond.

Since the fence was erected she had continued to use the Land for dog walks – she would let the dog off the lead. She would then continue into the Carnival Field. She still observed children playing on the Land (outside the fenced area), Usage of the Land was less then it had been before the fence was erected.

(b) Christopher Stubbs, 29 Alton Road, Wilmslow

He and his family moved to 29 Alton Road, Wilmslow in May 2000 having previously rented a house on Broad Walk for a while. Pownall Park was attractive as a neighbourhood with good schools, a tennis club and a rugby club. They also discovered that there was a residents association and a neighbourhood watch scheme. Over the years there have been a number of community events in Pownall Park including street parties in 2002 and a fair at Pownall Park School.

He had used the Land for a number of activities with some use on at least 2-3 days each week (apart from holidays and periods of absence for work). Those activities had included

Playing (chasing and ball games) with his sons when daylight allowed – during winter months this was restricted to week-ends;

As his boys got older the games became more formalised – games of football or cricket with which other children would join in;

In 2001 an informal soccer school was held on the Land by the son of friends;

Generally, his own use of the Land was with the children but he did do some gentle jogging on different part of the field.

He could not recall having used the Land during school hours.

In 2002 he helped to run Wilmslow Sports FC Team and training was held on Saturday mornings. These would involve 10-12 players plus 2 adults with between 6 and 8 of these being residents of Pownall Park. In 2003/4 and 2004/5 he helped with a younger team (also Wilmslow Sports FC) which his son played for; one of the other players was the son of a member of staff from the school and it was never suggested that permission was required to use the field. The school provided a key for access from the Land to the School field for matches but no permission was given for training. The key was provided to him by another member of Wilmslow Sport FC. He also had a key to a locker where equipment was kept. He had the key for 3 years. The majority of matches were played on the School field. After 2002 the older team went over to 11 a-side teams and went To Wilmslow High school to train.

It was rare to use the field without there being other users present – dog walking, kicking a football or rugby ball. Mr Stubbs' house overlooked the field and it was rare, on return from work, not to see someone on the Land – maybe a group kicking a ball about or an individual or couple throwing something for a dog to chase.

No-one had ever suggested that permission was required to be on the Land and the only signage was the sign on the other side of the school fence. During the two years when the school fair held quad biking in one section of the field and the two years when fireworks were released from a small section of the field the majority of the field was still available for the public to use. On the contrary Mr Stubbs and his family watched fireworks displays from the Land most years.

Mr Stubbs agreed that generally he and his family accessed the Land from the gate at the rear of his house. His children had been 4 and 6 when they moved to Alton Road. They went to Gorsey Bank School and again used the gate onto the Land in order to go to and from school – entering the school by the back gate. Initially his wife took the children to school but as they grew older the children went on their own.

The Land had been used during two school fairs for quad bikes. However, only a small area had been cordoned off by straw bales; people reacted with common sense and courtesy to this use and the rest of the Land was still available. One year someone brought a football goal onto the Land and this was used whilst the fair was going on. Entry to the school fair was at the rear gate to the school and this was where the entrance fee was charged.

Fireworks had been let off from a small part of the Land in two years but during the rest of the time the fireworks were let off from the school field itself..

(c) *Mrs Deirdre Stubbs, 29 Alton Road, Wilmslow*

She and her husband (Christopher Stubbs) had moved to Wilmslow when their children were four and six. Their elder son joined Gorsey Bank School in the Easter term of 1999-2000. They moved from their rented house on Broadwalk in May 2000.

The family used the Land on a number of days each week for a variety of activities. Both before and after school both boys would play with other children most days weather permitting – football, chasing, throwing balls for dogs and climbing trees. After school older children would play football or cricket after the majority of the children had dispersed at the end of the school day. As she had direct access to the field, she often supplied drinks and snack for children.

During school holidays the Land was used frequently by groups of children. There were often enough for them to have a 5-a-side game of football or cricket with multiple fielders. It was not uncommon during the summer holidays to see groups of 10-12 children arrive on the field in the morning with bags of food and drink and spend most of the day there.

Dog walkers also used the field and walked along the boundary of the old fence and/or threw a ball for a dog to chase. On several occasions she saw at least one dog being trained to run through slalom poles and perform tricks.

Wilmslow Sports FC used the Land for football training on three years -2002-5. Mrs Stubbs often chatted to other parents during these sessions including one who was a teacher at the school.

When visitors were at the house the family would often go onto the field to play some form of game – football, cricket or rounders. At one point they had a small kite and would fly that on the Land although the proximity of trees meant that this was no very successful. After their youngest son left Gorsey Bank School – in the summer of 2005 – both boys continued to kick a ball about on the field on a couple of weekday evenings and nearly every weekend until the fence was moved. Mrs Stubbs returned to work once the boys had started at senior school but still saw the Land being used regularly on the days and times she was not at work.

She had never seen anyone approached by staff at the school nor was she aware of anyone having been told that they had to have permission to be on the Land. She had seen the sign on the school field but did not understand that sign to refer to the Land itself. She recalled the use of the field for quad biking during school fairs and confirmed that this affected only a small area with access to the rest of the field being unaffected. This was also true of the two years when fireworks were set off from the Land.

She confirmed that generally access to the Land was taken direct from the gate at the rear of the property. She turned right and then left to get to the school. The paths were very well used. When asked to what extent the activities she had described on the user form had taken place during the time when she took or collected the children to and from school she replied "Pretty much every day. I'd hang around and they would have a play." The family's usage of the Land was much less once the children had got older – they were not using it daily at the time when the fence went up.

(d) *Matthew Niven, 23 Alton Road, Wilmslow*

He and his family had lived at 23 Alton Road since August 2006. The existence of large open fields at the area of the property had been a strong attraction. Their children were 6 and 4 when they moved in. They went to Gorsey Bank School. The family made regular use of the Land especially for long periods of time during the summer. They often played football, rounders and Frisbees when they had guests. He had seen

other local families playing similar games – not just his immediate neighbours. One of his children played rugby and football with other children. Since the fence was put up these activities have diminished because of the restricted space available. They would watch the annual firework display from the Land although they also regularly received a letter offering free entry to the display on the Carnival Field. The only sign in place was the one behind the old fence-line. The first time he became aware of any "ownership" of the field was when a planning application was submitted to erect the fence.

He agreed, however, that there were times when the children would play on the Land on their way to and from school. He rarely used the Land on his own. He had not seen the school using the Land before the fence was put up. The blackberry bushes were alongside the path and the boundary with the allotments.

(e) Dr Ash Pawarde, 33 Alton Road, Wilmslow

Dr Pawarde is a retired consultant paediatric cardiac surgeon who practised in Bristol. He met his wife Professor Vivienne Lees, a consultant plastic surgeon practising at Wythenshawe Hospital, in December 1999 – she had been living at 33 Alton Road since 1997. They got married in December 2000. Until he retired in February 2007 he used to come to the Wilmslow address on alternative weekends. Since 2007 he had lived permanently at Alton Road. Over the years he had used the Land himself and had seen others using it. Children and youngsters would be seen sitting on the field – usually near the Oak tree, especially during the summer months. He would clear up their mess sometimes. One of the trees (outside the currently fenced area) has low-lying branches and was ideal for children to climb. He had noticed that mothers collecting children from school used the field to meet socially and gave as an example the fact that he had noticed such a group of mothers having a tea party on the grass. Children do play ball games on the Land – less now than before the fence was erected – if the ball goes into the school grounds they climb the gates to collect it. Apart from when a man in a visibility jacket locks and unlocks the gate there is no-one manning the gate. It is no longer possible to play cricket. The blackberry bushes by the side of the path were regularly harvested by passers by. He and his wife used to run regularly around the local area including the Land and the Carnival Field – their circuit followed the boundaries of the Land. He couldn't really say to what extent the Land was used by others whilst he was running. The most frequent activity outside school hours had been dog walking. He and his wife acquired a dog in 2008 and used the

Land for walking the dog. He set out posts to create a course for training the dog in agility - having seen someone else teaching his dog in that way on the field. No-one had ever given him permission to be on the Land or had suggested that he needed permission. He had occasionally watched the annual fireworks display from the Land. He had once been warned that he did so at his own risk but had never sought or been required to obtain permission to do so.

(f) *Alison Malone, 5 Prestbury Road, Wilmslow*

She was giving evidence, in part, on behalf of her recently deceased father. Her family had move into 25, Alton Road in 1969 when she was aged six. The Land was clearly visible from the upper floor of the property and was directly accessible from the back garden at the property. She and two siblings went to Gorsey Bank School and walked across the Land to get there. There was a well-worn path running diagonally across the field that was used by parents coming from the Carnival Field direction. The Land was mown but only occasionally and was rough and full of holes near the boundary with the school. The school fence was always falling down because children would hop over to use the goalposts for football. It was particularly popular during summer holidays with children and bikes. There used to be easy access through the school towards Lindow Common and lots of children would use it as a pathway. During her childhood it was common to see children playing on the Land before and after school and also at week-ends. Her family played cricket and rounders. She learned to play golf on the Land. The wooded area near the allotments could also be accessed from the Land and was used a lot by children for den building, hiding and picking raspberries. There are two mature trees that are popular for tree climbing. Every year her father would build a bonfire which the neighbours would attend. More recently the Round Table have organised fireworks. These were fired off from the Land but were moved further away from the houses when fireworks used to Land on houses in Alton Road. She left home in 1983 but she has regularly visited her former home and the Land has been used during family gatherings by children, grandchildren, nephews and nieces. She lived at the house again for about 9 months in 2000 and for 4-5 month in 2005-6 and for the last 6 months. When she was living back at the house she saw gangs of teenagers using the Land and families. The Land is and has always been popular for dog walkers and people following the footpath out of Wilmslow town centre towards Pownall Park and the rugby club or connecting to the footpath on Kings Road leading to Quarry Bank Mill.

(g) *Julie Niven, 23 Alton Road, Wilmslow*

She first became aware of the Land in 2003 when visiting the school with a view to placing her eldest child there. Since then all three children (now aged 15, 13 and 7) have attended the school and the youngest is still there. The family moved from outside Pownall Park to Alton Road in 2006. The house has direct access via a gate onto the Land and the family have used the Land almost every day in some form whether to walk the children across the field to school or to play recreational games at the weekend and in the summer evenings. It was common practice for parents to walk their children to and from the school across the Land. The sorts of activities undertaken on the Land included football, rounders, cricket, flying kites occasionally on windy days, parties and picnics, climbing trees, picking berries, riding bikes and scooters and sledging when it was snowy. Every year since 2006 they had held a fireworks party for friends in their garden and had all watched the organised display from the Land. She understood that Mr Malone had complained about the use of the Land for setting off fireworks for safety reasons and that since then they have been set off from inside the school grounds. She had observed the Land being used by groups of teenagers to play football, cricket and other team games. The Land was at its highest use at weekends and during the early evening in summer. Children would often play on the Land when school had finished and it was not uncommon to see them playing tag whilst their parents were congregating to chat at the end of the school day. This could occur for 10 minutes or more. Dogs are walked and unleashed throughout the day and evening. Dogs are either let off leash and to run around and others are on leads as their owners walk on the paths. One neighbour used to practice golf shots into an upturned umbrella in the early evenings. Another gentleman, from Broadwalk, used to train his collie dog in the early evenings and between 8.00am and 9.30 am using a course made from cones. It was not uncommon to see groups of teenagers in the evening, some of who came from the neighbouring streets in Pownall Park, and groups paying organised games at week-ends. Her family used to play a lot of rounders. Since the fence was erected her family still used the Land but for a reduced number of activities because of its size. Her family used the Land more than Carnival Field as the environment was nicer. Between 2006 and 2009 Carnival Field was probably more used by dog walkers than the Land but it was difficult to say. Also it was difficult to say whether the Land was used more for organised games during this period – Carnival Field had had a designated football pitch. She had never sought

permission to use the Land and no-one had ever suggested that permission was required. The Land was used by a larger group of local people than simply those on Alton Road.

(h) Pauline Styche, 31 Alton Road, Wilmslow

She had lived on Alton Road since 1993 having previously lived outside Pownall Park. When she moved there her children were 17, 15 and 11. Their house had a gate opening directly onto the Land. Her children went to school in Stockport. When the children were younger (i.e. after the family had just moved to Alton Road) they used the Land several times a week weather permitting – the eldest to play football and cricket with his friends, the girls used it for picnics in the summer, to sledge during snowfalls, to hit balls around, 2-3 times a week, at all times of the year and occasionally to try and fly kites. In one summer, in the early 1990s, the girls pitched a tent on the Land for a day just beyond the path but they did not actually sleep in it. They used it less whilst they were at university but since the children left home have returned with their own children who have also used the Land to run about on. Children have always played on the field and dog walkers have used it daily as it was a good space to throw balls around and give them exercise. She was not aware on any problems with dog excrement. Not all the children using the Land would be known to her. She had been aware of use by groups of teenagers. She remembered the Land being used "semi-officially" for sports training session on weekend mornings. There are blackberry bushes and children picked these with their parents. All activities on the Land were carried out in full view of the school and at no time did anyone suggest that permission was required. Her children's school holidays were different from Gorsey Bank school. The Education Department cut the field twice yearly at one point and could see that the Land was being used. Pownall Park has been a recognisable area in Wilmslow for as long as she could remember. It has always been a strong community. Everyone refers to the Land as "the Field". The Land is a more contained area and feels safer than the Carnival Field which is huge. The path was laid by the Council after they moved in.

(i) Jennifer Broomfield, Carrwood Road, Wilmslow

Before she retired as a teacher in 1998 she was at home in Pownall Park every afternoon. Since retirement she had been at home every day. This had given her the opportunity to visit the Land every day with and without dogs and children – sometimes in a dog walking group. She used Carnival Field and the Land. Carnival

Field was too large and formal for playing with young children. She moved into 13 Alton Road in October 1985 when her son was aged 2 and to Carrwood Road in 2007 after her son went to university. She taught at a school in Cheadle and her son went to school there. She had a collie cross dog. Every day she would meet up with a family by the name of Manual who lived at 19 Alton Road and who also used the field every day. In wet weather the children would wear splash suits and go in search of puddles (on the Land near the allotments) to jump in. The Land was the favourite place to play as it was more level than the Carnival Field and better suited to sports and because there was a lower lying area of ground near to the allotments which provided a habitat for frogs, toads etc and the children would watch the frogspawn hatch. Her son learnt to ride a pedal powered go kart, then a tricycle and then a bicycle on the Land as did many of his friends. Cycling was mainly on the path and, until the school gate started to be locked, in the school playground. She would throw balls for the dog to retrieve. In school holidays she would bring home gym equipment and organise activity days for groups of his classmates and neighbours' children. They would play short tennis, junior lacrosse, shinty, football and cricket. Once her son became teenage the games became almost exclusively football and cricket. She remembered him playing with a boy from Park Road and other friends. For 5 years from 1995 to 2000 a large football goal post was on the field for a few days at a time and used by children she didn't know. After her son went to University he would still bring friends back to the house occasionally and they would play football or do interval training on the field. She still uses the Land to exercise her dog. A neighbour on Broadwalk trained his border collies for agility on the Land – bringing his own jumps and fences. She had regularly watched the fireworks displays from the Land rather than the Carnival Field – although she did buy tickets. One of the places where tickets were required was by the footpath as it enters Carnival Field from the Gorsey Road direction. Not all the children she saw playing on the field went to school at Gorsey Bank. Balls would sometimes go over the fence and be thrown back and sometimes balls or bean bags would come over from the school side and be thrown back. Generally teachers supervising children in the school grounds would be too pre-occupied to notice what was going on the Land.

(j) *Kate Sherville-Payne, 35 Alton Road, Wilmslow*

She and her husband moved to 35, Alton Road from South Wilmslow in October 2005. She was aware of Gorsey Field from the searches carried out during the

purchase. There is a gate from their property direct onto the Land. This is often, but not always used, when taking the children to school. She has two daughters aged 12 and 9 who have both attended Gorsey Bank school as part of their school careers. When they were younger she would escort them to school. Later they went by themselves. They were 6 and 3 in 2009. They still use the field for playing, football, tree climbing, sledging and brambling. They used the Land more frequently when they were at the school but still use it when they have friends to play, at week-ends and during school holidays. They are on the Land a few times each month. When her younger daughter was learning to ride a bike she used to practice on the grassy part of the Land. She had also seen other people using the field for dog walking, playing ball games, sledging and having a picnic. Children take part in these activities on their way home after school. The children would "bramble" sometimes on the way home alongside the path outside 21 Alton Road. When it snows the field is popular with children for snowman building, snowball fights and sledging. Dog walkers often have a "scoop" for throwing a ball for their dogs. They are not just on the path itself although some do just use the path. She did not use the Land herself. The level of usage has reduced since the fence was erected.

(k) *Edward Clark, 58, Broadwalk, Wilmslow*

He moved into the area with his family in 1997-8 having previously lived in Gatley. His eldest child was 7 when they moved there and his second child was 4. The third was born a few years later. They are now aged 24, 21 and 17. He knew the Land from occasional visits prior to moving to Pownall Park. He moved to Pownall Park having researched the local schools. He, and his wife, used to jog around the perimeter of the Land and Carnival Field – usually on a few occasions each week but less now on the Land since it was fenced off. He and his wife also walked their dog around the Land on almost a daily basis and still does occasionally since the fence was erected. They would throw a ball for the dog to collect. When on the Land he would frequently see local children playing, runners and dog walkers at most times of the year. When it snowed local children and adults would make snowmen – collecting the snow from all parts of the field to make snowballs. He also saw "teams" of young children playing football. There was also occasional kite flying and picnicking. Older children sometimes collect on the Land – sitting or throwing balls. He used to take his two daughters to play on the field – paying "tig" and rounders. In 2003-5 his daughters had a birthday party and the whole of the Land was used for them to play on. They

attended at Gorsey Bank School in 1999 and 2004 respectively. Either he or his wife would walk the children to school. After the school day they would sometimes play on the Land on the way home. They were usually on the field under supervision. His children played on the Land mainly after school. He had watched the firework display each year except last year. The fireworks were set off from the Land occasionally but this only involved a small area near the allotments being cordoned off. Tickets were issued and checked from a desk at the corner of the Carnival Field by the allotments. He watched them from the Carnival Field and paid for a ticket. He had never asked for permission to be on the Land and no-one had ever approached him to suggest that permission might be required. He and his family had never been excluded from any part of the Land except the small area cordoned off on bonfire night. From what he has seen over the years the Land played an important part in enabling local community activities.

72. A statement from Richard Bull of 20 Carrwood Road stated that he had moved to Carrwood Road at the age of 1 year in 1993 and attended Gorsey Bank School from 1997 to 2004. During his time at Gorsey Bank he regularly played on the Land both at the beginning and the end of the school day – one of many children on the field –playing, chasing, playing football and throwing a ball. In year 5 he attended training sessions on the Land for Wilmslow Sports FC run by his father and the father of one of his friends. The sessions usually involved 10-12 players and lasted around 2 hours, In the summer of 2001 his brother had organised a football training camp on the Land and for 2 weeks they spent every morning for 2 weeks playing games or practising drills on the Land In years 5 and 6 (2003-4) he would regularly meet up with friends on the Land during the summer holidays and play football and cricket often staying on the Land with friends from the Pownall Park area from early in the morning until evening – having brought a picnic. After leaving Gorsey Bank school he used the Land less frequently for games and for walking and playing with the dog. When he was on the field there would often be other groups of children on the Land and dog walkers - many who would come and throw balls/sticks. No-one had ever suggested that he needed to have permission to be on the Land.

73. The Applicant's evidence also included a number of documents.

(a) A letter from Pam and Alan Thompson of 11 Alton Road stated that they moved into the area when the children were aged 10, 8 and 5. Whilst the Carnival Field was a valuable amenity the Land was perfect for the 5 year old. The fact that it could not be

seen from the road made it a safe open space while still affording him a sense of freedom and independence.

(b) A user form from Mrs K R Shaw of 27 Alton Road dated 28th July 2007 referred to 57 years knowledge and use of the Land, that she accessed the Land from her back gate to "walk and play", that she took part in ball games, that her family played games and referred to seeing the Land used for children playing, dog walking, team games, blackberry picking, football, cricket, bird watching, kite flying, people walking, bonfire parties and bicycle riding.

(c) A letter from Mrs Cartwright of 26, Belbroughton Road, Stourbridge referring to the erection of a fence across the field at the back of her mother's house referred to her families use of the Land fifty years ago and to the use of the Land over 60 years and challenged the suggestion that the school might need more space.

(d) Mr Roy Malone's user form referred to use of the Land by himself and his family between 1969 and 2009 for a variety of activities – use of footpath, walking, ball games, picking blackberries, bike riding, kite flying, firework parties, family bonfires, football, cricket and dog walking. This form, in the section dealing with community use, stated that the Round Table had used the Land for launching fireworks for a period of 10 years. It listed a range of other activities taking place on the Land including children playing, rounders, football training, dog training, golf practice as well as those already referred to. It referred to there having previously been unfettered access from the Land to Altrincham Road through the unlocked gate.

(e) A user form and letter from Mrs S J Walsh of 25 Alton Road referred to usage since 1969 for walking, playing with children and general enjoyment of open space and listed a range of other activities seen taking place on the Land including dog walking, team games, blackberry picking, community celebrations, football, cricket, picnicking, kite flying, bicycle riding.

(f) A letter from the school to parents dated June 2013 indicated that younger children were no longer allowed on the "top field" and detailing the regime for locking the back gate.

(g) The Spring 2009 Newsletter of the Pownall Park Residents' Association referred to a questionnaire of the previous year when a large majority of residents responded by saying that "they would like the field to remain available for everyone to use and wanted to protect it from development. It also referred to the recent fencing of the field by the school and the formation of "friends of Gorsey Field."

(h) Notes of a Meeting on 16th October 2009 between Mr Malone, Mr Stubbs, Peter Davies (Manager for Schools Organisation & development) and Maggie Swindells (Strategic Manager) discussing whether there was any room for compromise.

(i) A statement from Mrs Garrod saying that in the summer of 2002 and 2003 the Land was used for quad bikes during the summer fair and that "all other access to the Land was prevented".

(j) A letter from Mrs Garrod to parents enclosing a report she had compiled and explaining why the school needed to enclose part of the Land.

(k) An e-mail from Mr Stubbs challenging some of the statements in Mrs Garrod's report.

(l) Mrs Garrod's objection.

(m) Photographs.

(n) A leaflet produced when Pownall Park was being developed.

(o) An email response from Peter Davies dated January 21010 suggesting a compromise whereby the fence remained where it is and the rest of the Land became a TVG.

(p) Two aerial photographs of the Land.

The Case for the Objector

74. In her opening submissions Miss Stockley made the following main points:

(a) She stated that the Land was in use as a playing field for the school but had not been used regularly for that purpose prior to the current fence being erected.

(b) She accepted that February 2009 was the correct date for the erection of the fence and that the relevant 20-year period, therefore, ran from 1989 -2009.

(c) Clarification was sought from the Applicants as to the neighbourhood relied upon and its precise boundary as there were differences between the two maps accompanying the application and user forms –Maps B and B1. The Objector would challenge the cohesiveness of Pownall Park as a "neighbourhood".

(d) The heart of the objection was that the usage claimed was not of the extent and nature to amount to the required recreational use demanded by s.15 of the Commons Act 2006.

Members of staff from the school had been on the premises during much of the time and had been aware of any significant use.

(e) Certain categories of usage had to be discounted – walking with or without dogs akin to the use of a public footpath and use of the Land as a means of access to the school together with incidental play connected with the visit to the school. Qualifying usage had to be trespassory whereas parents visiting the school with their children were on the Land by permission. Once these uses had been discounted the usage would be shown to have been trivial and sporadic by a small group of people rather than by the general community.

(f) The Objector relied on the exclusion of the public at certain times – during the summer fair and when fireworks displays were held – as being indicative that any use of the Land by the public was permissive.

(g) Registration of the Land as a TVG would be incompatible with the statutory purposes for which the Land is held. Evidence would show that the Land was required for school purposes and that registration would be incompatible with usage as part of the school – for security and health and safety reasons.

75. The evidence of the Objector consisted of 14 witnesses who gave oral evidence and 11 written statements of evidence, a copy of the Objector's Objection, the report complied by Mrs Garrod in August 2009, a number of documents dealing with the title to the Land, the letters in support of the Objection and a petition, together with a number of legal authorities.

(a) Susan Garrod

She had taught at Gorsey Bank School from May 1994 until she retired in August 2012. From May 1994 she was a class teacher, from September 2000 to August 2005 she was deputy Head and she was the Head Teacher from 2005 to 2012. When she was the reception class teacher her classroom looked out directly towards the Land. The Land was regarded as being part of the school playing fields and had been maintained out of the School's budget since 1962. The School had been told by the local education authority that they were responsible for it. The actual maintenance was carried out by the local education authority – now Cheshire East and formerly Cheshire County Council. The Land was subject to the same maintenance regime as the other parts of the School field. The Land was separated from the rest of the school by a fence within which there was a gate for parents to use when dropping off or collecting children. The Land is boggy in places and there is a large mature tree with

low branches. This tree would not be suitable within a playground because of its attractiveness for children for climbing and the risk to their safety. The Land has a public footpath running from Gorsey Road through to the Carnival Field and beyond. The presence of the footpath, the boggy nature of part of the Land and the presence of the tree precludes the whole of the Land from being fenced in with the rest of the school. The Land as a whole was not needed when the school was smaller. The school was built in 1962 for 210 pupils but now has 420 which is the maximum number for the size of the site. The school had reached 420 by 2003-4. As the school had grown additional playing field space was needed but, for the Land to be used for sport and play, it would have to be fenced. Budgetary constraints had prevented the Land being fenced. During the time she had taught at the school the Land had been used for some school lessons but pupils were always accompanied and supervised by teaching staff and the lessons would include nature and observation walks and projects – treated as an outside trip,

In the Summer the school held a summer fair and on occasions the Application Land was used for quad biking which needed to be separated from the general public. She accepted, however, that only a small part of the Land had be cordoned off by bales for the quad bikes and that payment was not required for entry onto any other part of the Land.

She generally worked from 8.00am to 6.00pm every day during term time and frequently worked past 6.00pm (sometimes to 8.00-10.00, even midnight for some PTA functions) and also at week-ends and during school holidays (to use the school computer). Whenever she left the building she would have to check that it was secure. In the course of her duties she would visit all the classrooms and walk around the grounds. Nine of the 14 classrooms looked out towards the Land. Her duties would include conducting tours for prospective parents, monitoring outdoor activity and dealing with maintenance staff. During all her time at the school she had never seen the Land used for any purpose other people using the footpath – although dogs off the lead would sometimes run across the Land. Usage of the footpath was low except at school drop off and collection times. More children came in through the back gate than through the front entrance. Prior to 2005 the back gate had probably not been locked but since she had been head teacher it had been locked except for periods before and after dropping off and collection times.

During her time as head teacher permission had been given to Wilmslow Rotary Club to use the Land as a safe area for the purposes of its fireworks display – the bonfire and public admission was on the nearby Carnival Field. She did not know where precisely the fireworks were set off from

She had not seen the sorts of activities described on the user forms being carried out on the Land – no kites and no signs of bonfires. The only activities she had seen on the Land were at or after drop and collection times with parents standing on the Land talking and children playing around them and use connected with the footpath – walkers with dogs which strayed off the path.

She had asked for the old fence line to be moved quite often. As soon as she had become Acting Head she had wanted to fence in the Land but could not take any action until 2007 when her position became permanent, In 2008 money had become available for the Land to be fenced an in February 2009 work commenced for part of the Land to be fenced off to allow the enclosed portion to be suitably drained (top dressing was the only work done) and for a football pitch/play area to be formed. Local residents were consulted. They had feared that the Land might be developed but this was never intended. In the event only part of the Land was fenced and the back gate was kept where it was with the fence running alongside the path leading to the gate. Staff were instructed to challenge anyone straying from the footpath onto the field who got too close to the fence line and she was aware that staff had done so on occasions. The reason for the instruction is that she could not have any person outside the school interacting with the children.

The use of the Land could not be shared with the public due to the risks to children and risks of injuries occurring on school premises to members of the public. There would be security issues – for example estranged parents sometimes tried to contact their children. It was not possible for children to be allowed to use public Land even if supervised. The caretakers had found items left on the Land before it was fenced which were incompatible with use of the Land by children. The Land had also been subject to dog fouling. When the Land had been used for school activities or school work – about 4-5 times a term – it was always carefully planned and supervised and only the older age groups were involved. Offsted required the school to meet certain standards. Schools need to be enclosed by a 1.8 metre fence. There is no sense in which the Land could be used as a TVG jointly with the school.

She did not suggest that any of the applicant's witnesses were saying anything untrue. She was not watching the Land 100% of the time but she was puzzled and amazed at the evidence she had heard about usage of the Land. She knew many of the people. Had the Land been used as described it would have been of concern to her and she would have gone to the Chair of Governors to say that something had to be done about it. Some of the activities could have taken place when she wasn't in her office but some of the claimed activity, if it occurred with the frequency suggested, must have taken place at a time when she would have seen it. She had seen people using the footpath. Her mental image of a typical scene would be one or two people using the path. It is easy to tell whether people are on the footpath or not.

(b) Sally Stedman

She was Chair of Governors from September 2005 and Vice Chair since 2013. She had been a school governor for over 20 years – since 1989. The Land had always been part of the school but had not been put to full use because it is poorly drained and the School did not have the funds to carry out works, it was subject to dog fouling, the tree was a danger. She recalled the Land being used for games and outdoor activities during Roy Couchman's headship but concerns about the proximity of dogs on the public footpath had led to activities reducing. The school increasingly had to follow health and safety guidance. Local people were aware that the Land was owned by the school. She had correspondence with Roy Malone explaining to him that the school gave permission to the Round Table to let off fireworks on Gorsey Bank playing field. She didn't know whether that correspondence had led to the fireworks being set off from a different place as she didn't know precisely where they were set off from. She had never seen the claimed activities occurring on the Land other than people walking their dog along the footpath. She had, however, only visited the school intermittently during her early years as a governor. From 2005 her visits became more frequent when she became Chair. When she visited she would walk around the school – nine classrooms look out onto the school field. Once the fence was in place the school had the enclosed area top dressed.

(c) Annabelle Eccleston

She is employed as a Play Manager of KIDS GB which runs the independent Before and After School Club ("the School Club") located at the rear of Gorsey Bank School premises. She held this position from 1995-1998 and then again from 2002 to the present day. She had observed the Land every day she worked at the school and has

also helped out at school Christmas fairs and sports days. She also did holiday clubs. She would often be outside even in winter or when it was raining. She had observed incidents on the Land when staff had had to challenge strangers with dogs running loose and teenagers cutting through the field and accessing the immediately surrounding the school buildings. She had been involved in two incidents where she had challenged teenagers herself. There were also two occasions where teenagers were seen drinking alcohol and taking their clothes off on the Land which led to the children being removed from the outdoor play areas and the police being informed. Former pupils had also tried to climb the fence and have used foul language and have been told to leave the Land by staff. However, she had not seen members of the public using the Land in the ways described in the village green application – just people using the public footpath and she had never had occasion to challenge anyone who was not trying to climb the fence. She had seen WFA football training sessions and the school athletics club training on the Land after school.

(d) Amanda Bell

She is the School Business manager for Gorsey Bank School having worked there since September 2004 initially as a clerical assistant, then School Bursar and now School Business Manager. Her family moved to Wilmslow in 1963, a year after the school opened, and when she was aged 2. She had known the school and the Land most of her life. Her children attended the school between 2001 and 2005. She used to drop them off and collect them every day – usually at the rear of the school. She had a dog and would then take it to the Carrs for a walk. There would be a number of dogs tied up outside school. She was aware of the use of the Land for quad bikes during the summer fair. She was also aware of the permission granted to Wilmslow Round Table to set off fireworks from the playing field and produced various documents recording the payments made. The payment was use of a key to get in and out of the school grounds. The fireworks were set off from different places each year – from within the school and on the Land. She did not regard Pownall Park as anything more than a smart estate of houses – not particularly as a neighbourhood. Over 11 years whilst employed at the school she only observed members of the public using the public footpath or using the Land as a "cut through" for dog walking. She had occasionally seen a few children climbing trees or playing a game of football. Her own children had played football and climbed trees on the Land. This was not on their way to school – they had a friend (Mr Stubbs son) who lived near there.

(e) Colin Shepherd

He is the current Chair of Governors – since 2013 having been a governor for over 10 years. The Land has always formed part of the schools plying fields – since it opened. He thought that the Land had been purchased around 1959 for educational purposes. The school has maintained the Land from its own budget. Prior to the current fence being erected the Land was used occasionally for school purposes – much more often now. Permission has been asked for and granted for the fireworks displays on the Land now enclosed. Both before being appointed a governor (in 2003 he had been elected as a councillor and had distributed leaflets in the area) and since he had made irregular visits to the Land either on his way to or from the school or making other journeys. Between 1993 and 2003 he would have used the path occasionally. During those visits he had not seen the Land used for activities in the way or to the extent claimed. Had it been used to that extent he would have expected to have seen it. He had, however, seen dog walkers using the public footpath and letting their dogs off the leash on the way; the occasional picnicking party on a handful of occasions (his impression was that they were parents); and parents chatting or collecting their children from school when the children might be playing informally on the fringes of the Land. The school barely met the minimum requirements for open space per pupil. Without the fencing in place the use of the Land would be impracticable for health and safety and safeguarding reasons. Loss of the use of the Land would adversely impact on the ability of the school to meet current requirements and would offer a poorer educational experience.

(f) Lisa Woolley

She is the current Head Teacher having been previously (2007-2012) the Deputy Head. She arrives at the school between 7.30 and 8.00am and leaves between 6.00pm and 7.00pm but it is not unusual for her to leave the school at any time up to 10.00pm. She would also be in the school on some weekends and during school holidays. Her office overlooks the Land. Whilst she had seen external sports providers and the Kids Club using the field regularly for before and after-school activities and had known the Land to be used for school purposes (sports days, science lessons, and nature studies) she had never seen the Land used for any other purposes. The schools usage of the Land before the fence was erected was infrequent – small group activities accompanied by an adult. It was improbable that she would simply not have noticed activity had it occurred. She found the suggestion that some of the activities had taken

place (e.g. kite flying) preposterous. She couldn't envisage a scenario whereby the school could now share the Land with a TVG. She would worry about the school's Offsted rating if it lost the enclosed area of the Land.

(g) Melanie Livingstone

She lived at 35 Alton Road from April 2001 – October 2005 and has since lived at 117 Gravel Lane. When she lived at Alton Road her house backed onto the Land – the children's playroom and the main bedroom overlooked the Land. She only ever saw people use the path to take their children to and from school or walking the path with their dog. She didn't see any use of the Land itself. However, she did not go onto the Land except when taking the children to school.

(h) Karen Millrine

She had lived in Wilmslow since she was 11 years old (in 1984) except for the period 1991 -2006. From 1984 to 1991 she lived at 6 Manor Road, Pownall Park, Wilmslow and also from 2006- 2012. She had never been aware of the Land being used for recreational purposes. The public footpath was used by walkers some with dogs who abused the walkway as it was heavily fouled. Dogs dis wander onto the grassed area and this too was heavily fouled. However, the situation has improved more recently. Her two children (now aged 12 and 15) attended Gorsey Bank School but have now left. She used the Land to access the school because Gorsey Road is dangerous with parents parking. She had never seen the sorts of activities described in the Application taking place on the Land. She did see joggers on the pathway. As a teenager she had rarely gone to the Land. Between 2006-2009 she had only used it for access to the fireworks or as a back access to Wilmslow. She did not consider Pownall Park to be a neighbourhood – just a development of large houses with big gardens. From a conversation she had had with residents at a meeting she felt that some residents saw the Land as an extension of their gardens.

(i) Karen McLaughlin

She has lived at 19, Broadwalk since 2005 and her children went to Gorsey Bank School. Her daughter was currently in Year 6 and she regularly walked her daughter to school. She also used the path to cut through to Gorsey Road once or twice a week. She was aware of dog fouling on the paths. There were always dogs belonging to parents tied up near the school gate when dropping off and collecting children. She had not seen any of the sorts of activities claimed by the Applicant. At the end of the school day children run and play on the field. Her children played on the top field

within the school fence and she had always had to pull her children away when collecting them as they would be wanting to play on it. She had seen people walking dogs on the path on their way to the Carnival Field. Her family had used Carnival Field for activities but never the Land. In the first year of taking her daughter to school she had not seen any of the activities claimed.

(j) Susan Albion

She had lived at Hawthorn Lane, Wilmslow since April 2009 – shortly after the fence had been erected. She had a daughter at the school currently in Year 2 and one of the factors that had influenced her choice of school was the size of the playing fields. She had used the path regularly – about 3 times a week in 2009-10 and about once a week thereafter – and had never seen any of the activities described in the application taking place on the Land.

(k) Leigh Bird

She lived in Fulshaw Park, Wilmslow and was a parent of a child attending Gorsey Bank School and an active member of the PTA. Her son started school at Gorsey Bank in September 2009 and soon after she started to become involved in the PTA. Her knowledge of the Land only dated back to when her son started at the school. She had been involved in the School Fairs and had produced "flyers" (exhibited) for them. Entrance to the fairs and sale of tickets took place from two tables – one at the front of the school and the other on the rear path either on the Application Land or just within the gate.

(l) Gavin Mendham

He had been Deputy Head of Gorsey Bank School from 1983 -1990. He left in the summer of 1990 and moved to a school in Handforth. He had also been a classroom teacher as well as being deputy head. The school had regularly used the Land during the Spring and Summer months especially for such purposes as:

- Training for cross country events;
- A place to sit under the trees and read on hot days;
- Seasonal walks around the grounds;
- Additional areas for rounders and other sports – the school had quite a reputation for rounders and if a lot of classes were out they would go onto the back field.

There was a strong sports association run by school heads and all available space was well used. Frequency of use varied – it was often tied to events taking place. In the 3

week before a cross-country tournament it would be used every day. The same would be true before the athletics tournament. The calendar of sporting events would have carried on into the 1990s but then would have faded away due to other pressures on time. When he left there were still three teachers there who continued the calendar. The Land was better drained that the school football pitch and would be used for informal games.

The Land was always considered to be part of the school grounds and he was never aware of members of the public using the Land other than walking along the footpath or occasional dog walkers throwing a ball. Parents picking up and dropping off children would sometimes be on the Land – with their pre-school children playing after the morning drop off and the school children playing as they made their way home. He came past the Land on his way to and from school and also on occasions during school holidays. There had never been any occasion when the school had had to aske members of the public to give way to school use.

Security was more lax in those days than it would have to be today under health and safety requirements and the gate to the Land was usually open (off its hinges at one point) permitting easy access from the school. The attitude to school security changed markedly following the Dunblane attack in 1996. The Land was always well mown and maintained by the local authority. He remembered that Roy Couchman who was head at the time once showed him a Cheshire County Council site plan of the school grounds which had a dotted outline of a building on the rear field with the caption "site of infant school."

(m) Estelle Goodwin

She had moved to Carrwood Road in December 1990 and then had lived at Pownall Hall Farm, off Broad walk from 2005-1015. Her first child went to Gorsey Bank School in 1992 and she commenced the twice daily trip to and from the school via the back gate. She also used the footpath to access the town. In 1996 her youngest child went to the school and she would sometimes help out in class. She always used the back gate. As the children got older they would stay for the after school club and she would collect them later. All the children had left the school by around 2000 and at that time the family purchased a dog. They started to use the path at least once a week – part of a regular linear walk. She did not let her dog run free on the Land it wasn't large enough and there were plenty of other larger areas nearby. In 2005 she moved to Pownall Hall Farm and in that year became a School Governor. She had seen parents

walking across the Land taking children to and from school and some of those children would stop to play on the Land – climb the tree. She had not seen the other claimed activities on the Land. She had never seen any kite flying or bird watching. Her perception of use of the Land was it was a place to use to get somewhere else.

(n) Janine Smart

She is the Capital and Land Development Manager for Cheshire East Council. She confirmed that the Land was held by the Council for Education purposes and that there was no intention for the Land to be disposed of. She produced a number of documents dealing with the conveyance of the Land to Cheshire County Council in October 1938. The accompanying correspondence shows that it was purchased to be used for a Wilmslow Senior School for Boys Purposes.

76. The documents produced showed that the conveyance did not specify any purpose. However, the accompanying correspondence indicated that the purpose was for the construction of a senior School for Boys. The area purchased include the area occupied now by the school, the Land, the adjoining allotments and wooded area and the areas subsequently sold for the purpose of the Scout Hut and St Johns Ambulance. The field boundary in 1938 did not correspond with the old boundary between the school and the Land. A Statutory declaration dated 2008 and made for the purposes of s.31(6) of the Highways Act 1980 by Ian Gould – a County Property Manager - stated that the only public footpath over the Land was Footpath 26 and that insofar as any access had been taken other than over the footpath it had been with the permission of the Council. An extract from the Council's Terrier was subsequently provided to me (copied to the Applicant) which showed the way in which the school, the Land and the allotments were currently held. An explanation from the Objector's solicitor accompanied these documents and stated

"Please find attached the plans for the designation of the allotments and for Gorsey Bank School. These plans are taken from Atrium the land terrier of the Council which is a computerised system using ordnance survey mapping and contains details on land and property holdings of the Council.

Atrium shows that the allotments are managed by Environmental Services. The Assets Department of the Council collects the rent on the allotments which is approximately £200 per year and sends that money to Gorsey Bank School as part of the budget of the school.

Atrium shows that Gorsey Bank Primary School is allocated to Children's Services although on Atrium it refers to the old name of the department of Children and Families. Gorsey Bank School has commenced the application to become an academy and It is intended that the allotments will be included in the lease of the school to the academy on the conversion."

77. I comment here that this interpretation was not challenged and certainly the Terrier seems to indicate that the Land and the School are held by the Council on the same terms. This is the only record produced which indicates the statutory purpose for which the Land is held.

78. Written statements were also produced from:

(a) *Maggie Swindells* Her written statement indicated that she had been Head Teacher at Gorsey Bank from September 1991 to 2005. She used to arrive at school between 8.00am and 8.15am and leave after 6.00pm in the evening. Sometimes she would work at the school at the weekends and school holidays. The Land was used infrequently by members of the public apart from dog walking and was especially used as a short cut to the Carnival Field and the neighbouring allotments. The footpath was also used by parents accessing the back entrance of the school. The school field was used in preference to the Land in the evenings and at weekends for football and picnics because the Land was overgrown, full of weeds and was not a pleasant place to sit or play. In her experience it was extremely rare for the local community to make any use of the Land for social gatherings or community activities of any kind. The Land was used occasionally for school lessons and outdoor activity but not at playtimes, dinner times or for after school clubs.

(b) *John Adshead* – who was part of the Council's maintenance team from 1990 and confirmed that the Land had been maintained by the Council and the cost included in the school budget. Actual maintenance was put out to competitive tender from 1990. The Land would be mowed approximately 22 times per year. He referred to improvements being carried out to "the Field" to bring it up to the standard required for use by the school and stated that he had seen children from the school using the "Field" during school time. He also referred to there being evidence of its use for the school fair.

I cannot be sure that this statement is actually referring to the Land rather than to the Land and school field together.

(c) *Eric Garner* – who was a pupil at the school from 1968-1972 and now lived at Albany Road Wilmslow. He had never seen people using the Land other than people using the path to get to the Carnival Field. Since 2009 he has run football training on the Land with permission from the school.

It would appear that this last usage for football training refers to the Land within the new fence.

(d) *Simon Muckle* – was involved in the fireworks displays which he stated had been let off from the Land since 2004 with permission from the school.

However, the application he attached refers to the use of "Playing Fields and Playground Area at back of school."

(e) *Frances Naismith* was a teacher at the school for 8 years and one year as a trainee teacher. She had lived in Wilmslow for 16 years and had been a resident of Pownall Park for 8 years. She used the footpath regularly but had only seen the Land being used very occasionally – 2-3 children climbing trees or playing football and occasional dog walkers who would be on the path itself. As a teacher she had seen very little activity on the Land - other than usage of the footpath by walkers with or without dogs.

(f) *Fred Rayers* – his children had gone to the school since 2003 and from 1998 – 2007 he lived on Carrwood Road. He had been an officer in the Residents association from 2004-2007. He had no recollection of the Land having been used other than as a short cut for parents collecting children at the rear entrance of the school, people walking dogs on the footpath but letting the dogs off the lead, on a couple of occasions for summer fair activities and, very occasionally, boys playing football after school.

(g) *Helen Samuels* has been employed as caretaker and Midday Assistant at the school for 16 years working from 7.30am to 6.30pm and also at weekends and during school holidays when required. She had never seen the Land used for any purpose except as part of the school other than people walking dogs on the footpath. Had she seen anyone using it she would have challenged them.

(h) *Roy Couchman* had been the Head Teacher from 1959 to 1990 and was the head when the school moved to its current site in 1962. Between 1959 and 1962 the Land was in constant use almost every afternoon for athletics, football, hockey, P.E., rounders, inter-school cross country and athletic competitions, walks and nature rambles and school fetes. He never saw the Land, other than the public footpath, being used by the public.

(i) *Jayne Humphreys* had been a parent at Gorsey Bank School since September 2000, a member of the PTA from 2002-4 and a volunteer at the school from 2002-2013. She was involved in organising the quad bike rides at the school fair in 2003. A fee was charged an all other access to the Land was prevented, the public were excluded and the Land was used solely for this purpose. she had seen people using the footpath and occasional dog walking for access to Gorsey Road and the Carnival Field.

(j) *C.A. Wilson* – he was a regular user of the footpath and for a number of years helped out at the school. He never saw anyone on the Land other than those using the footpath or taking and collecting their children to and from. the school

(k) *John Patrick Wright* was employed by Cheshire County Council from 1968 to 1990 as an Area Playing Field Officer responsible for the maintenance of playing fields. The Land was maintained by Cheshire County Council – since 1974 from their Macclesfield depot. It was in a very poor condition in 1974 – with fly tipping and rubbish having to be removed. However, it was mowed every week as part of the programme to maintain the school from about 1985 and the cost was charged to the school.

79. In Closing the following submissions were made by Miss Stockley

(a) Citing the statutory criteria in the Commons Act 2006, s.15(3) she conceded that there was no dispute in relation to section 15(3)(b) or (c) and that any as of right use of the Land as identified in the Application ceased before the date of the Application, namely 23 March 2009 and that the Application was made within 2 years of the cessation of the relevant use. Section 15(2) of the 2006 Act might become relevant if it was determined that the Land as identified in the Application should not be registered, and consideration was at that stage then given to whether the smaller unfenced area should nonetheless be registered. In considering the registration of that smaller area which the Registration Authority would be entitled to do in such circumstances, the criteria contained in section 15(2) would then be applicable. However, the Objector's case was the same in relation to the consideration of the registration of both the Application Land, and of the smaller area should that become relevant, given that the matters in dispute were relevant to the criteria in both section 15(2) and section 15(3).

(b) The process of determination of the Application involves the application of the law to the facts found. There is no discretion involved nor are land-use merits material. The burden of proving all the elements necessary for the Land to become a town or village

green lies on the Applicant. The standard of proof is the balance of probabilities and the decision maker has to give careful consideration to the statutory requirements bearing in mind the seriousness of the consequences of the matter to the Landowner (per Lord Bingham in *R. v. Sunderland City Council ex parte Beresford* [2003] UKHL 60 at para 2. and Pill, L.J. in *R v Suffolk County Council ex parte Steed* (1996) 75 P&CR 102, 111).

(c) The relevant 20 year period for the purposes of section 15(3) is agreed. As any qualifying use ceased on 9 February 2009 when works to erect the new fence commenced, the relevant 20 year period is 9 February 1989 until 9 February 2009.

Neighbourhood within a Locality

(d) It was not disputed that the Wilmslow West and Chorley Ward is a qualifying locality within which the claimed neighbourhood lies. As to the claimed neighbourhood of Pownall Park, the boundaries of that area have been clarified by the Applicant as being those shown on Map B submitted with the Application. It includes the Land.

(e) As to whether the Applicant has demonstrated that the claimed neighbourhood has the requisite degree of cohesiveness to amount to a qualifying neighbourhood the Objector does not accept that it has been established. There are no shops, doctor's surgery or church in that area. Moreover, no cogent justification for the line drawn has been provided, particularly to the south. Hence, why are some of the properties on Altrincham Road included and others not in the very same vicinity? Why are Park Road and Davehall Avenue excluded? She suggested that the boundaries had been identified by reference to the location of houses from which the occupiers have provided user forms rather than by reference to a cohesive community. It follows that a qualifying neighbourhood had not been identified by the Applicant.

Use of the Land for lawful sports and pastimes by a significant number of the Inhabitants of the neighbourhood

(f) It was acknowledged by the Objector that some lawful sports and pastimes have been undertaken on the Land. However, the fundamental issue is whether such use has been to the extent required throughout the relevant 20-year period for recreational rights to have been acquired over the Land by the inhabitants of the neighbourhood.

(g) It is well established that in order to satisfy that element of the criteria, the use must have been of such a nature and frequency throughout the relevant 20-year period to demonstrate to the landowner that town or village green rights were being asserted. Mere sporadic intrusion onto the Land is insufficient. That issue is to be assessed from

the point of view of how the matters would have appeared to the landowner; *R. v. Oxfordshire County Council ex parte Sunningwell Parish Council* [1999] UKHL 28; *R. (on the application of Lewis) v. Redcar and Cleveland Borough Council* [2010] UKSC 11 paras.36 and 75. In assessing the evidence of use of the Land in this instance, a number of significant matters arise.

(h) First, and of particular note, walking of such a character as would give rise to a presumption of dedication as a public right of way must be discounted from the assessment; *R. (Laing Homes Limited) v. Buckinghamshire County Council* [2003] EWHC 1578 (Admin) at paras. 102 and 108; *Oxfordshire County Council v. Oxford City Council* [2004] Ch. 253 per Lightman, J at first instance at paras. 102 and 103. Applying that approach to the factual circumstances in this case, there is a surfaced definitive right of way close to the northern boundary of the Land running east to west from the residential area of Gorsey Road in the west through to the rear of the allotments, to Carnival Field and beyond. Any recreational use of that right of way is referable to a public footpath use. The consistent evidence on behalf of the Applicant and the Objector was that such footpath has been extensively used during the 20 year period for walking both with and without dogs. The same principles apply to any use that is more referable to a footpath use i.e. the use of the surfaced footpath along the western boundary leading to the school gate, walks taken around the perimeter of the Land and any use reasonably incidental to such a use such as stopping to chat, picking blackberries along the route or walking the route whilst throwing a ball for a dog to run around the Land. That is all distinguishable from the recreational use of the wider Land.

(i) It is apparent from both the Applicant's oral evidence and the written user forms that walking, both with and without dogs, was one of the primary uses of the Land. Moreover, very significant amounts of that activity were clearly more akin to the exercise of a public right of way. Mrs Lees used the path regularly from 1997, and initially only used the path to walk with prams, commenting that there were "always people walking down the path" and that the path is very well used by dog walkers. Mrs Stubbs had used the path to walk to and from town. Dr Pawade expressed the view that dog walking was the most frequent use of the Land. Further, he used the Land to run around the boundaries of the Land. Mrs Niven acknowledged that dog walkers generally stayed on the path if the dog was kept on a lead. Even in relation to those that were unleashed, some of the dog walkers remained on the path. Mrs Styche

stated that some dog walkers walked round the perimeter of the Land and Ms Sherville-Payne noted that some dog walkers stayed on the path. Mt Clark ran around the perimeter of the Land. Further, the blackberry bushes are along the path and can be picked from there.

(j) Such evidence is consistent with that adduced by the Objector. All the Objector's witnesses had seen people using the paths. Moreover, Ms Livingstone had used the path and seen others, including dog walkers, using it, whilst Ms Millrine had seen walkers and runners using the path. In addition, the evidence of third parties was similar. Mrs McLaughlin referred to people using only the paths and Estelle Goodwin stated that the Land was only used as a cut through and not as a destination. Taking the evidence in its entirety, it is apparent that a significant amount of the use has been referable to the exercise of a public right of way rather than to recreational rights over the entire Land. All such use must be discounted from the qualifying use that can be taken into account.

(k) Secondly, and also of significance, is that any recreational use of the Land that is related to the dropping of and picking up of children from the School must be similarly excluded. In order to use land as of right, the users must be trespassers in law; *R. (on the application of Barkas) v. North Yorkshire County Council* [2014] 3 All ER 178 at paragraph 27 per Lord Neuberger. The School positively encouraged access and egress to and from the rear via the Land and through the gate on the western boundary which was unlocked at such times for such purposes. School children being dropped and collected were clearly not trespassers on the Land when using it for such purposes, nor were those dropping them off or collecting them. They were permitted to be on the Land by the School. Moreover, any recreational activities carried out as an integral part of that journey to and from the School by such persons would similarly be *precario* and not as of right.

(l) The consistent evidence was that the School was accessed and egressed via the Land by many School children on a daily basis. Moreover, it was acknowledged that recreational use of the Land was frequently made at those times, by both the parents socialising on the Land whilst waiting for their children and by the children themselves on their way to and from the School whilst in the company of their friends. All such significant and daily weekday use throughout school terms must be discounted.

(m) That point is also of particular note in relation to the written user forms. A number of compilers refer to the recreational use of the Land by children playing on the Land. However, it is unknown from the forms whether or not such recreational use occurred as part of the journey to and from the School. It cannot be assumed that such recreational use was at other times, especially given the burden of proof on the Applicant.

(n) Once those two very significant elements of recreational use of the Land have been discounted, the remaining use is very materially reduced. Other discounts still have to be made from that remaining use. Any use outside the relevant 20 year period, although relevant to the consideration of the Application, must itself be discounted from the qualifying use. Hence, use referred to prior to February 1989 cannot be regarded as part of the qualifying use, such as that referred to by Mrs Malone during her school days.

(o) In addition, use by those who were not inhabitants of the claimed neighbourhood must be excluded, such as those living in Park Road or use by visiting grandchildren who lived outside the neighbourhood. That is also very relevant to the evidence in the user forms insofar as the compilers saw others using the Land but do not identify whether or not they were inhabitants of Pownall Park.

(p) The remaining qualifying use is limited. As to the oral evidence in support of the Application, it is relevant to note that the vast majority of witnesses were residents of Alton Road. Indeed, of the 11 witnesses so called, only two, namely Mrs Lees and Mr Clark, did not reside on Alton Road. They (the remaining witnesses) had direct private accesses leading from their rear gardens onto the path. It appears that they effectively used the Land as part of an extension of their private gardens. That is wholly distinguishable from the general community of Pownall Park using the Land. Although some 97 user forms have been compiled, and to call 97 witnesses would have been understandably impractical, it was nonetheless open to the Applicant to call a spread of witnesses from the Pownall Park area. The extremely high focus of witnesses from Alton Road supports the view that a large amount of the qualifying use was by those particular residents rather than from the local community.

(q) Limited weight can be given to the user forms. This evidence has not been subject to cross examination, and the details of the use by the compilers and others is unknown, particularly in relation to the matters raised above. Furthermore, the evidence contained in those written forms is inconsistent with the Objectors' oral evidence

which must be attributed more weight in relation to the disputed issues. They should also be considered in the context that Mr Stubbs indicated that only persons who indicated that they were in support of the Application were invited to complete a user form, and they were obtained in the context of a perceived threat of the development of the Land which would undoubtedly have influenced the compilers.

(r) The Objector's evidence on that fundamental issue, given that the question is whether the use was of such a nature that it would have been apparent to the Landowner that recreational rights were being asserted over the Land by the local community of Pownall Park, that such use was not apparent is of utmost significance. Of course, no one was present at the School at all times nor aware of what was taking place on the Land at all times. An element of could well have taken place without the School's knowledge. However, as Mrs Garrod put it, if it was taking place throughout the period stated and with the frequency stated, she would inevitably have seen some of it. Mrs Garrod was at the School for many hours beyond School times. She arrived earlier, left later, and worked there a number of evenings, weekends and during school holidays. She had clear views of the Land from where she worked and indeed was aware that people used the footpath. She was concerned about any use of the Land which was part of the School's property and the School was responsible for it, in addition to the crucial issue of the safety and security of the School children. Indeed, she had expressly instructed her staff to challenge people who were off the footpath and they duly did so on the few occasions it occurred. Further, it was not merely Mrs Garrod, but a number of others from the School gave evidence that they had not seen any regular recreational use of the Land. That is despite the extent of views over the Land from the School up to the footpath and the extent of the School's use of its outdoor space to the rear during the relevant 20 year period. That lack of use was also confirmed by parents who gave evidence to that same effect. Taking that evidence as a whole, given the extent of the School's presence in the vicinity as a "present occupier", any regular use of the Land by the general community for 20 years would have been apparent to the School. It was not.

(s) Finally, and in any event, any use must be to a sufficient extent by significant numbers of the inhabitants of the neighbourhood throughout the entire relevant 20 year period. In addition to the above, it is submitted that the evidence of use during the early part of that period is extremely limited. The sole witness who gave oral evidence in support of the Application during that initial period from February 1989 was Mrs

Broomfield when she lived at Alton Road. Although written evidence is provided in support of that earlier period, it must be attributed limited weight for the reasons stated. Further, as against that, the Objector's oral evidence is that no such use was taking place during the earlier period either. Indeed, Mr Mendham referred to the regular use of the Land by the School at that time when it was always fully available for their use.

(t) Taking into account the above, the use has been wholly insufficient to demonstrate to a reasonable landowner that recreational rights were being asserted over the Land by the local community throughout the 20 year period. This is not a situation where the landowner was aware of the use and passively encouraged or tolerated it. Instead, the landowner was not made aware of any regular use by the community as it was not occurring to any material level. On that basis, the Application should be rejected.

(u) As to the "as of right" issue, in addition to the above, the use of the Land insofar as it occurred was *precario* in that it was carried out pursuant to the landowner's implied permission. That arose from the School's exercise of its entitlement to restrict the public's use of the Land on occasions during the relevant 20 year period. Reliance is placed on the public's exclusion from part of the Land during two particular firework displays carried out on part of the Land and during two occasions of the use of part of the Land for quad bike training during the annual summer fair on another part of the Land. That is similar to the circumstances which arose in *Mann v. Somerset County Council* [2012] EWHC B14 (Admin). Such permission need only be established on one occasion during the relevant 20 year period in order to prevent the accrual of the recreational rights.

Incompatibilty of registration with statutory purpose for which land is held

(v) Finally, it was contended that the registration of the Land would be incompatible with its use for educational purposes. The Land is in the ownership of Cheshire East Borough Council. It was acquired by its predecessor by a Conveyance dated 6 October 1938. The purpose for its acquisition is not stated in the Conveyance. Nonetheless, the related correspondence entered into at the time of the Conveyance and directly relating to that Conveyance clearly indicates that the Land was acquired for the specific purpose of the provision of a Senior School for 320 boys. Mrs Smart confirmed that the Land remains held by the Council for the purposes of education and that it has not been appropriated to any other use. It has been maintained by the Council as part of the School which was paid for from the budget for the School. The

Land is currently in use by the School as part of its playing field and outdoor space and has been so used since 2009.

(w) Section 175(1) of the Education Act 2002 provides:-

"A local authority shall make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children."

There is thus a statutory duty on the Council to ensure that their education functions are carried out with a view to safeguarding and promoting the welfare of children.

(x) The leading case on statutory incompatibility is the Supreme Court's decision in *R. (on the application of Newhaven Port) v. East Sussex County Council* [2015] UKSC 7, especially at paras.91 to 103. The Land is held by the Council for education purposes, it is currently in use by the School as part of the functioning Gorsey Bank Primary School. The question arising is whether the registration would be incompatible with the use of the School for the statutory purpose of education. It is submitted that the crucial issue is not whether the School would be prevented from functioning as a School and would effectively have to be closed down, which the evidence does not suggest that it would if the Land was registered, but rather, whether there would be an incompatibility between the registration and the Council's statutory functions in relation to the School. It is contended that the evidence does establish the latter in that it is a statutory duty of the Council in relation to the School to ensure that the welfare of the children is safeguarded and promoted. Ensuring the safety of the children is fundamental to that statutory duty. The School is a Primary School. The clear evidence of Mrs Woolley, supported by Mrs Garrod, is that the Land cannot be used by the School children unless it is securely fenced. It cannot function as part of the School as a shared area with the general public. In effect, if the Land is registered, the current fence will be removed and the Land will no longer be actively used by the School. Hence, that area of land held for educational purposes and currently functioning as part of the School would no longer continue to function as part of the School. That in turn would reduce the outside space available for use by the children. It is needed in order to meet the playing space requirements for the School at its current size and to ensure that the children have sufficient PE lessons. There is no extant statutory requirement for such playing space nor for a specific amount of PE lessons. They are targets which should be sought to be achieved, particularly given the importance placed upon sport and physical education for children in terms of their

general well-being. They are actively promoted by Ofsted and the failure of the School to meet such would affect its Ofsted ratings and ultimately its standard and attractiveness as a school. Those resulting circumstances of the registration of the Land make its registration incompatible with the use of the School for the statutory purpose of education for which it is held. An integral element of that statutory function is to promote the welfare of the pupils, which in turn is positively contributed to by having sufficient playing field provision and outdoor areas to enable the sporting and PE targets to be met. The necessary effect of removing the area of playing field currently in active use from their use is incompatible and inconsistent with the exercise of that statutory function.

(y) These circumstances are distinguishable from the circumstances which arose in the Moorside Fields decision in Lancaster relied upon by the Applicant. The Inspector was unable to find that the relevant land had been acquired for the purposes of education, in contrast to the present case. Moreover, in that case, reliance was placed by the objector on the Land being needed in the future for a new or extended school. This is consistent with *Newhaven*, para. 101

> "The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility."

In contrast, as in Newhaven where the beach was held as part of a working harbour, the Land is currently held and used as part of the School and has been so used regularly since 2009.

80. I requested further submissions on the issue of statutory incompatibility with an opportunity for the Applicant to reply on that point.

Further submissions

81. The Further Submissions of the Objector made the following additional points

(a) Gorsey Bank Community Primary School ("the School") is a community maintained school, maintained by Cheshire East Council as the local authority.

(b) By virtue of section 13(1) of the Education Act 1996, the local authority is under a general statutory duty to ensure that efficient primary education, secondary education and, in the case of a local authority in England, further education, are available to meet the needs of the population of its area. Section 14(1)(a) of that Act further requires a local authority to secure that sufficient schools for providing primary education are available for its area. In terms of the relevant general power conferred,

section 16(1)(c) of the 1996 Act goes on to state that for the purpose of fulfilling its functions under the Education Act 1996, a local authority may, inter alia, establish primary schools, and maintain primary schools, whether established by it or not.

(c) Section 175(1) of the Education Act 2002 specifically requires a local authority to make arrangements for ensuring that its education functions are exercised with a view to safeguarding and promoting the welfare of children. That same duty is also imposed on the governing body of a maintained school by virtue of section 175(2). Further, in considering what arrangements are required to be made to comply with such duty, regard must be had to any guidance given from time to time by the Secretary of State: see section 175(4)

(d) The current guidance issued by the Secretary of State for Education under section 175 of the Education Act 2002 in relation to the safety of children is "Keeping Children Safe in Education" issued in July 2015. That is statutory guidance to which the local authority and governors of the School must have regard in complying with their section 175 duties. Of particular note are paragraph 7 which states:-

> "All school and college staff have a responsibility to provide a safe environment in which children can learn"

and paragraph 42 which states:-

> "The assessment of the quality of leadership and management made during an Ofsted inspection includes an assessment of the effectiveness of the safeguarding arrangements in place in the school or college to ensure that there is safe recruitment and that all children are safe."

(e) It is thus clear that the local authority and the School's governors are under a statutory duty to provide a safe environment for the children at the School. There is no specific statutory duty requiring a school playing field to be fenced. Instead, the relevant duty in section 175 of the 2002 Act as expanded upon in statutory guidance thereunder is to ensure that the children are kept safe and in a safe environment. The means by which that is achieved is a matter for individual schools on a case by case basis. In determining whether land forming part of school premises should be enclosed, all the relevant circumstances would be relevant, including the ages of the children, the use of the land in question, its location and other security measures employed. Ultimately, it is for an individual school to determine how to comply with its safeguarding duties.

(f) Applying the legal position to the present circumstances, the Application Land is held by the Council for educational purposes and has been occupied by the School as part

of the School premises throughout the relevant 20-year period. Since its fencing in 2009, it has been regularly used by the School on a daily basis during school times as part of the local authority and School's statutory functions to provide primary school education, and it continues to be so used. In the same way that West Beach in Newhaven was part of the operational land of the Harbour, the Application Land is part of the School and, indeed, is actively in use as part of the School. As such, it is subject to the statutory regime imposed on the local authority and the governors to ensure that it is a safe environment for the children whilst attending the School.

(g) Given those factual circumstances, the fundamental question arising is whether registration of the Land as a village green would be incompatible with the exercise of the particular statutory purposes for which the Land is held and used. As stated in paragraph 93 of the Judgment in *Newhaven*:-

> "Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."

(h) The Land was used by the School relatively frequently during the early part of the relevant 20 year period as pointed out by Mr Mendham. However, as he stated, there were very significant implications for school security during the 1990's after the Dunblane incident. The Land was only again used regularly once it was securely enclosed by fencing in 2009.

(i) The reasoning for the School's approach was provided by Mrs Garrod and Mrs Woolley. Mrs Garrod, the Head Teacher between September 2005 and August 2012, explained that the fencing which was erected in 2009 was necessary to protect the pupils from risk of injury, to prevent them from absconding, and to prevent them from having contact with the public. Mrs Woolley, the current Head Teacher, pointed out that her primary responsibility was to safeguard the children. The Application Land is currently fenced by appropriate fencing and the gates are locked during school times once the children have arrived to ensure their safety. In order to properly safeguard the children, notably of primary school ages, she stated in terms that the Application Land could not be shared with the public. Hence, if it was registered as a village green, that Land could no longer be used by the School as at present or, indeed, on any regular or meaningful basis. Otherwise, there would, in her view, be an inadequate level of security. She expressed concerns over the resulting security of the children; health and

safety issues; children straying off the School premises; the interaction of children with the public; the interaction of the children with dogs; and dog fouling issues should the Land be a shared space. Instead, her clear evidence was that if the Land was registered, it would no longer be able to be used as an active part of the School premises.

(j) Ultimately, the responsibility for the School's compliance with its safeguarding duties is for the School. The Head Teacher's view, as supported by the Governors and the local authority, is that the Application Land could not be used by the School if it was registered as a village green. That being the clear evidence, it is submitted that it is difficult to envisage a greater incompatibility with registration and the continuing use of the Land for the statutory purposes for which it is held in that the two are so incompatible that the evidence is that the Land would then no longer be able to be actively used for the very statutory purpose for which it is held.

(k) Reference was made in paragraph 93 of the Newhaven Judgment to the general rule that where there is a conflict between two statutory regimes, a general provision does not derogate from a specific one. The Commons Act 2006 was acknowledged to be a generally worded statute. The safeguarding duties imposed on a school, as expanded upon in statutory guidance, are much more specific. In contrast to the 2006 Act which is capable of applying to any land, those safeguarding duties, including the duty to provide a safe environment for school children, are specific to schools and to land held and used as part of school premises. It is those more specific provisions which should take precedence in the present circumstances in relation to the Application Land where conflict arises.

(l) The present circumstances fall wholly within the principles set out in Newhaven. The Port had statutory duties to maintain and support the Harbour, and powers to do so which involved carrying out works to the Beach. Such works would be incompatible with registration as they could not be carried out if registration occurred. Similarly, the local authority and the governors have statutory duties to safeguard and promote the welfare of the children at the School. In order to do so, the Application Land is in use and it is fully enclosed together with locked gates during its use. That is incompatible with registration as such use on such enclosed land could not continue if the Land was registered. The evidence is that the Land could not be used for the statutory purpose for which it is held if it was registered.

(m) This is not a case where any incompatibility is contended to arise only if the Council or the School exercise their future powers in relation to the Land. On the contrary, the Land is currently in active use by the School and has been so used since 2009. It is that ongoing existing use, which commenced prior to the Application being made, which is incompatible with registration rather than some future use or development which may or may not in the event occur. As in Newhaven, where the harbour authority held the harbour land for harbour purposes throughout the period of public user of the Beach and as part of a working harbour, the Council held the School land for the purposes of education throughout the period of claimed public user of the Land and as part of a functioning School. Indeed, in Newhaven, the proposed works to the Beach alleged to be inconsistent with registration had not occurred as at the date of the Application nor as of the date of the Supreme Court's Judgment. In contrast, the incompatible use had commenced on the Application Land prior to the Application being made. There is thus no requirement for the incompatible use or development to have occurred at the start of or even during the relevant 20-year period. Instead, the issue should be determined on the basis of the evidence as at the date of the determination of the Application.

(n) Finally, in relation to the disposal or change of use of a school playing field, that is governed by section 77 of the School Standards and Framework Act 1998 which requires the consent of the Secretary of State for Education to be obtained before any such disposal or change of use can occur. That provision specifically applies to a maintained school. It applies to a change of use whether to another educational purpose or to a non-educational purpose. It reflects the importance of protecting school playing fields for that purpose. Hence, such consent would be required if and when the Application Land was sold or if and when it was put to another use.

(o) There is no current intention to dispose of the Land. However, insofar as the registration would result in the Land ceasing to be used as a school playing field and being instead used solely for general recreational purposes by the local community, it is contended that such a change of use would ordinarily require the Secretary of State's consent. Therefore, registration is thereby further incompatible with the statutory purpose for which the Land is held as the use would be changed due to the effects of the 2006 Act, bypassing the need for the Secretary of State's consent and the criteria applied to such changes of use to ensure the proper protection of such land for

such purposes. That more specific statutory regime should be applied rather than the more general provisions of the 2006 Act which are inherently inconsistent with it.

(p) Consequently, for all the above reasons, it is submitted that the 2006 Act cannot operate in relation to the Application Land and so registration should not occur on that specific ground.

82. The Applicant made submissions in response as follows:

(a) As identified by the further submissions of the Objector, there is no specific statutory duty requiring a school playing field to be fenced. Instead, the relevant duty in section 175 of the 2002 Act as expanded upon in statutory guidance thereunder is to ensure that the children are kept safe and in a safe environment. The response from the Objector conflates statutory guidance with a statutory duty, seeking to raise the former to the status of the latter, which it does not have.

(b) The Objector has also identified in earlier Submissions, that there is no extant statutory requirement for playing space nor for a specific amount of PE lessons. There are instead targets which should be sought to be achieved, particularly given the importance placed upon sport and physical education for children in terms of their general well-being.

(c) Gorsey Bank School operated successfully for many years with the fence in its original position and managed to safeguard its pupils throughout the period to 2009 even though the original fence was inadequate, incomplete and ineffective. By moving the improved new fence back to the original position, the school would ensure that safeguarding requirements were met. It was agreed by Mrs Woolley during her evidence, that the school could continue to provide all required PE and play time space required with the fence in its original position.

(d) Section 13(1) of the Education Act 1996 states :

"General responsibility for education.

(1) A local education authority shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education, and secondary education are available to meet the needs of the population of their area."

The school can meet its statutory responsibilities without the need for any further land. This was not the case in *Newhaven* and differentiates the nature of the Land in this application from that of a working harbour.

(e) The Land was not an integral part of the school prior during the 20 year qualifying period, and was used very occasionally (if at all given the lack of clear evidence and statement from Mrs Swindells) during the 20 year period up to February 2009. Indeed in her statement, Mrs Garrod stated that the current unfenced area that is still used for LSP, for which no permission is required, is actually not suitable for use within a fenced school playing field area. The occasional use of the Land for tree rubbing or nature walks that was the case pre 2009, and the sporadic use of the Land for PE and (non-rainy day) playtimes is very different to the essential use of land for the daily operational running of a harbour.

(f) The view of the current head teacher and the governors may well be that sharing the application land with the public would be a potential risk, but there does not appear to be a clear legal reason for not allowing this co-existence. Mrs Woolley acknowledged that pupils are taken from the school on trips to Pownall Park Tennis Club and Total Fitness in Handforth. Both these activities would appear to have a higher degree of inherent risk than a sporting or other activity on a piece of ground with no direct access to roads and with two easily controlled entrances. Whilst ongoing use by the school would involve a little more planning than at present, it does not appear to be so impractical as to make use of the application land incompatible with the statutory purpose of education.

(g) Guidance from the Health and Safety Executive in relation to risk education (quoted from extensively in the submission) suggests that there would be no statutory incompatibility with the application land being used for educational purposes – specifically getting children to start to recognise hazards and risks in a comparatively safe location. The application land is surrounded by properties that pose no potential threat, has no vehicular access and has readily controlled access from only two points.

(h) Furthermore, in the Ofsted report for Burley and Woodhead C of E Primary School, attached to the email sent with this submission, the report states on Page 5.

> "Pupils say they feel safe and are very aware of how to keep safe. A footpath runs through the school grounds and all pupils are aware of the implications of this and know that they should not speak to approach strangers. They are aware of safety issues when using technology and at other times, such as when working by the school pond."

This report provides further support for the argument that it is not impossible for the public to share land used for educational purposes. However, in the case of the land

covered by this application, there would still be an adequate fenced area providing a space separated from the public, whilst the application land could be used with appropriate guidance to pupils and staff.

(i) Part of the application land is still not fenced and is not used by the school, and as set out earlier, is deemed by the school to be inappropriate for educational purposes. Should the argument relating to statutory incompatibility be deemed applicable for the fenced area of the application land, it still does not seem to apply to the unfenced area that continues to be used by the residents of Pownall Park where permission is still not required and LSP continue to be carried out as they were during the 20 year qualification period for the whole area covered by the application.

(j) It is the belief of the Applicant that the Objector has not shown, on the balance of probabilities, that there is statutory incompatibility between the education purposes for which the Land is held and its registration as a TVG. However, if the fenced area is deemed to be ruled out on this basis, then the registration of the current unfenced area would not appear to be covered by the same arguments, and TVG registration should still apply to this reduced area.

CONCLUSIONS

General

83. I remind myself that I am purely concerned with the question whether the statutory requirements for establishing a Town or Village Green have been made out. I am not concerned with whether or not there is already sufficient open space within the area nor whether it is more desirable in the public interest that the enclosed land should be exclusively available for children at the school or generally available for local people. The public interest, insofar as it is relevant, must be taken to be served by the statutory requirements of the Commons Act 2006.

84. Also, I am not concerned with the motives of those making or opposing the application save insofar as it might affect the truthfulness of their evidence. I have already made it clear that I have no reason to believe that anyone who gave evidence at the inquiry was not telling the truth as they believed or remembered it. Not having seen or heard evidence from those whose written statements or user forms were submitted I cannot form the same opinion – save insofar as the written statements accord directly with evidence that has been heard orally and tested by cross examination. Necessarily, I have to give more weight,

therefore, to the oral evidence that has been tested by cross-examination than to the written statements and user forms. My general presumption has been, however, that all those who made written statements or filled in user forms will have done so truthfully.

85. Nonetheless, whilst there are some common elements to the evidence given by both sides there is a fundamental conflict in terms of the degree of use for lawful sports and activities that has occurred on the Land. Some of this conflict of evidence can be put down to differences in memory or perception but, in my view, if the Land had been used in the manner and to the extent claimed by the Applicant over the full 20-year period, it would have been bound to have come to the attention of those who were concerned with the management and running of the school.

86. I recognise that the Applicant appeared in person and that he is not a trained lawyer whereas the Objector was represented by Counsel with particular experience and specialist expertise in the relevant law. I should say, however, the submissions of the Applicant display considerable research into and understanding of the issues and that I consider that it is highly unlikely that they could have been made more effectively had the applicant been legally represented. Furthermore, the Applicant has behaved impeccably throughout the whole process – having met all the required deadlines and complied with all procedural directions.

Preliminary findings of fact

87. Whilst these are not the only findings of facts that I have made and which are relevant to the issues on which I have to decide, I think that it is helpful to set out those preliminary findings which then form a context in which to consider the more difficult issues. These findings are:

    (a) That some lawful sports and pastimes have been undertaken on the Land at various times. This is not now disputed by the Objector and is, in fact, confirmed by a number of witnesses called by the Objector as well as in written statements. I deal later with the question whether these have been proved to have occurred "as of right" and to a sufficient degree and over a sufficient period of time by a significant number of the inhabitants of a qualifying neighbourhood so as to establish TVG rights.

    (b) That there was no attempt by the School or the local education authority prior to February 1999 to prevent the public from undertaking lawful sports and pastimes on the Land. In so far as there may have been challenges to members of public seen on the Land these appear to have been made either because the member of the public was trying to interact with pupils at the school, attempting to enter the school premises or

behaving in a lewd or disruptive manner. The instruction given to staff to challenge members of the public appears to have been confined to protecting the integrity of the school and the safety of its pupils and not generally aimed at challenging recreational use of the Land.

(c) That the notice displayed behind the fence near school gate prior to 2009 could not reasonably have been taken to have referred to the Land and, therefore, contained no indication of intention to exclude the public from using the Land.

(d) That the use of the Land for quad biking at the school fair occurred only on a small area of the Land, cordoned off by straw bales, on 2-3 occasions and that there was no attempt to exclude the public from the remainder of the Land during these events. This was the consistent evidence of all those who gave evidence at the inquiry and I prefer that evidence to the written statement given by Jayne Humphreys. Indeed any attempt to prevent people from straying of the public footpath would clearly have been a difficult exercise.

(e) That the use of the Land (rather than the school field or playground) by the Round Table for setting off their fireworks displays occurred only on two occasions again within a very small area within the field and that members of the public were not excluded from, or required to pay to enter, the Land. On the other occasions the fireworks were set off within the school grounds. The permission granted to the Round Table was not specific to the Land.

(f) That no general permission was expressly given or could be implied for members of the public or members of the Pownall Park area to use the Land for lawful sports or pastimes but that some of the activities described clearly were carried out with permission express or implied.

(g) That, on a balance of probabilities, the use of the Land for football training for junior teams of Wilmslow Sports FC had been granted express or implied permission. The facts that matches were played on the school pitch (clearly with permission), that a key to the school premises had been provided to Wilmslow Sport FC and that they had a locker on the school premises is strongly suggestive that permission for training had been granted at some point in time. On any basis, bearing in mind the above, I do not believe that the training sessions would have been regarded by the Landowner as a trespass.

(h) That parents and their children when dropping off or collecting their children from school had implied permission to be on the Land and that this permission would have

extended to parents socialising before or after drop-off and pick-up and would also have extended to their children playing on the Land, climbing trees and any other form of informal play (with or without balls) as part of the trip to or from the school. Again I do not consider that any activity of this sort could or would reasonably have been regarded by the School as a trespass on school land but rather as part of the overall and normal interaction between the school, its parents and its pupils.

(i) That a proportion of the usage described by witnesses or user forms as "walking," "dog walking " or "jogging" was associated with the use of the existing public footpath, with the use of the path leading to the school gate, with parents bringing or collecting their child to or from school (in some cases bringing their dog with them) and with usage which was consistent with the exercise of a public right of way rather than a Town or Village Green. I will consider difficulties in determining the extent of that proportion later.

(j) That a proportion of the usage of the Land for blackberry picking was undertaken from the public footpath. The remainder took place at the boundary of the Land with the allotments.

(k) That there was some use of the Land for kite flying but that this usage was extremely occasional and sporadic.

(l) That the Land was used throughout the 20-year period for school purposes – more intensively during the headship of Roy Couchman but subsequently for various school activities several times each term.

(m) That the Land was maintained out of the school budget and the grass was cut on a similar frequency to the school field within the fence-line. I have considered whether this might be taken as indicative of implied permission or whether it might have re-inforced the view that this was land available for public use. Overall. I think that it is broadly neutral in throwing any light on the character of the usage of the Land but it does indicate that the Land was treated as part of the school over the 20-year period and tends to confirm that it was used for school purposes.

88. Bearing in mind my findings as to the circumstances in which the Land was used by quad bikes during the school fairs and for letting off fireworks it is necessary to consider the relevance and effect of the decisions in *R (Mann) v Somerset CC* [2012] EWHC B14 (Admin) and *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin).

89. In *Mann* the relevant area of land was associated with a public house and there had been occasional use by the owners of the land for beer festivals and funfairs for which the public were charged an admission fee and excluded from part of the land. The court held these acts of exclusion were positive acts demonstrating that the private owners of the land were exercising and retaining their rights by excluding all comers subject to payment of an entrance charge and (per Owen, J. at paras. 74-5)

> "They conducted themselves as an active landowner and, as the local inhabitants might reasonably be taken to have appreciated, as though the local inhabitants had no right over the land.
>
> 75 It is difficult to see, viewed objectively, how the local inhabitants could not have appreciated that in continuing to use the land they were doing so with the (implied) permission of the owner."

90. In *Goodman* the land in question was publicly owned and had on occasions been licensed by the Council for use by fairs, circuses and other events. The Inspector referring to the decision in *Mann* concluded, *inter alia*, that, if the land had been held for planning or industrial development purposes, it was reasonable to conclude that the temporary licensing of the activities that took place over several days would have alerted a reasonable person to the fact that he or she was using the land, when he or she had access to it, by permission. Dove, J, held that the issues raised in *Mann* were fact sensitive and illustrated the importance of the land being in private ownership and (at para.37)

> "moreover—in the hands of a private owner who was using the land to further his own commercial interests albeit on an occasional basis. The nature and quality of those occasional uses which were consonant with the commercial purpose for which the owner occupied the land clearly also had an important bearing on the Inspector's and the court's evaluation of the owner's conduct in that case."

The judge held (at paras 45-6) that the Inspector, in coming to a view on the issue, had come to conclusions which were reached

> " . . . apparently without regard to two key and distinct features in the case which the extracts from *Mann* which I have set out above meant should have been central to his resolution of the issue in relation to implied licence.
>
> 46 Those issues were, as I have set out above, first, the fact that the land was here in public ownership as distinct from the private ownership of the land which bore heavily

on the judgment in that case. Secondly, the nature and character of the events were further important and distinct material considerations. Those events—although charged for—were at least arguably not inconsistent with a public entitlement to use the land. This again is in sharp contrast with the commercial uses of the land, consistent with the trading of the public house in Mann. Both of these were therefore important circumstances bearing upon whether the owner in this case had clearly signified, by allowing this occasional activity, that at all other times the use has been undertaken by licence. They are two features which do not register at all in the Inspector's decision-making process. That was in my view an error of law by way of leaving out of account material considerations . . ."

91. I do not take the decision in *Goodman* to suggest that the principles applied in *Mann* could never apply to public land – only that the public ownership and the nature and frequency of the activities licensed on the land had to be considered in order to determine whether they amounted to an implied licence.
92. In the present case, the "licensing" of the Round Table to set off fireworks was not specific to the Land and the actual setting off of the fireworks had only occurred on two occasions within a small section of the Land. The public were not excluded from the remainder of the Land. Indeed, the evidence is that several of the residents of Alton Road came out of their houses and onto the Land in order to watch the fireworks. Although it appears that the Round Table supplied local residents with a free pass to the firework display and bonfire, no-one on the Land was required to have a ticket or a free pass in order to be there or to view the display from the Land. The point at which tickets had to be shown or purchased was actually on the edge of the Carnival Field.
93. The use of a small part of the field, again on two or three occasions, during the school carnivals for quad bike riding was again confined to a small area of the field which was cordoned off by bales. The public were not excluded from the remainder of the Land and were not required to buy a ticket in order to enter onto the Land.
94. Considering all these factors, I do not consider that these events were inconsistent with a claim by inhabitants of the local neighbourhood to use the Land "as of right", nor would they have had the effect of making the public aware that the landowner was asserting a right to exclude them from the Land, nor could they reasonably be taken as indicating to the local inhabitants that they were on the Land, either during those events or generally, by permission.

95. Whilst I have found that the holding of the Wilmslow Sports training sessions was probably carried out with implied or express permission this status would not have been clear to anyone else using the field and again I don't think that it could be taken to lead to the inference that all other activity on the Land was also by permission.

Neighbourhood within a locality

96. No issue was taken by the Objector as to the local government ward (Wilmslow West and Chorley Ward) being a locality for the purpose of the Act. Strictly, I think that the correct locality must be the ward referred to in the Application – Wilmslow South – which was the "locality" which was in existence during the 20-year period. Either way the objector does not take any issue in relation to the identification of the locality or to the amendment to reflect the current local government ward. Bearing in mind that reliance was placed on usage by the inhabitants of a neighbourhood it seems to me that the precise identification of the locality becomes secondary in any event. Whatever locality was identified then so long as Pownall Park is an identifiable area within it, with sufficient cohesiveness to meet the neighbourhood test, then Pownall Park could still be a neighbourhood within that locality for the purposes of the Commons Act 2006. I find that the local government ward was an appropriate locality for the purpose of the Act.
97. As to whether Pownall Park has sufficient cohesiveness or identity to be regarded as a neighbourhood I remind myself that the alteration in the law was intended to remove the artificiality of the former law's requirement of a legally recognised "locality" and was a material change from the previous requirement which echoed the common law. I note the characteristics which in the *Leeds* case led the Inspector to take the view that two areas of housing concerned in that case could be regarded as a neighbourhood and the higher courts' acceptance of those areas as neighbourhoods.
98. In the present case, it seems to me from looking at the map, from observation and from the oral evidence that there is a sense of identity in the geographical area known as Pownall Park as shown on Map B which accompanied the application and the user forms. I do not draw any adverse conclusion from the fact that the more detailed Map B1 is slightly different and excluded the Land and the Carnival Field. The Applicant has clarified that he is relying on Map B. I do not consider that the omission of a row of properties on Altrincham Road or Davehall Avenue and Park Road affects the integrity of the neighbourhood as defined. The latter two roads are geographically distinct from the defined area of Pownall Park. The omission of the row of premises on Altrincham Road initially

seemed surprising but it appeared from the evidence that the residents there had declined to become part of the Pownall Park Residents Association and, on inspection, the housing there does have a different character, was clearly built at a different time, and has limited physical connection with Pownall Park. I do not believe that the exclusion of this row of houses prevents the area shown within Map B from having the cohesiveness necessary to be regarded as a "neighbourhood" for the purposes of section 15 of the Commons Act 2006. I recognise that care has to be taken in placing too much reliance on planning designations but the Design Guide for the area is based on the fact that the properties in the area do have common characteristics and that there is a "character" to the area.

99. Whilst I don't believe that the existence of a residents association could be the sole criterion it must, I think, be a factor to be taken into account. The identification of Pownall Park as an area by estate agents may also have some significance and there does seem to me to be a reasonably clearly identified geographical area to which the name Pownall Park refers when carrying out a "Google" search.[3] I note the facilities that are said to exist within the area and I also note that a number of the facilities claimed on the user forms as being within the area are not actually within it. I see no reason, however, why a "neighbourhood" should have any set number of facilities. The fact that there is a rugby club and a tennis club has, I think, some limited relevance although no evidence was provided to suggest that the members would necessarily be made up of Pownall Park residents. I note also that Gorsey Bank School has a catchment which extends well beyond Pownall Park and that the private Pownall Park School will also serve a much wider catchment. At the end of the day, the decision as to whether Pownall Park is a neighbourhood within the meaning of the Commons Act 2006 has to be a matter of impression and judgment and in my view it clearly is such a neighbourhood.

Usage as of right for lawful sports and activities by a significant number of the inhabitants of a neighbourhood within a locality for a period of not less than 20 years

100. Bearing in mind that I have concluded that, whilst there is evidence of use of the Land for lawful sports and pastimes undertaken on the Land, a proportion of the use of the Land was not of a character which could lead to the acquisition of TVG rights because it really amounted to usage attributable to the use of a public right of way, was consistent with the assertion of a less onerous right – i.e. a public right of way, or was permitted - the difficult question is whether the remaining proportion of use for lawful sports and pastimes was of

[3] These two points are probably connected.

such a quality and frequency as to meet the requirements of section 15. This requires consideration of

(a) the level and frequency of the exercise of lawful sports and pastimes;

(b) whether these sports and pastimes were being undertaken by a significant number of the inhabitants of Pownall Park; and

(c) whether the activities satisfying the above tests had occurred throughout the 20 year period.

For the statutory requirements for the establishment of a TVG to have been met all three of these elements must be established by the Applicant (on whom the burden of proof falls) and unless I am satisfied on the balance of probabilities that all these elements have been demonstrated I cannot recommend that the application be accepted.

101. I repeat that it is impossible to reconcile the evidence given by those who support the application and those who oppose it. There is some confirmation from witnesses called on behalf of the objectors that the Land was used by walkers and dog walkers mainly on the footpath and that occasionally children were seen playing games but none of this suggests the level of regular usage described by some of the witnesses for the Applicant; nor does it suggest usage which would have carried the outward appearance, judged from the point of view of a reasonable landowner, that a village green right was being asserted. This difference in the two bodies of evidence cannot, in my view, be explained by the fact that the usage (other than dog walking) would mainly have occurred after school hours and during the school holidays. It is obviously true that the employees of the School would not have been present during all daylight hours and would not have been on the premises throughout the school holidays. However, some staff were on site outside school hours into the evening and, from time to time, during school holidays. It would be remarkable if the claimed level and variety of activities on the Land always co-incided with the absence of staff at the school over a 20 year period.

102. Furthermore, some activities were claimed to have been conducted during the school day. Whilst I accept that teachers and other employees at the school may not have been concentrating on what did occur on the Land, from my site visit I was satisfied that there were clear views of the Land from the classrooms which faced out towards the rear of the school and that these views would have existed even before the old fence line was removed. Equally, however, it is clear from the objection letters and evidence that dog walking was observed and that the Land was contaminated with dog excrement on a

regular basis and that there was some evidence of usage by groups of teenagers – although not necessarily of the kind that could be described as lawful sports and pastimes. The objection letters are also not specific as to when these activities had been observed.

103. I have to disregard usage which is attributable to or consistent with the use of the existing public footpath, use of the path leading to the school, usage which amounts to walks or jogging around the perimeter of the Land (which I regard as being consistent with the use of, or claim to, public footpath rights – a less onerous right), usage forming part of the trip to drop off or pick up children from the school (which I regard as being "*precario*") and the usage which I consider to have been likely to have been permitted as part of the football training ("*precario*").

104. I also have to consider the relative weight to be given to usage described by the witnesses to the inquiry, the usage claimed on the user forms and the usage referred to on the user forms as having been observed rather than participated in.

The witnesses for the Applicant

105. The evidence of Mrs Lees, Mr and Mrs Stubbs, Mr and Mrs Niven, Alison Malone, Pauline Styche, Mrs Broomfield, Mrs Sherville Payne and Mr Edward Clark all indicates regular usage which went beyond the use consistent with a public right of way and beyond any usage connected with trips to and from the school. The children of Mrs Lees and Mrs Broomfield did not even go to that school and other witnesses described activities on the field continuing after their, or their children's, connection with Gorsey Bank School had been severed. It did appear from the evidence, however, that usage of the Land declined as children got older. I note also that the evidence of Dr Pawarde suggests a lower level of use, other than for dog walking, than is suggested by the other witnesses.

106. The Applicant called 11 witnesses, including himself. Nine of these witnesses (representing 7 families) either lived, or had at the relevant time lived, on Alton Road. More significantly, 6 families lived in properties which backed onto the Land and had direct access from their gardens onto the Land. It would be quite understandable, in my view, for the occupants of houses on Alton Road to make regular use of open land at the rear of their properties especially where they had direct access. This little group of houses is not, however, put forward as a neighbourhood in its own right – nor, in my view, could it be. Furthermore, I do not believe that usage of the Land that came solely or primarily from a small group of houses backing onto, or very close to, the Land could be regarded as usage by a significant number of the inhabitants of the neighbourhood. Whilst I would not expect there to be evidence of usage from every street in the neighbourhood there would, in my

view, have to be sufficient evidence that usage came from a wider range of streets so as to be representative of the neighbourhood as a whole rather than being concentrated on a small pocket of houses very close to the Land.

107. The result of this choice of witnesses has, in my view, two potential effects. First, it is, in my view, likely to give an incorrect and exaggerated impression of the level of use of the Land from the neighbourhood. Secondly, it means that, in order to demonstrate the level of usage from the neighbourhood beyond Alton Road, the Applicant's evidence depends on the two witnesses whose properties were not on Alton Road, on what evidence the 11 witnesses can give of use by other people from the neighbourhood, and on the user forms.

108. Of the two witnesses who did not live on Alton Road during the period in respect of which they were giving evidence, Susan Lees could speak only of usage from 1997 – i.e. 12 years of the relevant 20-year period. However, she only moved into the neighbourhood in 2001. For two to three years her own usage was to visit the Land with a friend whilst they both had very young children – in prams or toddlers. Her friend, however, lived within the neighbourhood – albeit on Gorsey Road which is also very close to the Land. Their usage was very much associated with use of the footpath but they would stop and sometimes put rugs on the grass whilst letting their toddlers run around. After she had moved into the area (College Close) she and her sons would use the Land 2-3 times a week for a variety of activities which, in my view, meet the criteria for lawful sports and pastimes. She spoke of seeing groups of children doing similar things. Edward Clark (Broadwalk) had also moved into the neighbourhood in 1997 and his children went to Gorsey Bank School. Some of the children's activity he described was clearly associated with their trips to and from school but he did refer playing "tig" and rounders on the Land and holding a birthday party there.

109. So far as the use of the Land by the witnesses who gave evidence (and their families) is concerned I do not consider that this demonstrated usage by a significant number of inhabitants of the neighbourhood over the required 20-year period. The great majority of the usage described came from families who had direct private access onto the Land.

110. All the witnesses gave evidence about seeing other people and children using the Land and several witnesses referred to their children playing with friends from the neighbourhood but very little specific evidence of the identity or location or quantity of these families could be provided. Some witnesses spoke of recognising some of the other users as local people and one indicated that they included people who were local but not his immediate neighbours. However, it still remained unclear to me how much of the usage of the Land was undertaken by people who did not live in the immediate vicinity on Alton Road. This

is highlighted by the fact that there are a number of other areas of open Land – the Carnival Field, The Carrs and even Lindow Common which would appear to have been as close and as convenient for many local residents of the neighbourhood whilst also offering greater scope for recreational activities.

111. I have no doubt that the gentleman from Broadwalk who used to set up a course for dog training (and who I believe to be Mr Bryant – user form No.36) was using the Land for a lawful sport or pastime. Undoubtedly there were some other dog walkers who played with their dogs on the Land. It is clear from the evidence that a proportion of dog walkers were simply using the paths. Some of the latter group may well have let their dogs off the lead whilst they used the public footpath or the path running down to the school. It is unclear from the evidence given as to what proportion of dog walkers fell into which category and, of those who were actually using the Land rather than the paths, how many of these may have come from the neighbourhood.

112. All but three of the witnesses who gave evidence could only speak of the use of the Land for the latter half of the 20-year period. Alison Malone and Jennifer Broomfield and Pauline Styche gave evidence of their usage from 1969, 1985 and 1991 respectively. However, Alison Malone's knowledge of usage of the field had substantial gaps since she left the area in the mid 1980s (i.e. before the 20 year period commenced) although continuing to visit the family home and living there again for more substantial periods of time in 2000 and 2006. Essentially, therefore, the evidence of actual use during the first years of the 20-year period comes from two witnesses. Pauline Styche lived on Alton Road and her house had a direct access onto the Land. Jennifer Broomfield also lived on Alton Road – although further down from the Land. The evidence they gave of their use of the Land in the early part of the 20-year period suggested a less intensive use than has been claimed for the later period.

113. Ultimately, no clear picture was provided as to what usage came from residents on Alton Road and from the inhabitants of houses in the immediate vicinity as opposed to residents from the remainder of the neighbourhood over the full 20-year period. I do not consider that the evidence given of usage – mainly by people from streets in the immediate vicinity amounts to usage by a significant number of the inhabitants of the locality. Equally, the oral evidence on its own does not convince me that in the first half of the 20 year period the level of usage had been as regular as it was in the last half of the 20-year period nor again that the level of usage during that period came from the neighbourhood rather than from a few streets in the immediate vicinity.

114. The oral evidence on its own, therefore, does not lead me to believe that the statutory test have been met. It is, therefore, necessary to look at the user forms carefully to see to what extent they can provide any further assistance – particularly in relation to the early part of the 20-year period.

The user forms

115. I recognise that the questions on the user forms have been designed to try and give as clear a picture as possible of the level and length of usage of a piece of land. In many TVG cases these may be sufficient to do so. The present case is, I consider, more complex as many of the activities said to have been carried out or observed may well be consistent with usage which was not "as of right" and/or which was consistent with usage of paths.

116. Many of the forms refer to walking and to dog walking as an activity undertaken or observed on the Land. As explained above, use of the public footpath, the path leading to the school or even crossing the Land on the way to and from school would not give rise to TVG rights. This would also be true where the walker is accompanied by a dog whether on or off the lead. The caselaw suggests that the fact that a dog may then stray onto adjoining land or that the owner may enter onto that land to recover an errant dog is equally not sufficient. The Land really has to become the focus of the activity – i.e. walkers need to be using the Land rather than just passing through and they need to be using more of the land than defined pathways or routes around the edges of the Land. There is evidence, in this case, that parents cut across the Land on their way to take children to school and to pick them up. Some of the user forms refer to there being a diagonal path across the Land created by parents crossing to get to the school gate. Some parents, on the evidence at the inquiry, were accompanied by dogs – which were tied up by the gate whilst parents delivered or picked up their children. Almost half of the user forms described walking or dog walking as being their sole or main use of the Land. Whilst the form does have a question asking "How often do/did you use the land (apart from the public paths)?" many users had already answered an earlier question by indicating that they were unaware of any public paths. Others had recognised the nature of the public footpath running from Gorsey Road to the Carnival Field and beyond. Overall, it is not possible to form a view as to what proportion of the use described as dog walking might have been done away from any defined path across the Land. The fact that objection letters make reference to dog excrement does not take matters much further. The presence of dogs on the Land itself is not a clear indicator of whether their owners were using the paths. The dogs of walkers on

the paths might well have been running on the field and been responsible for the deposit of excrement. I do not find it possible to form a sufficiently clear picture of the extent of usage of the Land itself by the dog walkers in order to conclude that their usage on its own or together with evidence of other uses amounts to usage by a significant number of the inhabitants of the neighbourhood over the 20 year period.

117. A number of forms were unspecific and when they refer to activities undertaken by the signatory or his/her family (e.g. "recreation" or "exercise"). This could refer to activities connected with the football training or with activity connected with visits to the School or even walking or running.

118. Even where more specific activities are described such as "ball games" or "tree climbing" it is not always clear whether or to what extent this might be associated with a visit to the School to pick up or drop of school children.

119. Despite the fact that most people signed the back of the plan attached to the user forms there is still some evidence of confusion between the use of Land and uses carried out, or seen, on Carnival Field – for example one form refers to use of the Land for "bonfire and firework displays, flower shows and circus's" (*sic*). Another refers to its use on the Queen's Jubilee. No evidence was given at the inquiry about use of the Land for the Jubilee or for a Circus or a flower show – which all seem much more likely to have been carried out on the Carnival Field. Some forms refer to the Scouts using the Land – which seems more likely to refer to the area on, or adjacent to which, the Scout Hut was situated than to the Land.

120. It is unclear from the answers to question 23 on the Form as to the frequency of the activities "seen taking place" on the Land might be. The list of activities offered on the form for people to tick includes blackberry picking, bonfire parties and kite flying as well as walking, bicycle riding and dog walking. Clearly these activities would inevitably be likely to have occurred with very different levels of frequency – from once a year in the case of bonfire parties to potentially usage every day in the case of walking. However, again it cannot be confirmed from the information on the forms whether those activities "seen" on the Land included the football training, usage connected with a school trip, usage by the families whose houses back onto the Land or even, especially in the early years of the 20-year period, usage by the school itself. It is also not clear when these activities were carried on during the 20-year period or whether they occurred for any significant part of it.

121. In those cases where long usage (i.e beyond the 20 year period) is described it is clear that the usage most clearly falling within the category of "lawful sports and pastimes" occurred

when the signatory's children or grandchildren were with them on the Land. In addition to the difficulty in eliminating usage connected with trips to and from school the questions and answers on the forms do not generally explain during which years the signatory would have had children or grandchildren of an age to take part in those activities. Apart from walking, dog walking and jogging the evidence at the Inquiry pointed to usage by children and families rather than by groups of adults.

122. Some 88 forms were submitted from individuals or families who either now live, or did live for some part of the relevant 20-year period within the neighbourhood. 28 of these forms came from residents (including those who gave evidence) who lived on Alton Road (on both sides of the road). Of the forms describing usage for more than 10 years some 20 came from residents on Alton Road.

123. I also bear in mind the evidence given by Mr Mendham, supported by the letter from Mr Couchman which indicates that in the early part of the 20 year period the school itself was using the Land more frequently than it is now – including some organised sports such as rounders and athletics and also after school activity such as cross country and athletics training.

124. Overall, taking both the oral evidence and the evidence from the user forms into account my impression is that there has been a level of usage which might have led a reasonable landowner to have realised that a town or village green right was being asserted but that this has only occurred over the last 10 years or so. I also conclude that much of this use has been attributable to the usage of the Land by a relatively small number of families mostly living on Alton Road so that I cannot be sure on a balance of probabilities that even during this period there has been usage by a significant number of inhabitants of the Pownall Park neighbourhood rather than from the inhabitants of one or two streets which are in the immediate vicinity of the Land. I find that the case in respect of usage relating to the early years of the 20 year period depends predominantly on the user forms and that these forms do not provide sufficient information in order for me to be satisfied on the balance of probabilities that sufficient qualifying activity (i.e. usage "as of right" rather usage associated with some lesser right or by permission) took place on the Land over the full 20-year period by a significant number of inhabitants of the neighbourhood.

125. I do not find, therefore, that the Applicant has demonstrated, in line with the principles set out in the caselaw, that on a balance of probabilities the Land has been used as of right for lawful sports and pastimes for a period of not less than 20 years by a significant number of

the inhabitants of Pownall Park so as to give rise to the acquisition of town and village green rights requiring registration under s.15 of the Commons Act 2006.

126. In view of this finding it might be considered unnecessary for me to consider the submissions made in relation to the incompatibility of the claim to TVG rights with the statutory purpose for which the Land has been held. However, I think that for completeness I should do so.

Incompatibility for statutory purpose

127. I find
    (a) that the Land was acquired in 1938, together with the present site of the School, the allotments, the wooded area and two other plots of land since sold off, by a local education authority, for educational purposes for the purpose of providing a school – albeit not the school which was actually built;
    (b) that two plots of land were sold off to the Scouts and to the St Johns Ambulance in 1968 and 1959 respectively;
    (c) that the present Gorsey Bank Primary School was built on its present site in the early 1960s and that the school moved into the newly built premises in 1962;
    (d) that the Land has been maintained at all material times since 1962 from the school's budget and has actually been used by the School to a greater or lesser degree at all material times up until the present day. I accept the evidence of Mr Mendham, confirmed by the letter from Mr Couchman, as to the usage up until the early 1990s and the evidence of Mrs Garrod and other teachers as to the usage from then until 2009. Mrs Swindells in her written statement confirms that the Land was used occasionally for lessons and outdoor activity but not at playtimes, dinner times or for after-school clubs during her headship which ran from 1991 to 2005.This seems to me to be consistent with the evidence of Mrs Garrod who gave evidence at the inquiry.
128. Land which has been acquired by a local authority for a particular statutory function will continue to be held for that purpose until it is appropriated for a different purpose. An appropriation requires some conscious deliberative process by a local authority; see Local Government Act 1972, s. 122; *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin); *R. (on the application of Malpass) v Durham* CC [2012] EWHC 1934 (Admin).
129. I find that there is no evidence to suggest that the Land has been appropriated for or held for any other purpose. The reference to the Land possibly being reserved for an infant

school has to be seen in the context that, according to Mr Mendham, in the 1960s it was the practice for separate infant schools or departments to be attached to primary schools. I note that the present school accepts children into the Reception class at age 5.

130. As the Land is held for educational purposes and is part of the existing School I accept that it has been held and used in performance of the following statutory duties of the local authority holding the Land

(i) Section 13(1) of the Education Act 1996 - to ensure that efficient primary education, secondary education and, in the case of a local authority in England, further education, are available to meet the needs of the population of its area. The same duty was imposed on local education authorities by the Education Act 1944, s.7.

(ii) Section 14(1)(a) of the Education Act 1996 to secure that sufficient schools for providing primary education are available for its area. The same duty was imposed on local education authorities by the Education Act 1944, s.8.

(iii) Section 175(1) of the Education Act 2002 specifically requires a local authority to make arrangements for ensuring that its education functions are exercised with a view to safeguarding and promoting the welfare of children and that the same duty is also imposed on the governing body of a maintained school by virtue of section 175(2).

131. The current guidance issued by the Secretary of State for Education under section 175 of the Education Act 2002 in relation to the safety of children is "Keeping Children Safe in Education" was issued in July 2015. That is statutory guidance to which the local authority and governors of the School must have regard in complying with their section 175 duties. Paragraph 7 states:-

> "All school and college staff have a responsibility to provide a safe environment in which children can learn"

132. I think that there are a number of problems with placing weight on the statutory guidance.

(i) First, for the purposes of considering statutory incompatibility it is my view that I have to confine myself to the period that is relevant to this application for registration of the Land as a TVG – i.e. 1989 - 2009. In order to have the effect of preventing the Land from becoming a TVG in 2009 the TVG rights must have been incompatible with the statutory duty at some point in the 20-year period. The statutory guidance issued in 2015 replaced guidance issued in 2014 which in turn replaced and consolidated earlier guidance in 2007 and 2004. So far as I am aware the earliest guidance issued under s.175 was that issued in 2004. The only statutory guidance

which could be relevant to the question whether or not TVG rights had accrued in 2009 is the guidance issued in 2004 and 2007.

(ii) All the versions of the Guidance are expressed in very general terms and seem to be mostly concerned with protection of children from abuse of one sort or another. The 2007 Guidance, for example, states

> "1.1. Everyone in the education service shares an objective to help keep children and young people safe by contributing to:
>
> - providing a safe environment for children and young people to learn in education settings;"

which is a much more watered down version from that in the 2015 Guidance. I have not been able to locate the 2004 guidance but it is unlikely to be expressed in terms very different from those in the 2007 Guidance. In any event, I am not convinced that the Guidance adds much to the statutory duty.

(iii) However, I do accept that the duty under s.175 would require the local education authority and the school governors to take steps to provide for the physical and moral safety of children whilst in school and that this duty would include taking steps to ensure that children are protected from any harm that could arise from uncontrolled contact with the general public whilst they are on school premises. The erection of a fence in order to keep the children separated from places of public access appears to me, therefore, to be a sensible, and in the modern social climate, essential measure in order to provide a safe environment in which children can be educated. I also accept that it is necessary for there to be some method of preventing children straying outside school grounds – for example onto the public highway.

133. There are two issues here. The first is whether, as a matter of law, the holding and use of Land for educational purposes – specifically the purpose of providing a primary school which also entails compliance with the s.175 duty – is a purpose incompatible with the acquisition of TVG rights and the registration of school land as a TVG. The second is whether there is such incompatibility in fact.

134. As already indicated in this report I can see no reason why the principle of incompatibility as described by *Lord Neuberger* in *Newhaven* should not apply to land held by a local authority for a specific statutory purpose - as a matter of law. Lord Neuberger expresses the principle as being based on

> "the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act."

This requires interpretation of the particular statutory purpose for which Parliament has authorised the "acquisition and use" of the Land and is not dependent on the identity of the body on whom the statutory purpose has been imposed. Whilst Lord Neuberger also drew on the principle of interpretation - *generalia specialibus non derogant* in support of the application of the principle to the powers of the Port in the *Newhaven* case I do not believe that it was critical to the principle itself. The distinction which Lord Neuberger was making seems to me to have been between powers that public bodies have generally available to them and powers that have been applied to specific areas of land. Where a statutory power has actually been applied to a particular piece of land and that land is used for the purpose for which the power is granted, it seems to me that the principle of incompatibility must be applicable whether the body having that power and purpose is a local authority or some other statutory body.

135. Thus, *Newhaven* Lord Neuberger pointed out :

(a) At para 98 of that in *New Windsor Corpn v Mellor* the land

> "was not acquired and held for a specific statutory purpose."

(b) At para. 99 in relation to the *Oxfordshire* case

> "while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility."

(c) At para 100, in relation to *R (Lewis) v Redcar and Cleveland Borough Council (No 2)*,

> "It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green."

(d) At para 101

> "The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour

authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

136. In the present case I have found that the Land was acquired for educational purposes, that it has not been appropriated for any other use and that from 1962 it has been used for the purpose of providing the Gorsey Bank School. In this case it is asserted by the Objector that the use of the Land is incompatible with its use as part of the school and evidence has been called as to why that is the case.

137. In my view, the principle of incompatibility can, as a matter of law, apply to land acquired by a local authority for, and used for the purposes of, their statutory functions as local education authority as identified above.

138. The alleged incompatibility must, in my view, exist during some part of the 20-year period in order to prevent TVG rights arising. The fact that land may have been used by the public for lawful sports and pastimes during that period notwithstanding the purpose for which the land has been acquired and is held, cannot, in itself, be determinative of actual incompatibility – otherwise the principle would never have any practical application. In *Newhaven* the beach had been used by the public over the 20-year period (and well before). The Supreme Court, at paras 94-97, took it as being self-evident that registration as a TVG would prevent the Port from being able to carry out all the functions it was empowered under its special Act to carry out – notwithstanding that the Port had not adduced any evidence that its exercise of its functions during the 20 year period had actually been restricted or prevented by the use of the beach.

139. On the same basis, the fact that Gorsey Bank School has managed to co-exist with some level of usage of the Land by local people over the 20-year period cannot be determinative of the question of actual incompatibility. The ability of the local education authority to provide school buildings (even, for example, a sports pavilion) on the Land, to enclose the Land to provide a safe play area for children and to exclude the public from any part of the Land so that it could be used for school activities, could not, in my view, be exercised compatibly with registration of the Land as a TVG. Mrs Garrod and Mrs Woolley gave evidence that the use of the Land for the purposes of the school would be severely restricted if it could not be enclosed, and the public excluded from it, whilst the school were using it. Mrs Garrod and Mrs Woolley specifically made reference to the need to safeguard the welfare of the children, to be able to control contact with the general public

and to the differences in the way the Land could be used depending on whether it was fenced or open to the general public. In my view, that evidence demonstrated that registration of the Land as a TVG was incompatible with many of the purposes connected with the school for which it might otherwise be used and, in respect of the fenced area, was now being used. This is confirmed by the much more limited use that the School made of the Land in the years immediately before the erection of the present fence (and the current usage of the unfenced part of the Land) and the usage of the enclosed area since that date.

140. Once the Land was committed to the purpose for which it was acquired and held – which I find to have been 1962 when the school opened on this site – that purpose was, in my view, incompatible with the acquisition of TVG rights over the Land. In my view an unrestricted right of access for members of the public living in the local community to enter at will onto the Land to walk and play with dogs, to set up a dog training course, or to play their own games would be incompatible with the use of the Land by the school as part of the school premises and would, after 2002, be incompatible with the duty of the local education authority to safeguard and promote the welfare of children at the school. I accept that it would be possible for the Land to be used as it had been used prior to 2009 but this usage was only possible by the School authorities treating the use of the Land in the same way as they would treat trips outside the school grounds. The use of the Land as a general play area at playtimes and lunchtimes and its use for organised school activities – such as sports days - would not, on the evidence I have heard, be contemplated or regarded as being consistent with the duty to promote and safeguard the welfare of the children.

141. I note that there are schools which have public footpaths running through them and I have noted the reference to such a path in the Offsted report attached to Mr Stubbs' further submissions. It may also be the case that schools still use public recreation grounds and swimming pools for some of their activities. However, the facts that public highway rights have grown up and been recognised under an understanding of the law pre-dating *Newhaven,* or possibly prior to the school itself having been built, and that schools can organise trips for groups of school children which brings them into contact with the public during the school day, does not seem to me to bear directly on the question whether or not registration and use as a TVG is compatible with land being held for the purposes of an existing school.

142. Furthermore, the position with a public footpath is very different from that with a TVG. The Ofsted report produced by the Applicant does not indicate what instructions had been

given to the school children about the footpath nor whether or not they were told to keep away from it – they were certainly told not to speak to or approach strangers. However, users of the path would have no right to deviate from the path into the school grounds. Contact between the children and the users of the path would be capable of being monitored and controlled and children could be segregated from members of the public using the public footpath. The same is not true if members of the public, including other children, are entitled to play freely within the same area as the schoolchildren. Whereas schools may sometimes have to cope with a pre-existing situation which is undesirable and perhaps unsafe, this is very different from saying that acquisition of public rights over land used for a school is compatible with the statutory purpose for which the school is held.

143. Mr Stubbs pointed to the Inspector's report in respect of Moorside Fields, Lancaster (Ref: COM 493) in support of his arguments. The Inspector, in that case, seems to me to have made three relevant findings,

(a) First, she was not satisfied on the evidence that the land in question had been held for educational purposes throughout the 20 year period – para 118. That is not the case here as I am satisfied that the Land has been held for educational purposes and specifically for the purpose of providing the Gorsey Bank school throughout the 20-year period.

(b) Secondly, the Inspector was not satisfied for what educational purpose the Land, or different parts of it, might be held. Two areas were marked on a plan as being for a replacement school site whilst no evidence was called to suggest that new school accommodation was required on the site and there were no current plans to do so. It appears, therefore, that these areas of land were regarded as being held for possible future use as a school and that the situation was more akin to the situation described by Lord Neuberger at para.101

> "The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility."

Again, that is not the situation here as I have found that the Land has throughout the 20 year period been held and used for the purposes of the provision of Gorsey Bank School.

(c) Thirdly, she seems to have concluded, on the evidence before her, that use for TVG purposes was not in fact clearly incompatible with the use of the relevant land for some educational purposes – e.g outdoor activities and sports. The evidence that I heard

indicates that as Gorsey Bank School has grown in size the amount of play space available to it no longer meets the recommended requirements. I have also heard evidence from two Head Teachers that their interpretation of their responsibilities to their children would prevent them allowing the school children to use the unfenced part of the Land as play space in the ways that the fenced area is currently being used.

(d) It was the Applicant's case that registration as a TVG would not prevent the school from sharing the Land with the public. Essentially his argument is similar to that in the *Lewis* case about the co-existence of TVG rights and the use of a golf course. However, there is no evidence here of co-existence between the full use of the land for all school purposes and the usage by the public. The evidence is, on the contrary, that the School was able to put the Land to a limited number of uses prior to the erection of the fence.

(e) It seems to me to be unrealistic to suggest that the school could use the Land as a playing field, or as a play area, if the public were able and entitled to enter onto the Land during any school activity, with or without dogs, and undertake any of the lawful sports and pastimes that registration of a TVG would authorise. Staff at the school would not be able to order the public off the Land, there would be no way of ensuring that the Land did not become contaminated by dog excrement during the school day, the concerns expressed at the inquiry about unauthorised contact by estranged parents would be extremely difficult to manage and I have no doubt that the only course that the school could adopt would be to revert to their previous fence line and to restrict the use of the Land to specific, limited and closely supervised small groups.

144. In any event, the issue here is not whether the school could revert back to the previous situation nor whether some school activities could still be carried out on the Land. At Newhaven the Port had co-existed with the use by the public of West Beach for more than half of a century and had performed effectively as a port. What had triggered the statutory incompatibility argument was the fact that they had plans to develop the port in accordance with their statutory powers which could not be carried out if the beach was registered as a TVG. Whilst the Supreme Court indicated that it was not necessary for the Port to lead evidence about its future plans Lord Neuberger's reasoning as expressed at paragraph 96 of the judgment was:

> "In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to

> ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

145. In the present case evidence was led as to the incompatibility between use for school purposes and registration as a TVG although in my view that incompatibility is equally obvious. The school could continue to operate. It could even revert to the restricted uses to which the Land had previously been put. However, the Land could not be available for the children to use as their playspace at playtimes and lunch times and could not be used in the same way as the rest of the school premises.

146. In my view registration and use of the Land as a TVG would be incompatible with the statutory purposes for which the Land was acquired and held and for which it had been used during the 20-year period namely the purpose of providing primary school premises pursuant the local education authority's duties under the Education Acts 1944 and 1996 and, since 2002, incompatible with the duty of the local education authority and the school governors under section 175(1) of the Education Act 2002.

Conclusion

147. Accordingly my recommendation to the Registration Authority is that this application should not be accepted and that the Land should not be registered as a Town or Village Green.

148. It was suggested to me that I should consider the registration of the unfenced section of the Land as a TVG. So far as usage in the 20 years prior to 2009 is concerned there is no material difference in the evidence of usage of the section of the Land currently unfenced and that which is currently fenced. Nor was there any suggestion that a wider group of people might have used one part of the Land rather than another. If a claim were to be put forward on the basis of 20 years usage from the date of the Inquiry (rather than from 2009) for registration of the unfenced area I consider that this would, in any event, require a fresh application. Consideration would have to be given to the effect which the erection of the fence, as an assertion of the landowner's rights, might have had on the continuity of any

usage of the unfenced section as of right after 2009. Whilst some evidence was heard at the Inquiry as to usage after February 2009 I could not be confident that the post 2009 usage had been sufficiently explored in evidence. In any event, this part of the Land remains held by the local education authority for the purposes of the school and, in my view, its registration would still be incompatible with the statutory purposes. I cannot, therefore, recommend that the currently unfenced part of the Land be registered as a Town or Village Green.

Stephen Sauvain Q.C. 8th February 2016

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THIS IS THE EXHIBIT REFERRED TO IN THE STATUTORY DECLARATION OF GORDON MELLOR DATED 15TH FEBRUARY 2013.

E. Mellor. LEBasford 15/2/2013.

LAURA E. BASFORD
SOLICITOR
37 TRENTHAM ROAD
LONGTON
STOKE-ON-TRENT
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CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13 June 2016
Report of:	Director of Legal Services
Subject/Title:	Village Green Application – Banky Fields, Congleton

1.0 Report Summary

1.1 This report deals with an application made by Mr Gordon Mellor on 8 March 2013 to register land at Banky Fields, Congleton as a Village Green. The application was made under Section 15(2) of the Commons Act 2006. The land in question is shown on the attached plan.

2.0 Recommendation

2.1 That the Committee receive and accept the recommendation contained in the written report (attached) of the Council's appointed independent expert, Mr. James Marwick of Counsel, and refuses the application for the reasons set out therein.

3.0 Reasons for Recommendations

3.1 After careful consideration of the application, evidence and all representations received, Mr Marwick has found that the land in question is held as open space, for public recreation, under statutory powers including the Open Spaces Act 1906, the Local Government (Miscellaneous Provisions) Act 1976 and the Local Government Act 1972. As such, and in accordance with settled case law, user of the land in question has been "by right" as opposed to "as of right". Therefore the statutory test cannot be made out and the application must fail.

4.0 Background

4.1 The Council is the commons registration authority for its area. As such it is responsible for determining applications to register land in its area as common land or as a town or village green.

4.2 This application falls to be determined under Section 15(2) of the Commons Act 2006. For the application to succeed, the applicant must demonstrate, on the balance of probabilities, all of the following. That:-

a) Lawful sports and pastimes have been indulged in on the land for a period of at least 20 years;

b) Those activities have been indulged in "as of right" (i.e. without secrecy, force or permission);

c) Those activities have been indulged in by a significant number of inhabitants of a locality or a neighbourhood within a locality;

d) That continued to be the case at the time of the application.

4.3 In this case, the 20 year period is the period of 20 years immediately preceding 8 March 2013, being the date upon which the application was made.

4.4 In accordance with its usual practice, the Council (following a resolution of this committee) appointed an independent expert to consider the application and prepare a report ("the Report") making a recommendation as to how the application should be determined. The appointed independent expert was Mr James Marwick of Counsel who, prior to preparing the Report gave preliminary consideration to the materials and, on 30 March 2015, issued Preliminary Advice and Directions (attached). The numbers in bold type below refer to paragraph numbers in either the Preliminary Advice and Directions or in the Report as the context so admits.

4.5 In his Preliminary Advice (**27**) and his Report (**17-25**), Mr Marwick identified the chain of cases which establishes in law the proposition that where a local or other public authority has lawfully allocated the land in question for public recreation or open space use, then such use is made of the land by the public "by right" and not "as of right". In those circumstances the "as of right" requirement of the statutory test cannot be met and an application to register land as a village green must, on that basis, be refused.

4.6 In his Preliminary Advice (**25**) Mr Marwick acknowledges that there are matters raised in the application which would ordinarily mean that the matter could not be determined without investigating those matters through a public inquiry. However, he notes (**26 & 29**) that "even taking the Applicant's case at its highest" (i.e. assuming the Applicant is correct about every other aspect of the statutory tests) the question of whether the use of the land has been "by right" as opposed to "as of right" may be determinative of the matter.

4.7 That question was potentially determinative because if the user was "by right" and not "as of right", then no matter how compelling the remainder of the applicant's case was, the application must, in law, fail. Accordingly, Mr Marwick was content to deal with that discreet matter on written representations and let the result of that determine whether an inquiry was then necessary to consider any other aspects. He issued directions to the parties on that basis.

4.8 Directions issued and duly complied with, and all relevant submissions made and considered, Mr Marwick the proceeded to issue his Report. In that Report (**26-31**), Mr Marwick found as follows:-

a) The Land is open space regulated under the Open Spaces Act 1906 and has, on the evidence, been laid out as open recreational space at all material times. As such, the land was at all material times held out for a statutory purpose for use as open space by the public (**26&27**).

b) That in accordance with the Supreme Court decision in *Regina (Barkas) v North Yorkshire County Council* [2014] UKSC31, as a matter of law use of land held under statute for the purposes of public recreation is use "by right" and not use "as of right" (**29**).

c) Therefore the application should be rejected (**31**).

4.9 The Applicant, and Landowners/Objector, having seen the Preliminary Advice & Directions, and having now been presented with a copy of the Report were invited to comment on the same. The Applicant commented:-

"When the Public Rights of Way committee meet to consider the village green application, I would ask them to approve the application on the grounds of this area of land is continually used for playing sports and recreational uses by the residents and children of the area, and not to refuse the application on a point of law.

If the committee refuse the application perhaps they would consider declaring the land as a public open space so the children and residents can continually use it for games and pastimes as I have for the last sixty years. But a Village Green would be better."

4.10 The advice from the Council's appointed expert is that it must refuse the application on this "point of law". The land is already held as public open space.

4.11 Cheshire East Council, as landowner, confirmed it had no comments to make on the Report.

4.12 Two other parties understood to be landowners did not offer up any comments on the content of the Report.

5.0 Wards Affected

5.1 Congleton West

6.0 Local Ward Members

6.1 Councillors Paul Bates, Gordon Baxendale and George Heyes

7.0 Financial Implications

7.1 There are no immediate financial implications that flow from the recommendation.

8.0 Legal Implications

8.1 In accordance with its standard practice, the Council appointed an independent expert in this field to consider and report on this matter. The recent high court decision in the Somerford matter has confirmed that this is an appropriate procedure to follow in the determination of village green applications.

8.2 The appointed expert carefully considered the matter, issuing to the parties Preliminary Advice and Directions on the “by right” versus “as of right” issue. Following the taking of that step, the independent expert allowed ample opportunity for further evidence and representations to be submitted, which too were considered very carefully. Having done so, he reached the recommendation reported herein.

8.3 Whilst the Council is not obliged to follow the independent expert’s recommendation, if it chose not to do so it would need a very clear and full explanation of the reasons for that decision, addressing all of the areas where it considered the independent report to be in error. Otherwise, a decision that did not follow the recommendation would be susceptible to challenge by judicial review.

9.0 Risk Management

9.1 This is dealt with in the legal implications section of the report.

10.0 Alternative Options

10.1 This is dealt with in the legal implications section of the report.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BANKY FIELDS, CONGLETON, CHESHIRE AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

PRELIMINARY ADVICE

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1. I am instructed by Cheshire East Borough Council (in its capacity as the relevant **registration authority** under the Commons Act 2006) in respect of an application dated 8th March 2013 (the **Application**) to register land at Banky Fields, Congleton in Cheshire (the **Land**) as a town or village green.

2. I am asked to act as an independent inspector in relation to the Application. I am a self-employed barrister in private practice who specialises in, among others, the law relating to village greens and open spaces. I am aware that this preliminary advice will be disclosed to the parties to the Application.

3. The Application is opposed by Cheshire East Borough Council in its capacity as **land-owner** and a Chinese Wall has been put in place by the Council to ensure there is no internal information sharing between the separate teams dealing with the Application as registration authority and land-owner respectively. This is in accordance with established practice where a council has a dual interest in an application to register land as a town or village green.

4. It is equally well established that it is acceptable and proper practice for a registration authority with such a conflict to appoint an independent expert to consider the application for registration. Such an approach was endorsed by the Court of Appeal in **R. (Whitmey) v Commons Commissioners [2005] QB 282**.

5. In this advice, references to **registration authority** and **land-owner** are references to Cheshire East Borough Council acting in those respective capacities.

6. In the first instance, I am asked to consider whether it is appropriate for the matter to be dealt with by way of a non statutory public inquiry or whether the matter can be dealt with by way of a written report prepared by myself after consideration of the written representations and evidence filed and served by the relevant parties. This preliminary advice therefore primarily addresses what I consider to be the appropriate procedure by which the Application should be determined by the registration authority together with other relevant procedural matters.

7. I have been provided with a copy of all relevant evidence and correspondence filed both in support of and against the Application, forwarded to me under cover of correspondence dated 25th March 2015. Nothing contained in this preliminary advice should be taken to be a determination of any factual or legal issue in respect of the Application.

8. The Application was made by a Mr. Gordon Mellor, a resident of Banky Fields, and accompanied by 13 letters of support from other local residents. The Application is proper in form, being made on Form 44 and completed with a statutory declaration. The Land is primarily a grass field which is owned and maintained by the land-owner. There are also some garages located on the southern part of the Land. Registration is sought under section 15(2) of the Commons Act 2006 (as amended), the relevant provision of which provides the following statutory test for registration:- *"(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."*

9. The Application states that the Land has been used for a wide range of sports and pastimes for well in excess of 20 years and a plan is annexed to it which identifies the neighbourhood relied upon by a relatively arbitrary circle encompassing the area around the Land.

10. The registration authority undertook a consultation exercise from 12th September 2013 to 6th December 2013 as part of which the Application was advertised and in particular any objections to it were invited from the land-owner. The land-owner did not respond to that consultation exercise.

11. There was then a delay, for unexplained reasons, in the subsequent consideration of the Application. I am instructed that because of this a renewed consultation exercise in November and December 2014 was undertaken which invited any further submissions from interested parties.

12. The land-owner did respond to that second consultation exercise by submissions dated 15th December 2014.

13. Mr. Mellor was allowed the opportunity to respond to those submissions and did so under cover of letter dated 26th January 2015, having in the meantime sought support from his local member of parliament, Fiona Bruce MP, who wrote to the registration authority under cover of letter dated 9th January 2015.

14. The primary objections of the land-owner are two-fold.

15. First, that the Application does not evidence a recognised neighbourhood within the meaning of the established case law.

16. Second, that the Land is held by the Council as open space under the Open Spaces Act 1906 and therefore that any use of the Land by local residents has been by right rather than as of right as the Land is held for public recreation purposes by the land-owner under a statutory trust. The land-owner avers that user alternatively has been by express and/or implied licence.

17. These propositions were rejected by Mr. Mellor in his said letter dated 26th January 2015 in which he also took exception to the procedural course adopted by the registration authority and in particular the second consultation exercise. Both Ms. Bruce and Mr. Mellor have questioned the entitlement of the registration authority to allow the land-owner what is perceived to be an unfair second bite of the cherry.

18. An unopposed application for registration as a town or village green does not lead to automatic registration of the land in question as a green. In each case, regardless of any objection, the registration authority must be satisfied that the applicant has strictly proved each constituent part of the test under section 15(2) on the balance of probabilities before determining that the application is successful: see, for example, the *Defra Guidance from February 2011*.

19. The registration authority has followed the procedural steps prescribed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) **Regulations** 2007 (including the consultation exercise prescribed by Regulation 5). The procedure provided for by the Regulations is directed towards ensuring that a fair opportunity is given to any relevant party to put its case and to respond to any matter raised during the course of consideration of the application. Regulations 6(2) to 6(4) expressly provide that the registration authority may take into account any further evidence or submissions filed after the close of its consultation period so long as the applicant is afforded the opportunity to consider and respond to the further evidence or submissions prior to determination of the application.

20. With regard to the above, I am satisfied for three reasons that the registration authority has acted properly and in accordance with a fair procedure in the present case:-

20.1 It has an express power under the Regulations to admit late evidence or submissions and an opportunity has been provided to the Applicant to respond to the same.

20.2 An application under section 15(2) must be considered on its own merits regardless of whether it is opposed or unopposed by the land-owner, which precludes the argument that the second consultation exercise has in itself frustrated the Application; it would face the same hurdles with or without the objection by the land-owner.

20.3 Finally, by my appointment as an independent inspector and by the imposition of a Chinese wall internally, the registration authority has acted in accordance with established good practice.

21. I am therefore satisfied that I can properly move on to address the question of whether the matter should be considered at non statutory public inquiry or by a written report.

22. There is no statutory duty or obligation placed upon a registration authority to determine a town or village green application by way of a public inquiry. A non statutory public inquiry will typically take place if there are material questions of fact which need to be determined in order for the town or village green application to itself be determined.

23. An obvious case would be where there is a substantial dispute as the extent and nature of the use of the material land over the course of the relevant 20 year period upon which the determination of the application will itself turn. In such cases, it would generally be sensible to hold an inquiry as the ultimate decision to register or not register is susceptible to challenge by judicial review on all the usual grounds.

24. If, however, there are narrow or no factual issues, or alternatively questions of law which may determine the application (notwithstanding any factual issues), a registration authority may choose to instruct a planning inspector or independent specialist to provide written advice and recommendations as to the merits of the application.

25. I summarised the objections to the Application very briefly earlier in this advice. The question of whether the Applicant has identified a sufficiently cohesive neighbourhood for the purposes of the Application would fall properly to be determined after the taking of evidence at a public inquiry as part of which the Applicant would be entitled to adduce evidence in support of the same. Regardless of whether or not I considered the Applicant's case to be strong in this respect on the papers, I would consider it an issue that I could only determine properly after the taking of evidence.

26. However, in contrast, the question of whether the use of land has been "by right" rather than "as of right" in that it has been used by local residents pursuant to a statutory trust by which the land is held as open space by the

land-owner for recreational purposes is a legal point which is potentially determinative of the Application without the need for an inquiry.

27. Recent case law has confirmed that in certain cases where land is held on trust, or laid out otherwise by statute for recreational purposes, the land is used by the local community "by right" and not "as of right": **R. (Barkas) v North Yorkshire County Council [2014] UKSC 31** (see for example, paragraph 23 of the Judgment per Lord Neuberger). I also direct the parties to the cases of **R. (Beresford) v Sunderland City Council [2003] UKHL 60** and **R. (Newhaven Port and Properties Limited) v East Sussex County Council** in which arguments relating to the ownership and maintenance of land by local authorities were also given further consideration. In particular, the Supreme Court in **Newhaven** considered the question of whether the imposition of byelaws gave rise to user not being "as of right" but rather under licence, the question being answered in the affirmative.

28. If user of the Land has not been "as of right", regardless of the extent of its user over the last twenty years for lawful sports and pastimes, this would likely be determinative of the Application.

29. It is therefore my view that it is a proper, reasonable and fair approach for the registration authority to obtain in the first instance written advice and recommendations as regards the merits of the Application without proceeding with a non statutory public inquiry. This is because the question of whether user has been "as of right" is potentially determinative of the Application and

it is an issue which can properly be considered without a public inquiry, taking the Applicant's case at its highest.

30. In coming to this conclusion, I express no view as regards the merits or otherwise of the Application. My full written advice and recommendations will be detailed in my written report in due course.

31. My recommendation is therefore that the matter can proceed by consideration of the Application on the basis of written representations and material evidence with a written report to be prepared thereafter for consideration by the registration authority.

32. I add that taking such a course of action does not preclude a non statutory public inquiry from later taking place if issues arise which make it prudent for such an inquiry to take place or I conclude in my written report that an inquiry is necessary.

33. My written report will consider whether there are any issues of law which, even when taking the Applicant's case at its highest, allow for the summary determination of the Application. The written report will therefore not be an exhaustive examination of when and how often the local community has used the Land but rather primarily a consideration of whether such user has been "as of right".

34. I would ask that the parties be invited to file and serve any further written evidence and written representations which they consider are relevant to my consideration of the Application, and in particular the question of whether user of the Land has been "by right" or "as of right".

35. Although the opportunity has already been afforded to the parties to make representations, on the basis of my flagging of the "by right" issue they should be entitled to make further representations as they see fit. Of particular relevance may be any further documentation which evidences the basis upon which the Land is held by the land-owner, albeit the key documentation appears to have been filed previously.

36. I should be grateful if my instructing solicitor could also collate any further relevant documentation in this respect.

Directions

37. I would ask that the following direction be notified to the parties:-

37.1 Any further evidence and written representations relied upon by any party be filed and exchanged by Monday 20th April 2015.

37.2 Any written representations in response to the same to be filed and exchanged by Monday 27th April 2015.

37.3 Any request for an extension to any of the above deadlines should be made in writing with reasons why an extension is sought as soon as it reasonably becomes clear that the deadline cannot be met.

38. Upon completion of the above directions, I will prepare my written report and recommendations. The parties should be warned that the failure to produce any further evidence and representations in accordance with the above timetable may lead to the same not being taken into account.

39. Please do not hesitate to contact me with any queries.

James Marwick

Trinity Chambers

30th March 2015

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IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BANKY FIELDS, CONGLETON AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

WRITTEN REPORT

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1. I am instructed by Cheshire East Borough Council (in its capacity as the relevant **Registration Authority** under the Commons Act 2006) in respect of an application dated 8th March 2013 (the **Application**) to register land at Banky Fields, Congleton in Cheshire (the **Land**) as a town or village green.

2. In a preliminary advice dated 30th March 2015 (which has been disclosed to the interested parties to the Application), I concluded that the Application could be considered by way of a written report after the filing of further representations and evidence rather than following a non-statutory public inquiry. This was because I considered there were issues which were potentially determinative of the matter even when taking the Applicant's case at its highest. The parties were duly afforded the opportunity to make further representations by the Registration Authority and I have been provided with copies of the same.

3. As foreshadowed in my preliminary advice, I am now duly instructed by the Registration Authority to prepare a written report in respect of the Application. In settling this written report, I have been provided with copies of the Application and all the material (including correspondence and statements) provided in support of it; the objections duly made to it; and further correspondence, submissions and evidence from all concerned with the Application, including such further representations as I invited in my preliminary advice. I have had regard to all of that material in compiling my report and recommendations.

The Application

4. The Application is dated 8th March 2013 (date-stamped by the Registration Authority on the same date) contained within Form 44 and completed with an appropriate statutory declaration by Mr. Gordon Mellor, who is named as the applicant in the Application (the **Applicant**).

5. The relevant land identified for registration is named as the playing field at Banky Fields, as identified in outline in red on a plan (scale 1:1000) appended to the Application. The neighbourhood relied upon in support of the Application is delineated on a separate plan by, on its face, a fairly arbitrary circle encompassing the wider vicinity to the Land. The Land is a large area of open recreational space which is crossed by public paths. There are also a number of garages located on the southern part of the Land.

6. There were a number of supporting statements by way of letter (thirteen in all) appended to the Application (as listed in section 10 of the Application). The statements, in broad terms, are from local residents and speak to extended user of the Land for well in excess of 20 years for a wide range of activities. There is a summary of the user appended to the Application which avers user for the full spectrum of activities, including, among others, football, kite flying and dog walking. Unlike as is sometimes seen, the supporting evidence is not in a questionnaire form which speaks to user without permission or force and the extent of user. However, suffice it to say that the Application, prima facie, establishes a case that there has been extensive user of the Land for lawful sports and pastimes for in excess of 20 years immediately prior to the date of the Application.

Objections by the Land-Owner

7. The Land is owned by Cheshire East Borough Council (in its capacity as Land-owner[1]): registered under title number CH420768. By objections dated 15th December 2014, it objected to the registration of the Land as a town or village green. Its primary objections can be summarised as follows:-

7.1 The Land at material times has been allocated as open space by the Land-owner in its capacity to do so as a local authority. In accordance with section 10 of the Open Spaces Act 1906 and **R (on the application of Barkas) v North Yorkshire County Council [2014]**

[1] My preliminary advice dealt with matters regarding the question of a conflict and the Land-owner's change in position during the course of the processing of the Application. For present purposes, I do not repeat that earlier advice and I use the distinct definitions of **Registration Authority** and **Land-owner** to delineate between its involvement in two capacities.

UKSC 31, any user of the Land has therefore been "by right" rather than "as of right".

7.2 Further, user of the Land is controlled by signs making clear that it is an offence not to clean up after your dog pursuant to the Dogs (Fouling of Land) Act 1996 (a subsequently repealed statute but in force at material times up to 2005).

7.3 The Application fails to identify a legally recognised administrative unit or cohesive neighbourhood within the meaning ascribed to the terms locality and neighbourhood by established case law.

7.4 Further and in the alternative, the Council avers that it has permitted user of parts of the Land, namely, the erection of garages (and access thereto) for use by licensees.

Further Representations

8. The Objector made no further representations after the issuing of directions pursuant to my preliminary advice. It repeated its original objections as summarised above (confirmed by email dated 5th May 2015).

9. In his further representations (contained in emails dated 29th April 2015, and then from 8th May 2015 onwards), the Applicant addressed issues predominantly concerning the licensing of the garages. As I will deal with below, the licensing of the garages is not, in my view, a central matter in relation to the Application.

Statutory Framework: The Commons Act 2006 (the **2006 Act**)

10. The Application is made under section 15(2) of the 2006 Act. That section provides the following test for registration of land as a town or village green[2]:-

"(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."

11. The burden of proving that the Land has become a town or village green lies with the Applicant. The standard of proof is the balance of probabilities. All the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on the balance of probabilities, per the guidance given by Lord Bingham in **R v. Sunderland City Council ex parte Beresford [2004] 1 AC 889.**

12. The motivation of the Land-owner in terms of any intended future development the Land is not a material consideration in considering whether the test under section 15(2) has been satisfied. Any future allocation of the Land by the Land-owner is also a matter outside the scope of my report.

[2] The Growth and Infrastructure Act 2013 (partly in force as from 25th April 2013) introduced a number of further significant measures to the law on registering new town and village greens under the 2006 Act, which require consideration in addition to the provisions of section 15(2) above, but which are not engaged in the circumstances of this Application. Section 15C of the 2006 Act took effect on 25th April 2013 and excludes the right to apply for the registration of land in England as a town or village green where a trigger event has occurred in relation to the land. The right to apply for registration of the land as a green remains excluded unless and until a terminating event occurs in relation to the land. Trigger and terminating events are set out in Schedule 1A to the 2006 Act.

13. There are a number of issues which would properly need to be determined at a non-statutory public inquiry. For example, the question of whether the Applicant has identified a neighbourhood within a locality within the meaning of section 15(2)[3] as challenged by the Land-owner is a matter, in my view, which could only be determined after the hearing of evidence at a public inquiry. Likewise, whether there has been sufficiency of user by a significant number of local inhabitants for the relevant 20 year period would be a matter properly for determination after a public inquiry, albeit that in a case where the Land has been laid out for recreational use by the Public this may readily be proven. For present purposes, I take the Applicant's case at highest; namely that it has established a prima facie case in these respects.

14. I say at this point that the parts of the Land on which the garages have been erected would undoubtedly fall not to be registered due to the presence of the building structures. It is well-established that this does not prevent an application succeeding in relation to other parts of the Land insofar as user of the balance of the Land can be shown (and the statutory test is otherwise satisfied). Equally, user of the Land for access to and from the garages would very likely fall outside of user for lawful sports and pastimes. However, I advise for present purposes on the basis that the Applicant would establish prima facie at a public inquiry that there has been significant user of the Land for lawful sports and pastimes (discounting any user associated with the

[3] A neighbourhood need not be a recognised administrative unit (unlike a locality), however, a neighbourhood cannot be an area simply delineated on a map. It must have a sufficient degree of cohesiveness: R. (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC [2003] EWHC 2803 (Admin); [2003] 4 P.L.R. 95. The question of whether there is such cohesiveness typically falls to be established at an inquiry. Whereas under the customary law, a right to indulge in activities could only attach to a single defined area, under the 2006 Act, "neighbourhood" can mean two or more neighbourhoods: Leeds Group Plc v Leeds City Council [2010] EWCA Civ 1438; [2011] Ch. 363.

garages and those parts of the Land upon which the garages have been erected).

15. The issue I identified as potentially determinative of the Application is whether user of the Land has been "as of right" and I now go on to address this issue and the relevant law in respect of the same. If user of the Land has not been "as of right" for the relevant 20 year period then the Application would fall to be rejected.

Qualifying User

16. The Applicant must prove, among others, on the balance of probabilities that there has been sufficient qualifying user (i.e. user as of right for lawful sports and pastimes) during the 20 year period (being the 20 years immediately prior to the date of the Application) to allow the Land to be registered.

17. User "as of right" means not by force, nor stealth, nor the licence of the owner. The most authoritative discussion of the term was that of Lord Hoffmann in **R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335** (at para 351A):-

"The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right- in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

18. The term was further considered by the Supreme Court in **R. (Barkas) v North Yorkshire County Council [2014] UKSC 31**. Per Lord Neuberger (at para 14):-

"…it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right"."

19. In **Barkas** the Supreme Court was considering whether user of land allocated for public recreation under the Housing Act 1985 by a local authority was user "by right" or "as of right". In finding that such user was "by right", Lord Neuberger held as follows (at para 21):-

"In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."

20. Lord Neuberger further elaborated upon the reasons why user of land allocated for use by the public by a local authority would fall to be considered in these terms (at para 24):-

"I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

21. The Supreme Court expressly endorsed the view of Lord Walker in **Beresford** as regards local authority land held under section 10 of the Open Spaces Act 1906 for the enjoyment of the land by the public as an open space (per Lord Walker at para 87):-

"…where land is vested in a local authority on a statutory trust under section 10 of the Open Space Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers."

22. In more straightforward terms, the consequence of the case law is that it is now settled law that where land is held by a local authority as allocated open space under section 10 of the Open Spaces Act 1906 then the public have had a right to use it and therefore user cannot be "as of right"[4].

23. **Beresford** is an earlier House of Lords case where there had been uncertainty as regards the specific statutory power under which the land in that case had been laid out as open space by the city council (albeit that there was contemporaneous evidence that it was undoubtedly demarcated as open space by the city council) and the majority of the House of Lords had therefore found that user "by right" could not be made out. **Beresford** was found to have been wrongly decided by the Supreme Court in Barkas: per judgments of Lord Neuberger and Lord Carnwath.

[4] Section 10 provides: *"A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—*
(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and
(b) maintain and keep the open space or burial ground in a good and decent state,
and many inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

24. Lord Neuberger held as follows at paragraph 49:-

"I consider that Beresford was wrongly decided for the reasons given by Lord Carnwath, and, while it would be wrong to repeat those reasons, it is right to express my reasoning in summary form, especially in view of my hesitation in giving the decision its quietus. It seems to me clear on the facts, which are helpfully summarised by Lord Carnwath in para 73, that the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period, and that, in those circumstances, there was no basis upon which it could be said that the public use of the land was "as of right": it was "by right". The point made in para 24 above applies. I should add that, quite apart from this, I also share the mystification expressed about the reasoning in Beresford by Sullivan LJ in the Court of Appeal in this case in the passage quoted by Lord Carnwath in para 85 below."

25. The Supreme Court in **R. (Newhaven) v East Sussex County Council and another [2015] UKSC** considered the extent to which the imposition of a byelaw by a local authority (even if not brought to the attention of users of land) could amount to a grant of a revocable implied permission for the public to use the land. In finding that a byelaw which prohibited certain activities, by implication, inferred a permission to do other activities (citing the example that a byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead: per paragraph 58), it was held that byelaws could confer such

permission even if not brought to the attention of the public (drawing an analogy with user by right pursuant to statute: per paragraph 71).

Analysis

26. The Land-owner avers that the Land is open space regulated under the Open Spaces Act 1906. There is no direct documentary evidence in this case that there has been any appropriation for this or any other purpose. However, pursuant to **Barkas**, it is plain that no such direct evidence of an appropriation is needed: per Lord Carnwath at paragraph 85. Equally, the evidence is all one way in this case that the Land has at all material times been laid out as open recreational space; it is known as the playing field at Banky Fields and the evidence of the Applicant is that it has been laid out as such for well in excess of twenty years. This is not a case where (save for the small area where the garages are situate) it can be reasonably contended that the Land has been laid out for any other purpose by the Land-owner (and its predecessors in title).

27. The Land-owner (and its predecessors in title) had wide powers at material times to hold land out for recreational purposes: the Open Spaces Act 1906, the Local Government (Miscellaneous Provisions) Act 1976 and the Local Government Act 1972 (in terms of its wide appropriation powers in particular) conferred such power to provide land as open space. In the context of both the statutory framework of powers available to the Land-owner (in particular under the Open Spaces Act 1906) and the manner in which the land was held out, I am satisfied on balance that the Land at material times was held out for a statutory purpose for use as open space by the public.

28. Such a conclusion is supported by Lord Carnwath's approval of the first instance Judge's decision in **Beresford** (per paragraph 74) in similar circumstances where there was no express evidence of an appropriation:-

"Smith J at first instance confirmed that decision. Like the authority she attached importance to the fact of public ownership:

"In my judgment, the fact that land is in public ownership is plainly a relevant matter when one is considering what conclusion a reasonable person would draw from the circumstances of user. It is well known that local authorities do, as part of their normal functions, provide facilities for the use of the public and maintain them also at public expense. It is not part of the normal function of a private landowner to provide facilities for the public on the land. Public ownership of the land is plainly a relevant consideration." ([2001] 1 WLR 1327, para 45)

I have set out this reasoning in some detail, because in my view the approach of the authority, and that of Smith J, were unimpeachable in common sense and in law."

29. Pursuant to **Barkas** (a decision of the most senior court in England & Wales), it is now well established that where land is allocated as open space in such circumstances then user by it by the public will amount to user "by right" and not "as of right". I have cited a number of paragraphs from **Barkas** which elaborate upon this distinction and in particular land held under the Open Spaces Act 1906. In essence, where land is laid out under statute for recreational purposes as open space, the public do not use it "as of right" but "by right". I have concluded that this is such a case given the Land-owner is a local authority which has held the Land at material times as open space.

30. I am fortified in this view by the presence of the signs on the Land controlling its use. The Dogs (Fouling of Land) Act 1996 entitled a local authority to control the fouling of its land in such a way where access to it was afforded to the public by entitlement or permission: per section 1 of the said Act. Furthermore, pursuant to **Newhaven**, the control of user of land in such a way pursuant to statute can amount to the granting of an implied revocable permission to use the Land. The presence of the signs pursuant to the said Act when read with the Act would imply to the public that they had a right or permission to use the Land as it is in only in such circumstances that the Act would apply. Thus, even if I was wrong on my first conclusion as regards user by right, I would be satisfied that the imposition of the signs controlling user of the Land would be sufficient to defeat any finding of user "as of right".

31. It follows that the Application must fail, in my view, because any user of the Land has been "by right" and not "as of right" for the reasons I have given above. For the avoidance of doubt, insofar as garages have been constructed on small plots of the Land and present during the relevant 20 year period those parts of the Land would in any event, in my view, fall not to be registered as no user for lawful sports and pastimes was possible and user of those parts of the Land has been by an express licence. However, the balance of the Land is otherwise open space and for the reasons I have given, the Application fails in relation to such open space.

Conclusion and Recommendations

32. I have concluded as follows:-

32.1 User of the Land has not been "as of right" but "by right" at material times (save where garages have been constructed where no user can be established).

32.2 I recommend that the Application be rejected for the reasons I have given and for the reasons for rejection to be recorded as those stated in this report.

33. If there are any queries with this report, please do not hesitate to contact me.

James Marwick

Trinity Chambers

j.marwick@trinitychambers.co.uk

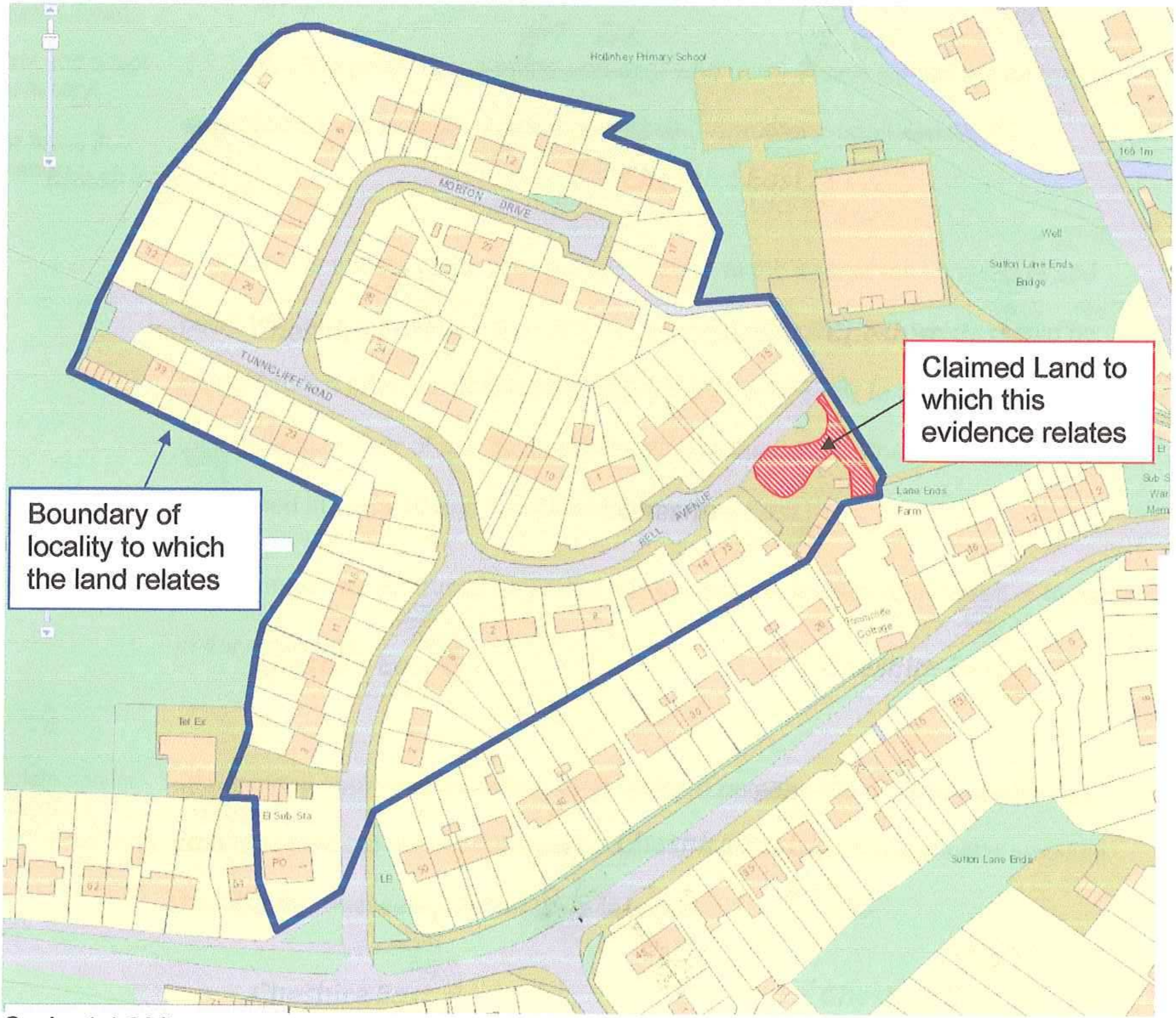
24th June 2015

This map is the exhibit referred to as MAP A on the attached Form 44. [signature] Rosemary C Pike 8.3.13.

MAP A - LOCATION OF CLAIMED LAND AND LOCALITY

Map A identifies the location of the claimed land to which this application relates as the hashed area (shown on Map A) adjacent to No. 16 Bell Avenue, Sutton, Macclesfield, SK11 0EE.

The locality to which this land relates is identified using a bold line (shown on Map A) encompassing the dwellings of Bell Avenue, Morton Drive and Tunnicliffe Road.



Scale: 1:1,200

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13 June 2016
Report of:	Director of Legal Services
Subject/Title:	Village Green Application – Land Bell Avenue, Sutton in Macclesfield, Cheshire

1.0 Report Summary

1.1 This report deals with an application made for and on behalf of Sutton Parish Council on 8 March 2013 to register land at Land Bell Avenue, Sutton in Macclesfield as a Village Green. The application was made under Section 15(2) of the Commons Act 2006. The land in question is shown on the attached plan.

2.0 Recommendation

2.1 That the Committee receive and accept the recommendation contained in the written report (attached) of the Council's appointed independent expert, Mr. James Marwick of Counsel, and refuses the application for the reasons set out therein.

3.0 Reasons for Recommendations

3.1 After careful consideration of the application, evidence and all representations received, Mr Marwick has identified that the land in question was laid out by Macclesfield Rural District Council, and subsequently held by its successor(s), under statutory housing legislation. As such, and in accordance with settled case law, user of the land in question has been "by right" as opposed to "as of right". Therefore the statutory test cannot be made out and the application must fail.

4.0 Background

4.1 The Council is the commons registration authority for its area. As such it is responsible for determining applications to register land in its area as common land or as a town or village green.

4.2 This application falls to be determined under Section 15(2) of the Commons Act 2006. For the application to succeed, the applicant must demonstrate, on the balance of probabilities, all of the following. That:-

a) Lawful sports and pastimes have been indulged in on the land for a period of at least 20 years;

b) Those activities have been indulged in "as of right" (i.e. without secrecy, force or permission);

c) Those activities have been indulged in by a significant number of inhabitants of a locality or a neighbourhood within a locality;

d) That continued to be the case at the time of the application.

4.3 In this case, the 20 year period is the period of 20 years immediately preceding 8 March 2013, being the date upon which the application was made.

4.4 In accordance with its usual practice, the Council (following a resolution of this committee) appointed an independent expert to consider the application and prepare a report ("the Report") making a recommendation as to how the application should be determined. The appointed independent expert was Mr James Marwick of Counsel who, prior to preparing the Report gave preliminary consideration to the materials and, on 25 April 2015, issued Preliminary Advice and Directions (attached). The numbers in bold type below refer to paragraph numbers in either the Preliminary Advice and Directions or in the Report as the context so admits.

4.5 In his Preliminary Advice (**23-31**), Mr Marwick identified the chain of cases which establishes in law the proposition that where a local, or other public, authority has lawfully allocated the land in question for public recreational or open space use, then such use is made of the land by the public "by right" and not "as of right". In those circumstances the "as of right" requirement of the statutory test cannot be met and an application to register land as a village green must, on that basis, be refused.

4.6 In his Preliminary Advice (**18, 21, and 22**) Mr Marwick acknowledges that there are matters raised in the application which would ordinarily mean that the matter could not be determined without investigating those matters through a public inquiry. However, he notes (**32**) that "even taking the Applicant's case at its highest" (i.e. assuming the Applicant is correct about every other aspect of the statutory tests) the question of whether the use of the land has been "by right" as opposed to "as of right" may be determinative of the matter.

4.7 That question was potentially determinative because if the user was "by right" and not "as of right", then no matter how compelling the remainder of the applicant's case was, the application must, in law fail. Accordingly, Mr Marwick was content to deal with that discreet matter on written representations and let the result of that determine whether an inquiry was then necessary to consider any other aspects. He issued directions to the parties on that basis.

4.8 Directions issued and duly complied with, and all relevant submissions made and considered, Mr Marwick the proceeded to issue his Report. In that Report (**8-18**), Mr Marwick found as follows:-

a) The Land was acquired by Macclesfield Rural District Council (a predecessor in title to Macclesfield Borough Council and East Cheshire Borough Council) as part of a larger conveyance of land executed on or about 21st March 1947 (**8**).

b) the Land was subsequently lawfully laid out as a housing estate sometime in the post-war period (**9-11**)

c) At all material times, a local authority was entitled to lay out open space in connection with the laying out of the housing estate: section 80 of the Housing Act 1936 and later provided for by section 12 of the Housing Act 1985 which was the relevant statute in force during the 20 year period (**12**).

d) User of the Land has been "by right" and not "as of right" from 1993 to 2006 in circumstances where qualifying user must be shown from 1993 to 2013. Therefore the recommendation is that the application be rejected (**17**).

4.9 The Applicant and Objector, having seen the Preliminary Advice & Directions, and having now been presented with a copy of the Report were invited to comment on the same. The Applicant has not responded to that invitation. The objector (landowner) has confirmed that they have no comments to make.

5.0 Wards Affected

5.1 Sutton

6.0 Local Ward Members

6.1 Councillor Hilda Gaddum

7.0 Financial Implications

7.1 There are no immediate financial implications that flow from the recommendation.

8.0 Legal Implications

8.1 In accordance with its standard practice, the Council appointed an independent expert in this field to consider and report on this matter. The recent high court decision in the Somerford matter has confirmed that this is an appropriate procedure to follow in the determination of village green applications.

8.2 The appointed expert carefully considered the matter, issuing to the parties Preliminary Advice and Directions on the "by right" versus "as of right" issue. Following the taking of that step, the independent expert allowed ample opportunity for further evidence and representations to be submitted, which too were considered very carefully. Having done so, he reached the recommendation reported herein.

8.3 Whilst the Council is not obliged to follow the independent expert's recommendation, if it chose not to do so it would need a very clear and full explanation of the reasons for that decision, addressing all of the areas where it considered the independent report to be in error. Otherwise, a decision that did not follow the recommendation would be susceptible to challenge by judicial review.

9.0 Risk Management

9.1 This is dealt with in the legal implications section of the report.

10.0 Alternative Options

10.1 This is dealt with in the legal implications section of the report.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BELL AVENUE, SUTTON AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

PRELIMINARY ADVICE

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1. I am instructed by Cheshire East Borough Council (in its capacity as the relevant **registration authority** under the Commons Act 2006) in respect of an application dated 8th March 2013 (the **Application**) to register land at Bell Avenue, Sutton in Macclesfield, Cheshire (the **Land**) as a town or village green.

2. I am asked to act as an independent inspector in relation to the Application. I am a self-employed barrister in private practice who specialises in, among others, the law relating to village greens and open spaces. I am aware that this preliminary advice will be disclosed to the parties to the Application.

3. In the first instance, I am asked to consider whether it is appropriate for the matter to be dealt with by way of a non statutory public inquiry or whether the matter can be dealt with by way of a written report prepared by myself after consideration of the written representations and evidence filed and served by the relevant parties.

4. This preliminary advice therefore primarily addresses what I consider to be the appropriate procedure by which the Application should be determined by the registration authority together with other relevant procedural matters. I have been provided with a copy of all relevant evidence and correspondence filed both in support of and against the Application, forwarded to me under cover of correspondence dated 25th March 2015. Nothing contained in this preliminary advice should be taken to be a determination of any factual or legal issue in respect of the Application. Equally, this advice is not intended as an full rehearsal of all evidence but rather summarises the key matters at this stage.

5. The Application was made for and on behalf of Sutton Parish Council (the **Applicant**). The Application is made on Form 44 and completed with a statutory declaration completed by a Mr. Trevor Maddock in his capacity as the clerk and responsible financial officer of the Applicant. The Land is identified on an attached plan as an area of mature open space adjacent to Bell Avenue which forms part of a residential estate including the roads Morton Drive and Tunnicliffe Road. The locality is identified as an area delineated by a blue line which encompasses the housing estate and the Land insofar as it extends around the residential houses on the three aforesaid roads. Registration is sought under section 15(2) of the Commons Act 2006 (as amended), the relevant provision of which provides the following statutory test for registration:- *"(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."*

6. The Application states that the Land has been used for a wide range of recreational purposes for in excess of 20 years and that such user has been open user without permission. The prominence of the Land as the only green open space in the vicinity of this area is cited together with the loss of amenity which would be caused by any development on the Land; in this respect, the Application cites an application for planning permission which had been made in relation to the Land sometime previous to the Application (the Application pre-dates the imposition of the trigger event amendments to the 2006 Act).

7. In support of the Application are a significant number of questionnaires and correspondence otherwise from local residents (not all of whom are from the three aforementioned residential roads), as well as the Bell Avenue Residents Group. The questionnaires and correspondence on their face make an evidential case that there has been user of the land by local residents (a term I use without prejudice to the 'locality' relied upon by the Applicant in the Application) for a number of lawful sports and pastimes for well in excess of 20 years.

8. The Land is owned by the Peaks and Plains Housing Trust (the **Trust**). The Trust has objected to the Application in a detailed objections statement filed on its behalf by Planning and Law Limited on 6th December 2013. In its objections, the Trust identifies that the Land was transferred to its ownership pursuant to a wider housing stock transfer from Macclesfield Borough Council (as it then was) on 17th July 2006.

9. Appended to the objections are a number of plans which delineate the transferred stock. They do not include any documentation otherwise relating to the execution of the transfer.

10. The Trust avers that the land is landscaped land which forms part of an area of a garage court. The Trust takes a number of objections which include (non-exhaustively) that a locality or neighbourhood has not properly been identified, that there is not evidence of significant user and that given the nature of the Land as very much ancillary to the garage court that any user must have been of a low level and by implied permission of the Trust. The Trust also answers the Applicant's case that this is the only green open space in the nearby vicinity and makes the point that the Application is, in its view, motivated by preventing any development.

11. The Applicant was afforded the opportunity to respond to the objections of the Trust and did so in further representations dated 24th July 2014 in which, inter alia, the extent of user alleged by the Trust was rebutted.

12. I have seen photographs of the Land (which I understand were provided in support of the Application) which show that is indeed a small area of open grassed space with a number of mature trees present on it (seven in total as I understand from the Bell Avenue Residents Group letter dated 2nd December 2013).

13. As a starting point, I am satisfied that there are no procedural irregularities in how the Registration Authority has dealt with the matter to date with the application processed in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) **Regulations** 2007 (including in particular the consultation exercise prescribed by regulation 5).

14. I am therefore satisfied that I can properly move on to address the question of whether the matter should be considered at a non statutory public inquiry or by a written report.

15. There is no statutory duty or obligation placed upon a registration authority to determine a town or village green application by way of a public inquiry. A non statutory public inquiry will typically take place if there are material questions of fact which need to be determined in order for the town or village green application to itself be determined.

16. An obvious case would be where there is a substantial dispute as the extent and nature of the use of the material land over the course of the relevant 20 year period upon which the determination of the application will itself turn. In such cases, it would generally be sensible to hold an inquiry as the ultimate decision to register or not register is susceptible to challenge by judicial review on all the usual grounds.

17. If, however, there are narrow or no factual issues, or alternatively questions of law which may determine the application (notwithstanding any factual issues), a registration authority may choose to instruct a planning inspector or independent specialist to provide written advice and recommendations as to the merits of the application.

18. I summarised the objections to the Application by the Trust very briefly earlier in this advice. I have considered all objections raised to the Application. The question of whether there has been sufficient user of the Land in the 20 year period immediately pre-dating the Application would fall properly to be determined after the taking of evidence at a public inquiry. The Applicant would be entitled to adduce evidence in support of the same and the Trust to seek to rebut it. Regardless of whether or not I considered the Applicant's case to be strong in this respect on the papers, I would consider it an issue that I could only determine properly after the taking of evidence (particularly where there are a large number of questionnaires).

19. Prima facie, the Application is likely deficient in that it identifies the triumvirate of streets as the locality when it is settled law that the locality must be an administrative area recognised by law and a distinct and recognisable community as might lay claim to a town or village green: **Ministry of Defence v Wiltshire CC [1995] 4 All E.R. 931**. It is in fact a neighbourhood within a locality that is likely intended to be relied upon the Applicant.

20. A neighbourhood need not be a recognised administrative unit. However, a neighbourhood cannot be an area simply delineated on a map. It must have a sufficient degree of cohesiveness: **R. (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC [2003] EWHC 2803 (Admin); [2003] 4 P.L.R. 95.**

21. It would not be proper for the Application to be rejected on the basis that it does not correctly identify a locality or a neighbourhood within a locality as it is a matter manifestly capable of remedy by the Applicant and likely simply an error which may have arisen due to a misunderstanding of the statutory test. The Regulations expressly provide at regulation 6(4) that in such circumstances the Applicant should be afforded a reasonable opportunity to remedy the position. I consider that the question of whether the triumvirate of streets which is likely intended to be the neighbourhood relied upon has a sufficient degree of cohesiveness would be a matter for determination after a public inquiry.

22. In my view, no point of law is otherwise taken in the objections which would, in my view, be determinative of the Applications; the objections taken are for proper consideration after an inquiry. This is not to pre-judge the merits of the Application either way. In terms, on the face of the objections to the Application I would not be satisfied that the Application could be disposed of without a public inquiry (subject to the remedying of the 'neighbourhood' point).

23. There is, however, a further matter which is raised by the Trust's objections. For the substantial balance of the relevant 20 year period (which extends from 1993 through to 2013) during which user of the Land must be evidenced, the Land was owned by a local authority, namely Macclesfield Borough Council. Local authorities are creatures of statute and hold land for prescribed statutory purposes. In the absence of any evidence to the contrary, it would appear likely on its face that the Land was laid out under the Housing legislation (as enacted by section 12 of the Housing Act 1985 at material times) by Macclesfield Borough Council (or its predecessors in title) in connection with the provision of housing accommodation as open space for use by the public.

24. If this was the case, the Supreme Court has now ruled in **Barkas v North Yorkshire County Council & Ors [2014] UKSC 31** that where the owner of land is a local, or other public, authority which has lawfully allocated the land for public use such use is "by right" and not "as of right" and that it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right" simply because the authority has not objected to their using the land. In that case, land had been allocated as recreational space pursuant to section 12(1) of the Housing Act.

25. I also direct the parties to the case of **R. (Newhaven Port and Properties Limited) v East Sussex County Council [2015] UKSC 7**.

26. In that cases arguments relating to the ownership and maintenance of land by local authorities were also given further consideration. In particular, the Supreme Court in **Newhaven** considered the question of whether the imposition of byelaws gave rise to user not being "as of right" but rather under licence, the question being answered in the affirmative.

27. Equally, the housing transfer documentation may evidence that the Trust holds the Land on trust on an equivalent basis for the public.

28. If user of the Land has not been "as of right" but "by right", regardless of the extent of user over the last twenty years for lawful sports and pastimes, this would likely be determinative of the Application.

29. It is important that to the extent possible the basis upon which the former local authority held the Land is established. Further, it is proper that the parties have a reasonable opportunity to deal with this issue: per regulation 6 of the Regulations.

30. For the avoidance of doubt proper in every application under section 15(2) of the 2006 Act, regardless of any objection, the registration authority must be satisfied that the applicant has strictly proved each constituent part of the test under section 15(2) on the balance of probabilities before determining that the application is successful: see, for example, the *Defra Guidance from February 2011*.

31. The Regulations further expressly provide at regulation 6 for an opportunity to be afforded for the Applicant to respond to any further point not raised in an objection. I am therefore satisfied that there is no barrier to the taking of this issue and indeed that it is proper that the issue is dealt with.

32. Upon the said opportunity being afforded to the parties to deal with the issue, it is my view that the registration authority may obtain in the first instance written advice and recommendations as regards the merits of the Application without proceeding with a non statutory public inquiry. This is because the question of whether user has been "as of right" or "by right" is potentially determinative of the Application and it is an issue which can properly be considered without a public inquiry, even taking the Applicant's case at its highest.

33. In coming to this conclusion, I express no view as regards the merits or otherwise of the Application. My full written advice and recommendations will be detailed in my written report in due course.

34. I add that taking such a course of action does not preclude a non statutory public inquiry from later taking place if issues arise which make it prudent for such an inquiry to take place or I conclude in my written report that an inquiry is necessary especially as my opinion will be subject to further evidence and representations relating to the "by right" issue.

Directions

35. I would ask that the following direction be notified to the parties. These directions are primarily directed at affording the opportunity to the parties to deal with the question of the basis of ownership of the Land by the Trust and Macclesfield Borough Council and the consequences of the same.

35.1 Any further evidence relied upon by any party be filed and exchanged by Friday, 15th May 2015.

35.2 The registration authority will disclose any further evidence relating to the statutory basis of ownership that it obtains through further inquiry by Friday, 15th May 2015.

35.3 Any written representations of the parties in response to the same to be filed and exchanged by Friday, 29th May 2015.

35.4 Any request for an extension by the parties to any of the above deadline should be made in writing with reasons why an extension is sought as soon as it reasonably becomes clear that the deadline cannot be met.

35.5 The parties' attention is drawn to the case law I have identified above.

36. Upon completion of the above directions, I will prepare my written report and recommendations. I repeat what I have said above at paragraph 34. The parties should be warned that the failure to produce any further evidence and representations in accordance with the above timetable may lead to the same not being taken into account.

37. I ask my instructing solicitor to note paragraph 35.2 and I would advise that the registration authority should make suitable further evidential enquiries.

38. Please do not hesitate to contact me with any queries.

James Marwick

Trinity Chambers

21st April 2015

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BELL AVENUE, SUTTON AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

WRITTEN REPORT

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1. I am instructed by Cheshire East Borough Council (in its capacity as the relevant registration authority under the Commons Act 2006) (the **Registration Authority**) in respect of an application dated 8th March 2013 (the **Application**) to register land at Bell Avenue, Sutton in Macclesfield, Cheshire (the **Land**) as a town or village green.

2. I settled a preliminary advice dated 27th April 2015 which invited further representations and evidence from the parties in respect of the statutory basis upon which the Land was held by Macclesfield Borough Council (and/or its predecessors in title). This is because where land has been lawfully allocated by a local or public authority for public use, it is now established that user of the land is "by right" and not "as of right": R. (Barkas) v North Yorkshire County Council [2014] UKSC 31. Thus, I considered that examination of this issue might prove determinative of the Application, notwithstanding that the Applicant had put forward a case which was otherwise properly to be determined at a non-statutory public inquiry.

3. I gave directions (subsequently amended) which provided for the parties to serve any further evidence and representations they sought to rely upon in respect of this issue.

4. The Objector subsequently disclosed documentation relating to a conveyance of the land in 1947 and an indenture from 1920 under cover of an email dated 14th July 2015 which invited a finding that the Land was laid out under relevant statutory housing legislation. This was later supplemented by an advice from Counsel (Mr. John Hunter) dated 27th July 2015 which dealt with the further evidence and the inference to be drawn from the same. The Applicant was afforded the opportunity to deal with the further evidence and representations from the Objector, and did so in an email dated 3rd September 2015 which queried the absence of the Land from any development plan or any later planning application.

5. I am satisfied that I am in a position now to deal with the issue raised in my preliminary advice and that it is proper for me to do so based upon the written evidence. As well as the above representations and evidence, I have been provided with copies of the Application and all the material (including correspondence and statements) provided in support of it; the objections duly made to it; and further correspondence, submissions and evidence from all concerned with the Application. I have had regard to all of that material in compiling my report and recommendations.

6. This report and its recommendations are concerned with the issue of whether user of the Land has been "as of right" at material times. As I have advised above, I consider that the balance of the constituent parts of the test laid down by section 15(2) of the Commons Act 2006 (the **2006 Act**) would properly be matters for determination at an inquiry.[1]

[1] Section 15(2) provides:-

> *"(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."*

7. The burden of proving that land has become a town or village green lies with the applicant. The standard of proof is the balance of probabilities and I apply this standard in the findings I make in this report. All the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on the balance of probabilities.

8. The documentation relating to the 1947 conveyance evidences that the Land was acquired by Macclesfield Rural District Council (a predecessor in title to Macclesfield Borough Council and Cheshire East Borough Council) as part of a larger conveyance of land executed on or about 21st March 1947. The indenture dated 10th July 1920 and its accompanying plan identify the Land as being part of the wider area conveyed in 1947.

9. It does not appear to be in dispute that an area, encompassing the Land, was subsequently laid out as a housing estate sometime in the post-war period. Even if this was in dispute, I would be satisfied by (i) the stock transfer of social housing and land to the Objector in 2006 and (ii) the private sales of properties within the estate from 1973 onwards listed as memoranda in the 1947 conveyance documentation, that a housing estate had been laid out by Macclesfield Rural District Council and subsequently held as such by it and its successor(s) in title at material times up to the stock transfer in 2006.

10. There is no express reference in the documentation to the statutory basis upon which the Land was laid out as part of a wider housing estate or the basis upon which the land was acquired in 1947. The Objector relies upon the case of Naylor v Essex CC [2014] EWHC 2560 (Admin) as authority for the proposition that an inference can be drawn in the absence of any direct evidence as to the basis upon local authority land has been laid out, applying the statutory

presumption of regularity: per paragraphs 11 to 13 of Mr. Hunter's advice dated 27th July 2015.

11. I accept this proposition which is supported by the Supreme Court's decision in Barkas, where it was held that the case of R. v Sunderland City Council ex parte Beresford [2004] 1 AC 889, in which there was no direct evidence of the basis upon which the open space in question was laid out, was wrongly decided with Lord Neuberger concluding at paragraph 49 that it was clear on the facts that that land must have been lawfully allocated. I am therefore satisfied that I may draw such inference as I consider reasonable in the absence of any direct evidence, an approach which was affirmed in Naylor.

12. I find that the Land was laid out by Macclesfield Rural District Council, and subsequently held by its successor(s), under statutory housing legislation. Although there is no direct evidence of this in the conveyance or otherwise, local authorities are creatures of statute and must act in accordance with their statutory powers. I have already concluded that the Land was laid out as part of a wider housing estate, and applying the presumption of regularity, I am satisfied that this was, as matter of inference, pursuant to the statutory housing legislation in force at material times (including the Housing Act 1936 as at 1947, the Housing Act 1957 and more lately the Housing Act 1985). At all material times, a local authority was entitled to lay out open space in connection with the laying out of the housing estate: section 80 of the Housing Act 1936 and later provided for by section 12 of the Housing Act 1985 which was the relevant statute in force during the 20 year period. I am satisfied that the Land was laid out as open space in connection with the laying out of the estate generally. It has at all material times been an area of open space used by the public on the Applicant's case.

13. I have taken account of the Applicant's representations that there is an absence of direct evidence relating to the purpose for which the Land was held and a lack of reference in later development plans and planning consent(s). However, I am satisfied that I am entitled to draw the inference I have set out above pursuant to the authorities and that the evidence supports the conclusion I have reached.

14. It is established from Barkas that any member of the public using land laid out and held as open space under section 12 of the Housing Act 1985 does so by right. In Barkas the Supreme Court was considering whether user of land allocated for public recreation under the Housing Act 1985 by a local authority was user "by right" or "as of right". In finding that such user was "by right", Lord Neuberger held as follows (at para 21):-

> *"In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."*[2]

15. The relevant 20 year period in the present case is that immediately preceding the date of the Application. From the commencement of that period in March 1993 until the stock transfer in 2006, I have concluded that the Land was laid out as open space under Macclesfield Borough Council's (and any predecessors) statutory housing spaces.

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[2] As to the distinction between "by right" and "as of right", Lord Neuberger in Barkas (at para 14):-

> *"…it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right"."*

16. Applying Barkas, I am satisfied that user of the Land during this period has been "by right" rather than "as of right", and the Application must therefore fail as qualifying user cannot be shown during the relevant 20 year period.

Conclusion

17. I have concluded as follows:-

    17.1 User of the Land has been "by right" and not "as of right" from 1993 to 2006 in circumstances where qualifying user must be shown from 1993 to 2013.

    17.2 I recommend that the Application be rejected for the reasons I have given and for the reasons for rejection to be recorded as those stated in the report.

18. If there are any queries with this report, please do not hesitate to contact me in Chambers.

James Marwick
Trinity Chambers
j.marwick@trinitychambers.co.uk
29th October 2015

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of meeting:	13th June 2016
Report of:	Director of Legal Services and Monitoring Officer
Title:	Village Green Application – Land Adjacent to Chelford Road and Black Firs Lane, Somerford

1.0 Purpose of Report

1.1 This report is intended to apprise members of the outcome of the Judicial Review the decision to refuse to register land at Black Firs Lane, Somerford as a village green. It also seeks authority to appoint an independent expert to reconsider that matter and report to a subsequent meeting of this Committee.

2.0 Recommendations

2.1 That the Director of Legal Services be authorised to appoint an appropriately qualified independent expert to conduct a non-statutory public inquiry to consider the application and provide the Committee with a report and recommendation for determination.

3.0 Reasons for Recommendations

3.1 The High Court has quashed the Council's decision to refuse the application thereby declining to register the land in question as a village green. Consequently, the Council must now re-take the decision curing the defects in process identified by the court.

4.0 Background

4.1 An application in respect of land along the verge of Black Firs Lane and Chelford Road, Somerford ("the Application Land") was initially submitted in May 2013, and refused at Committee on 15th September 2014, following a written report provided by an independent expert, Mr James Marwick.

4.2 The decision to refuse the application was subsequently challenged by Judicial Review proceedings in the High Court on the following four grounds:-

(i) Did the Defendant act in breach of the rule of natural justice that no one should be judge in their own cause?

(ii) If the Defendant was entitled to act on the advice of an independent legal expert, was Mr Marwick such an expert?

(iii) Was Mr Marwick's advice vitiated by procedural error by allowing the Defendant to put in evidence opposing the TVG application out of time and not giving Mr Bell the opportunity to comment on the late evidence before giving his opinion?

(iv) Was the decision of the Defendant procedurally erroneous in that Mr Marwick did not hold a public inquiry to find facts?

4.3 In respect of Ground (i) the court found in favour of the Council finding that the Council's practice of appointing an independent expert to consider the matter and report to the Public Rights of Way Committee, who would then determine the matter on the basis of that report, was a lawful process in keeping with the rules of natural justice.

4.4 In respect of Ground (ii) the court found that Mr Marwick was a suitable independent expert.

4.5 In respect of Ground (iii) the court found that Mr Marwick had fallen into error, procedurally, by accepting late highways evidence from the Council and not giving Mr Bell sufficient time to comment on the same.

4.6 In respect of Ground (iv) the court found that there was sufficient dispute over matters of fact such that the testing of the evidence (by cross examination) in a non statutory public inquiry was required.

4.7 Consequently, the court case was lost and the decision quashed on account of two linked procedural errors made in the course of the consideration of the matter by Mr Marwick. However, importantly, the court found no fault with the Council's practice of determining such matters by appointing an independent expert to consider and report to its Public Rights of Way Committee.

4.8 On account of the finding, the Council must re-determine the matter. In light of the findings, it would be prudent to do so by means of a non-statutory public inquiry held by an independent expert, who would then report to this Committee for a determination.

4.9 Members should note that the Council considers the land in question to be comprised within the public highway and so has objected to its registration on that basis.

5.0 Wards Affected

5.1 Brereton Rural / Congleton West

6.0 Local Ward Members

6.1 Councillors John Wray, Paul Bates, Gordon Baxendale and George Hayes

7.0 Financial Implications

7.1 There will be costs in the region of £15000 exclusive incurred by the Council in appointing an independent person to hold a non-statutory public inquiry.

7.0 Legal Implications

7.1 These are set out in the main body of the report.

8.0 Risk Assessment

8.1 These are set out in the main body of the report.

10.0 Access to Information

10.1 The background papers comprise the documents relating to the application and the High Court judgement. These are available upon request.

For further information:

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CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of meeting: 13th June 2016
Report of: Public Rights of Way Manager
Title: Public Rights of Way Annual Report 2015-2016 and Work Programme 2016-2017

1.0 Report Summary

1.1 This report records the achievements of the Council in terms of its public rights of way functions during the year 2015-2016 and sets out the proposed work programme for the year 2016-17. Details are set out in Appendices 1, 2,3 and 4. It follows the same format and layout as previous years with similar commentary to allow ease of statistical comparison year on year.

2.0 Recommendations

2.1 That Members note the Annual Report for 2015-2016 and approve the proposed Work Programme for the Public Rights of Way Team 2016-2017.

3.0 Reasons for Recommendations

3.1 As set out in the background and options section of the report (section 10).

4.0 Wards Affected

4.1 All

5.0 Local Ward Members

5.1 All Members

6.0 Policy Implications

6.1 The development of the Rights of Way Improvement Plan (see Appendix 3) is aligned with the health and wellbeing objectives and priorities of the Council as stated in the Corporate Plan (2.1.1 Encouraging healthier lifestyles) and the Council's commitment to the Change4Life initiative.

6.2 In addition, the ROWIP, as an integrated part of the Local Transport Plan, is set within the context of indicators concerning sustainable transport, air quality and CO_2 emissions.

7.0 Financial Implications

7.1 None arising.

8.0 Legal Implications

8.1 None arising

9.0 Risk Management

9.1 There have been no claims against the Council in 2015/16 for surface defects on the network managed by the PROW team although there has been one case relating to an urban path in Knutsford that is being handled by the Insurance Team on behalf of the Highways Service as it is a path managed by them. At the moment the case has not been concluded.

10.0 Background

10.1 The work programme for the Public Rights of Way Team is usually approved by the Rights of Way Committee at the first committee meeting of the financial year, in the form of a series of targets. Targets are set in the context of the former Countryside Agency's (now Natural England) National Targets for public rights of way, which have as their aim that the rights of way network in England and Wales should be:

- Legally Defined
- Properly Maintained
- Well publicised

10.2 In addition to those targets, and reflecting the range of new work imposed by the Countryside and Rights of Way (CROW) Act 2000, targets in relation to three other areas are also set:

- Implementation of the Rights of Way Improvement Plan
- Implementation of the CROW Act 2000: New Duties and Powers
- Countryside Access Development and Initiatives

10.3 Each area is examined individually, below but with the specific successes of 2015/16 together with targets for 2016/17 contained within the relevant appendices.

11.0 Network Management – Maintenance and Enforcement

11.1 The Network Management and Enforcement Team consists of three full-time officers who deal with the protection and maintenance of the network. They operate on an area basis, with each officer responsible for approximately 630 kilometres of the network. Within their area, they are responsible for maintenance and enforcement to remove obstructions and keep the path network available for use.

11.2 An outline report and target work programme for the Maintenance and Enforcement Team is attached at Appendix 1. The component tasks represent the "Milestones" identified in the former Countryside Agency's National Targets.

11.3 601 path problems have been logged throughout the year 2015/2016 which is a decrease on the 661 problems that were logged throughout the year 2014/2015. The charts below illustrate the numbers and types of problems reported. In Fig 2 the numbers and distribution of different types of issues are very similar to 2014/2015. Fig 3 shows that the number of priority 1 (public safety) issues has remained reassuringly low with 2 issues reported and compares favourably with previous years with just a small handful of issues to deal with.

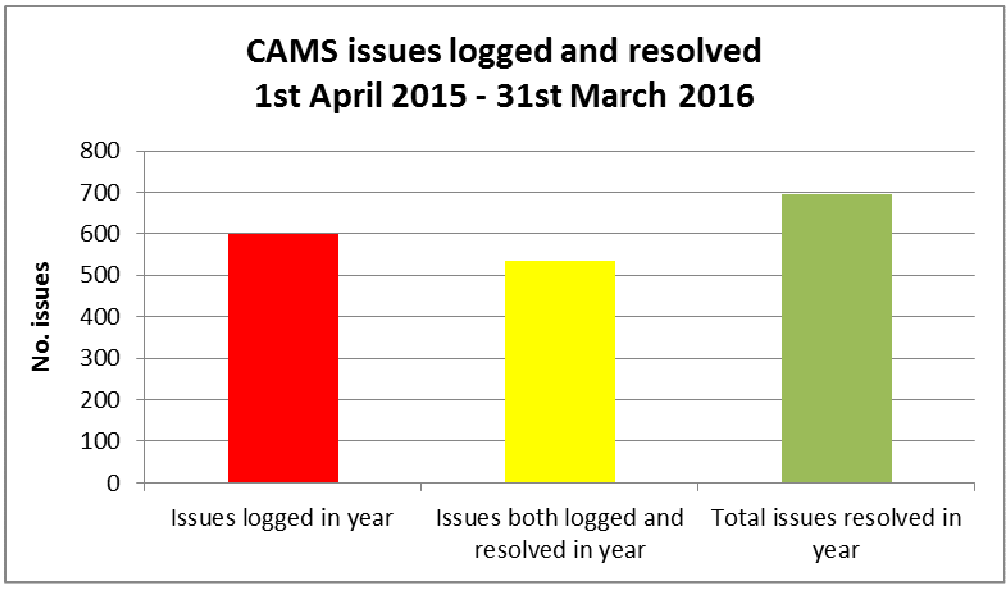

Fig 1.

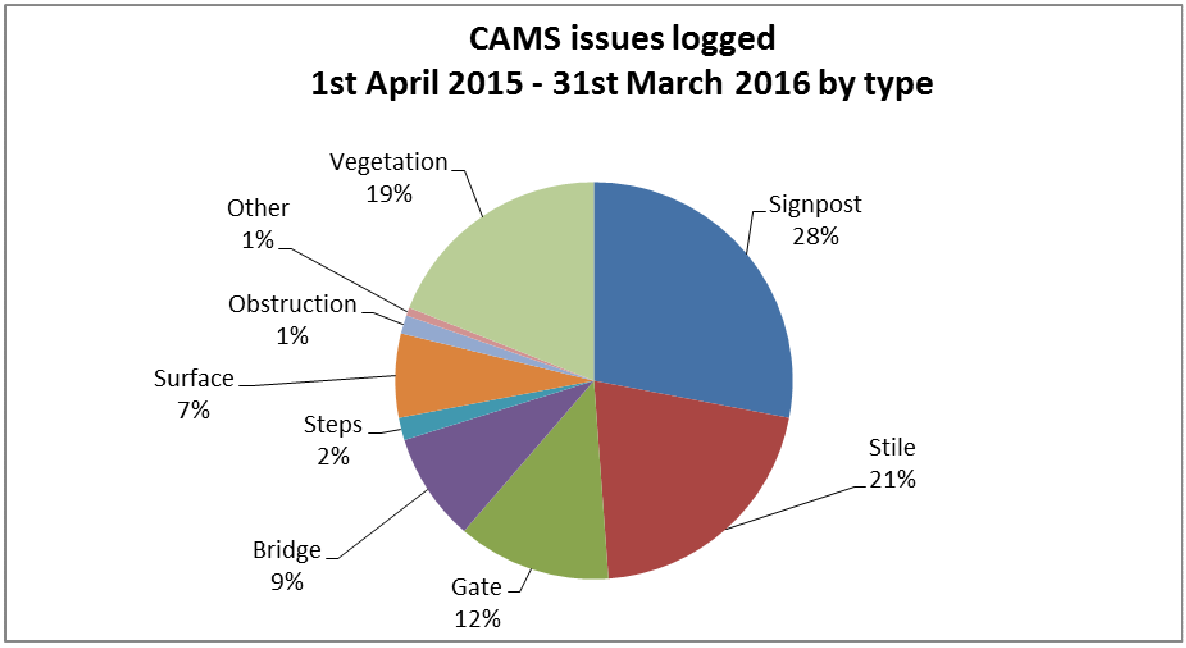
CAMS issues logged
1st April 2015 - 31st March 2016 by type
Vegetation 19%
Other 1%
Signpost 28%
Obstruction 1%
Surface 7%
Steps 2%
Stile 21%
Bridge 9%
Gate 12%

Fig 2.

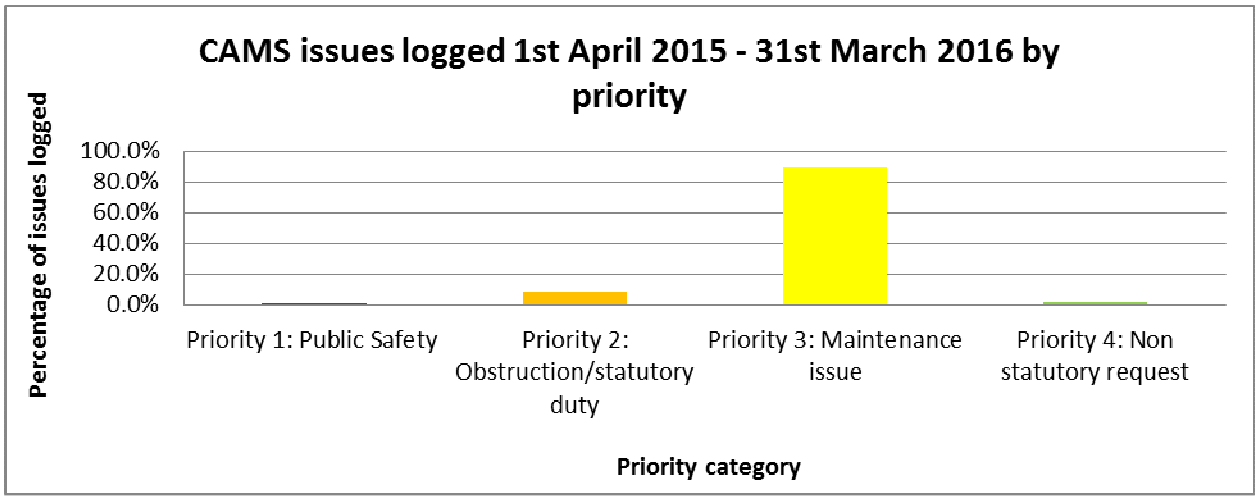
CAMS issues logged 1st April 2015 - 31st March 2016 by priority
Percentage of issues logged
100.0%
80.0%
60.0%
40.0%
20.0%
0.0%
Priority 1: Public Safety
Priority 2: Obstruction/statutory duty
Priority 3: Maintenance issue
Priority 4: Non statutory request
Priority category

Fig. 3

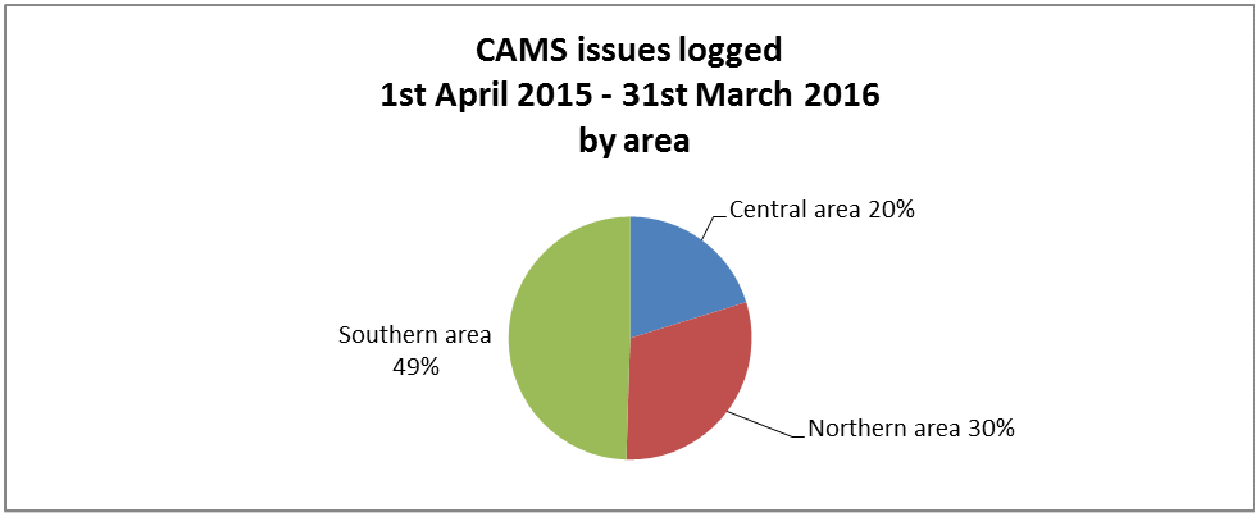

Fig 4.

12.0 Path Inspection

12.1 A path inspection scheme exists in the form of the former National Best Value Performance Indicator 178: percentage of paths deemed 'easy to use'. Although councils are no longer required to report on BVPI178 in Cheshire it has been collected as a local indicator for the Local Transport Plan. The survey is carried out on a randomly generated basis of 5% of the network. The team duly carried out the BVPI 178 inspection this year: the percentage pass rate was 81%, which compares favourably with a pass rate of 77% in 2014, and an average of 82% over the last five years. It is reassuring that last year's lower figure has stabilized. Whilst budget pressures can impact on this area, last year additional funds were injected into this area of work at the expense of other areas which may have contributed to arresting any decline, allowing the team to increase the output of minor tasks that may have had a positive affect on the statistics. Whilst the small nature of the sample may throw up inconsistencies or temporary spikes the sequence of years 2010 to 2015 shows results overall that are normally in the low 80%.

13.0 Rights of Way Improvement Plan - Access Development

13.1 There is one full-time member of staff dedicated to the implementation of ROWIP and access development projects. Work has continued this year in delivering access projects from the existing ROWIP: Appendix 3 contains an outline report and work programme.

13.2 The Countryside Access Development Officer is responsible for the administration of the Cheshire East Local Access Form. The post holder also facilitates the Rights of Way Consultative Group, attends multiple groups and forums on behalf of PROW/Countryside, comments on planning applications and seeks planning gains, and responds to general enquiries and requests for information.

14.0 Legal Orders Team

14.1 The legal orders team comprises four officers (3 x full-time, 1 x part-time) who operate on a caseload basis and deal with public path orders, (diversions and extinguishments), definitive map modification orders, (changes to the definitive map) emergency and temporary closures, land searches, planning applications and day to day enquiries. One post deals exclusively with Public Path Orders based on public applications. This post, created in 2010 is funded by the fees from those applicants and nets nil on the budget.

14.2 The year has seen the previous increase in planning applications that the team have been consulted on continuing at a high level and increasing from 237 to 253 and 123 land search requests were processed following developers and solicitors enquiries. Additionally 66 temporary closure orders were processed, predominantly on behalf of developers and 7 Town and Country Planning Act S257 diversion orders have been processed to enable development to go ahead. These applications take precedence over conventional Highway Act diversions due to the tight timetables involved. The need to respond to these and the consequent work generated liaising with developers and colleagues in the Planning Department has had a significant knock on effect on other areas of work, reducing the amount of time available for core Definitive Map Modification Orders investigations and Highways Act diversions.

14.4 During the year discussions have continued with Legal Services towards extending the team's areas of responsibility to include the Council's duties with regard to the Commons and Town and Village Green Register and Village Green applications.

14.5 The team's fee generating capacity has been extended to include pre-application meetings and consultations with developers in order to generate additional income. Investigations are underway at the moment to re-assess the true cost of processing diversions especially associated with development which tends to generate a greater amount of work.

15.0 Policy development

15.1 The policies currently in place reflect the following activity.

- Maintenance and Enforcement Protocol
- Statement of Priorities for Definitive Map Modification Orders
- Charging Policy for Public Path Orders, Searches & Temporary Closures and HA 80 S31 declarations.
- Policy for Structures on Public Rights of Way
- Standard Response Times for Different Categories of Problem on the Network

15.2 The imminent implementation of the Deregulation Act 2015 will require an appraisal of processes and policies for dealing with Definitive Map Modification Orders and Highways Act diversions. Tight timescales are being introduced

requiring their processing within time limits and additionally the processing of Highways Act diversion will become a duty rather than a discretionary service. A policy response to these changes is being developed at the moment.

16.0 Local Access Forum and ROW Consultative Group

16.1 The primary purpose of the Forum is to provide advice to Cheshire East Borough Council, and other bodies, such as Government Departments, Natural England, the Forestry Commission, English Heritage, Sport England and Town and Parish Councils, on how to make the countryside more accessible and enjoyable for open air recreation, in ways which address social, economic and environmental interests. The Forum consists of volunteer members.

16.2 The Forum has again been successful in making improvements for walkers, cyclists and horse riders in the design of road schemes across the borough. Working groups have continued to pursue the forum's stated priorities of improving safety on rural lanes and promoting access for all, with publications this year including Driving Safely on Rural Lanes and More Walks for All leaflets.

16.3 The Cheshire East Local Access Forum is complemented by the Cheshire East Rights of Way Consultative Group which meets twice yearly.

16.4 The Consultative Group operates to achieve the following purposes:-

- to enable interest groups (users, landowners and others) to engage in constructive debate and discussion about issues of law, policy, principle and work programming with members and officers of the Cheshire East Council;
- to encourage understanding of each others' concerns; and,
- to participate in the consultation process and ongoing monitoring associated with the Rights of Way Improvement Plan.

16.3 The Consultative Group meetings are extended to allow user group representatives to meet Network Management officers on a one to one basis in order to discuss work priorities and individual case issues. This allows user groups and the council to agree prioritisation of issues and works.

17.0 Budget

17.1 The annual budget for the years 2015/16 and 2016/17 are set out below. During this year, as in the previous year the budgets have remained as set throughout the year allowing the team to both plan spending and clear some of the previous backlog that had arisen. To facilitate an increased work output a small additional resource not exceeding £15,000 has been made available from other areas.

	2015/16	2016/17
Total PROW revenue budget	£394,000	£394,000
Network maintenance budget	£48k revenue + £100k capital	£57k revenue + £100k capital
Maintenance budget per PROW km	£76.0/km	£81/km
Other funding	• £300k LTP ROWIP/ Cycling capital budget	• £300k LTP ROWIP/ Cycling capital budget

18.0 Conclusion

18.1 As with previous years the team has delivered a high standard throughout the year. The budget stability has allowed the current hard work to be reflected in the condition of the network. However there are pressures, imposed by the increasing amount of work dealing with development that has had a major impact on the output of work associated with DMMOs and Highways Act diversions. The backlog for Highways Act diversions is approaching 50 cases which equates to at least a 3 year waiting list whilst the DMMO backlog is now over 30 which at current performance levels equates to approaching 10 years. Given that the Deregulation Act will introduce short timescales for dealing with both, then proposals for dealing with the implications of the Deregulation Act and the potential of acquiring additional duties associated with town and Village Greens will have to accommodate these backlogs. The proposals will also have to manage the increasing work pressures associated with development which is increasing at a rate that has seen planning consultations more than double in three years and requests for temporary closures increase by 50% in the same period.

19.0 Access to Information

19.1 The background papers relating to this report can be inspected by contacting the report writer:

Name: Mike Taylor
Designation: Public Rights of Way Manager
Tel No: 01270 686115
Email: mike.taylor@cheshireeast.gov.uk

APPENDIX 1
SECTION 3: NATIONAL TARGET 2: "PROPERLY MAINTAINED"

Component Task		Source			Achievements April 2015 to March 2016	Targets 2016/17
No	**Measure of Success**					
3.1	All footpaths, bridleways and byways correctly signposted where they leave a metalled road.	C/side Act 68 NERC Act 06			• 388 signs erected across the borough.	• Installation of additional signs and replacement signs following loss and damage to ensure the requirements of Countryside act 1968 s 27 are fulfilled.
3.2	All PROW clear of obstructions, misleading notices, other hindrances or impediments to use.	HA 80 s130			• Enforcement actions saw 16 notices served for cropping and 6 for general obstruction. • Additionally 27 "seven day" warnings were issued in relation to cropping offences. • Officers have not been required to remove obstructions because offenders have responded successfully in all cases.	• Carry out necessary enforcement work in line with adopted protocols to ensure that the duty set out in Highways act 1980 is fulfilled.
3.3	Bridges, stiles, gates etc are in place where required; all are safe and convenient to use.	HA 80 s41 and s146			• In Cheshire East 154 stiles, 186 gates comprising 142 kissing gates, 14 bridleway gates and 30 pedestrian gates have been installed. Additionally 51 bridges of varying lengths have been installed.	• Renew and repair structures to ensure that they adequately allow the public to access all public paths in Cheshire East. Assist owners and occupiers to repair and replace stiles and gates on public rights of way. Replace structures with less limiting barriers wherever possible in line with ROWIP policies, DDA and Equality Act 2010.
3.4	Surface of every PROW is in proper	HA 80 s41			• A routine maintenance programme is in operation and	• The routine maintenance programme will be extended as new paths

Component Task		Source			Achievements April 2015 to March 2016	Targets 2016/17
No	**Measure of Success**					
	repair, reasonably safe and suitable for the expected use.				Paths comprising 211 km were subject to routine strimming/ tractor flailing at least once during the growing season with many cut more frequently to a maximum of 3 cuts per annum.	requiring routine maintenance are encountered (e.g. paths created through ROWIP). • Officers will continue to work with colleagues in other departments and other partners in order to facilitate additional funding for special projects in relation to rights of way wherever possible.
3.5	All PROW inspected regularly by or on behalf of the authority.	HA 80 s58			• Bridges are inspected every two years, but paths in general are not inspected due to a lack of resources. This could result in a lack of a legal defence to claim(s) for personal injury. • All maintenance officers hold bi-annual meetings with the relevant representative of the walking and equestrian user groups to agree priorities for work.	• The maintenance officers will continue to hold bi-annual meetings with the relevant representatives of the walking, equestrian and other user groups to agree work priorities and to discuss the results of the survey work carried out by these groups. • Volunteer survey scheme to be extended dependant on availability of volunteers.
3.6	The authority is able to protect and assert the public's rights and meet other statutory duties (e.g. to ensure compliance with the Rights of Way Act 1990).	HA 80 s130			• All cropping obstructions were responded to within 4 weeks of reporting.	• Continue to adhere to the response times set out in the current standard.
3.7	Waymarks or signposts are provided at necessary locations and are adequate to	C/side Act 1968 s27			• Waymarking is undertaken by staff and contractors as appropriate. Additionally waymarkers are provided to	• Waymarking and signposting will be undertaken as appropriate.

Component Task		Source			Achievements April 2015 to March 2016	Targets 2016/17
No	**Measure of Success**					
	assist users. Waymarking scheme/initiative in place.				partners such as Mid-Cheshire Footpaths Society and the Ramblers' Association to enable them to replace missing and damaged waymarkers.	

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Appendix 2

Legal Orders Team

SECTION 2: NATIONAL TARGET 1: "LEGALLY DEFINED"

Component Task		Source	Achievements 2015/16	Targets 2016/17
No	**Measure of Success**			
2.3	No backlog of legal events requiring orders to be made	WCA 81 S53(2) (a) & 53(3) (a)	• Legal Event Modification Order made for all legal events in 2015/16	• Legal Event Modification Order to be made for all legal events in 2016/17
2.4	No backlog of applications to modify the Definitive Map	WCA 81 Sch 14	• 2 Schedule 14 applications determined and a further 7 applications under active investigation during the year (see below). • 33 applications remain in backlog (see below). The oldest of these dates to 2004.	• Target is to determine 6 cases.
2.6	No backlog of decided applications/other cases awaiting definitive map modification orders	CoAg	2 orders determined • 1 DMMO order confirmed • 0 DMMO order confirmed with modifications • 0 appeals against refusal, awaiting decision • 0 appeals against non-determination within 12mths	• Continue to make orders as soon as reasonably practicable. • Contested DMMOs to be submitted to PINs. • Directed applications/orders to be processed as required.

Component Task		Source	Achievements 2015/16	Targets 2016/17
No	**Measure of Success**			
2.7	The authority has considered the need to consolidate the Map and take any necessary action	WCA 81 S56	• Preparation of digital map for consolidation complete. • Work to consolidate statements begun.	• On hold due to lack of staff.
2.9	No other matter affecting the Definitive Map outstanding	CoAg	• Electronic list of 415 map anomalies was completed in 2008. 0 anomalies corrected during 2015/16.	• No progress can be made with rectifying anomalies without additional staff resources.

Summary of work from April 2014 to March 2015, backlog of work outstanding and forecasts for 2015/16

Area of work	Work completed/in progress April 2015 – March 2016	Backlog	Projected work 2016/2017
Planning application consultations	253	n/a	300+
Rights of Way searches	123	n/a	150
Highways Act s31 deposits	1	n/a	
Temporary & Emergency Closures	66 (high proportion being 6 month closures and Secretary of State extensions)	n/a	75
Gating Orders	0	n/a	0
Public Path Orders HA80	11 cases in progress	48 applications on waiting list	9 Orders to confirmation stage.
Local Government Act 2000 Dedications	3 Deed of Dedications completed	0 Deed of Dedication in progress	
Public Path Orders TCPA90	1 Order confirmed, 9 cases in progress	n/a	10 cases likely to be dealt with.
Contested Orders referred to PINs	HA80 = 0 WCA81 = 0 TCPA90 = 0	Contested WCA81 case to be referred to PINs	
Definitive Map Modification Order Applications – schedule 14 applications	4 Orders confirmed, 7 in progress	33	6 Cases to be targeted.
Definitive Map Anomalies (investigation/legal orders required)	2 completed	415	0 without additional staff resources or additional budget to commission consultants

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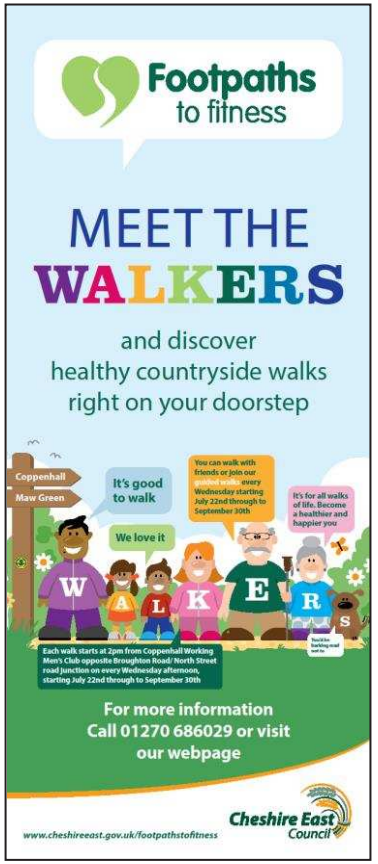
Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 H7	xx	**Odd Rode Footpath No. 22** • S106 developer contributions were used to deliver improvements in Scholar Green. • Project included an improved path surface and a new path across the playing fields, providing all-weather access to the childrens' play area. • Delivered, in partnership with the Parish Council, ansa parks team and Scholar Green Primary School, by Cheshire East Highways.  Before  After  Before  After	• Project completed.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7	T117	**Middlewood Way Station access** • Accessibility improvements for pedestrian access to Middlewood Station to encourage use of public transport option. • Including path surfacing works, lighting and ramp to avoid steps.  Steps before  Steps after  New ramp  Before  After  Signposting	• Project completed.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017

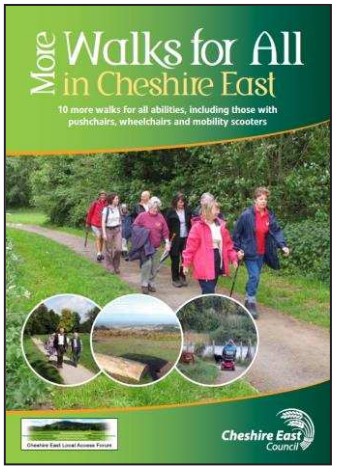
H2
H3
	X6	**Public Health Transformation Fund**
		• Development and delivery of Footpaths to Fitness project having secured grant funding.
		• Delivery of circular, promoted walks close to target community where activity levels are lowest.
		• Development of brand, promotion and publicity.
		• Programme of weekly led walks each with special interest focus, attracting 93 participants.
		• Partnerships with South Cheshire Clinical Commissioning Group and GP practices, Local Area Partnership and AgeUK Cheshire.
		• Footpath network accessibility improvements: 48 stiles replaced with gates and muddy sections surfaced.
		• Encouraging volunteer walk leaders to provide longevity of project.
		• Monitoring and evaluation of participants showed:
		  ○ 85% over 51 years old, of which ⅔ were women.
		  ○ 54% had physical long term condition or illness.
		  ○ 83% are planning to walk more regularly.
		  ○ 75% joined to walk with others in a group.
		 
		 
		Footpaths to Fitness led walk, way mark and publicity materials
			• Project completed.
			• Options for delivery of similar projects in other target areas to be explored.

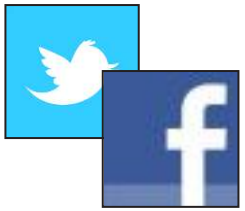


Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7 S8	Various	**Assistance to Local User Groups / Parish & Town Councils** • Advice and assistance to local user groups and Parish & Town Councils in their planning of access improvements and external funding bids, including: ○ Goostrey Footpaths Group proposal for dedication of new PROW. ○ Chelford proposal for a new route to link housing with village hall. ○ East Cheshire Ramblers on permissive path in Kettleshulme area. ○ Sandbach Footpaths Group creating new paths and publishing leaflets. ○ Local walkers for potential new path in Kettleshulme Parish. ○ Access improvements in Great Warford and Alderley Edge. ○ Congleton Partnership on signage and access barriers to parks. ○ Holmes Chapel Partnership for potential new permissive path.  Permissive path waymark  Sandbach Footpaths Group waymark	• Ongoing, as arising.
H2 H3 S7 S8	n/a	**Mapping** • Assistance with mapping provided to Cheshire East departments, including the Countryside Ranger Service for grant applications and management plans. • Assistance with mapping for third sector groups producing walks leaflets. • Landscape Scale Partnership project with National Trust.	• Ongoing, as requested.

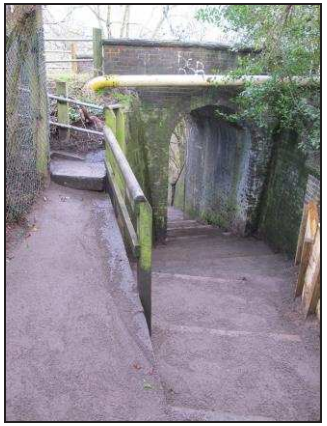
Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7	T69	**Congleton Footpath No. 23 Dane Walkway** • Delivered in partnership with and funded by Congleton Partnership through a grant secured from Cheshire East Partnerships team. • Route forms continuation of Dane Walkway through town, and Dane Valley Way. • Aimed to improve accessibility as far as practical and to improve aesthetics of route to encourage use. • Works included railing repairs and repainting, new handrail alongside steps, new destination signage, tree management and new surfacing.   Before  After	• Project completed.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3	X15	**Mobberley Bridleway No. 17** • Part of the long distance horse rider and cyclist promoted route, Laureen's Ride. • A route linking Mobberley village with the wider Public Rights of Way network. • Previously muddy underfoot and with remnants of restrictive path furniture. • Continuation of an tried and tested surface and path furniture replacements have helped to make the route more accessible for all users.  Before  After 	• Project completed.
H2 H3	H36	**Wilmslow Footpath No. 95** • A popular route on the edge of Wilmslow, linking Newgate countryside site with the wider Public Rights of Way network. • Previously muddy underfoot and with remnants of restrictive path furniture. • Surface and accessibility improvements have helped to make the route more accessible for users.  Before  After	• Project completed.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3	X7	**More Walks for All Leaflet** • Developed in partnership with volunteers from Cheshire East Local Access Forum and partners National Trust, Canal and River Trust, Parish & Town Councils and local friends of groups. • Leaflet offers 10 pleasant routes for people of all abilities, including those with children, pushchairs and wheelchairs. • 7 of the routes are accessible by public transport, with train and bus stops and routes stated. • Details of path surfaces, gradients, gates and gaps are given for each walk to help residents and visitors alike enjoy exploring the varied countryside of Cheshire East. • Publicity and promotion with printed leaflets and online download.   More Walks for All leaflet extract and front cover	• Project completed.

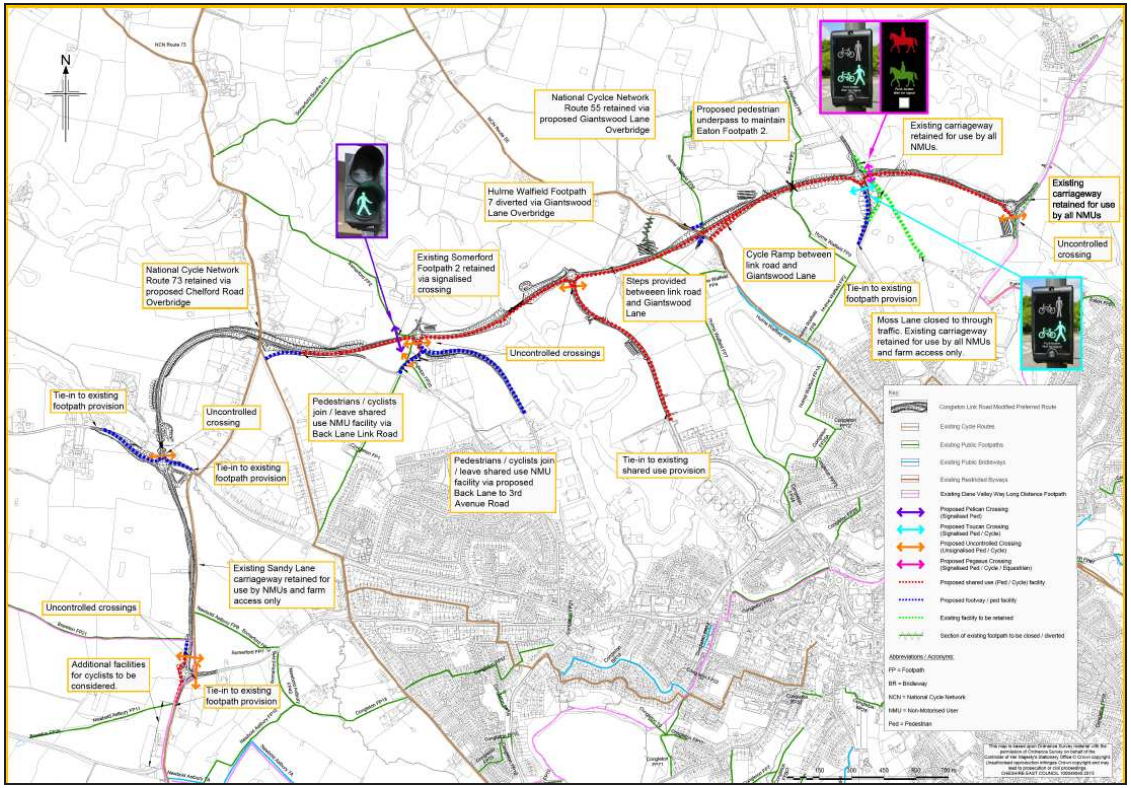
Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7 S8	Various X10	**Planning Applications, Pre-Applications and Local Plan** • Planning applications and pre-applications commented upon from the perspective of active travel and leisure walking, cycling and horseriding, putting forward ROWIP aspirations. • Developer contributions sought and secured through section 106 agreements and unilateral undertakings. • Input from Public Rights of Way and Countryside into emerging Cheshire East Local Plan. • Towpath improvements in Elworth, Sandbach: preparation for delivery of surfacing project to create circular walk and ride options for residents of new housing development, in partnership with Canal and River Trust.	• Ongoing, as arising. • S106 funding to be used to improve routes in Elworth and Handforth.
H2 H3 S7 S8	X15	**Publicity to promote walking, cycling and horse riding** • Published and promoted More Walks for All leaflet. • Articles submitted for partnership newsletters for all news items. • Newsletters and social media feeds made for all news items. • Signposting on site promoting links and networks. •    Examples of destination signposting	• Work ongoing to coincide with national and local events and projects.

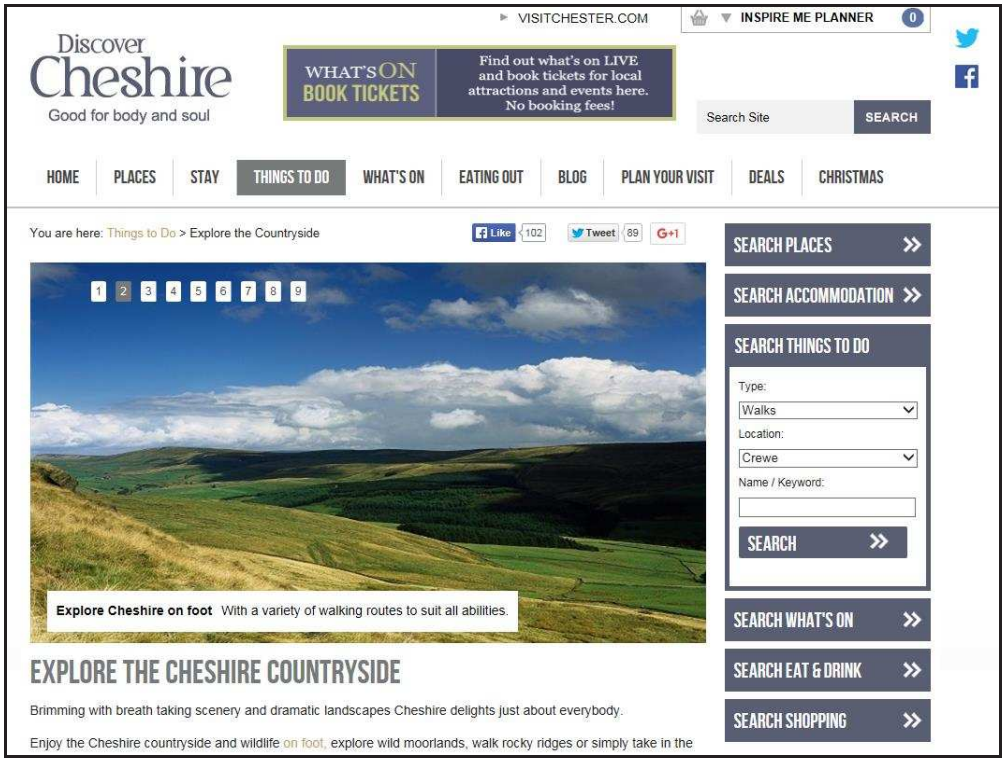
Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S8	T37	**Crewe Footpath Cycle Track Order** • Development of ROWIP suggestion from Local Area Partnership and Sustrans. • Proposal to convert status of footpaths Nos. 3 (part) and 36 to cycle track on route used by both pedestrians and cyclists. • Route runs from residential areas of Crewe and village beyond towards town centre. • Project in partnership with Cheshire East Highways. • Legal Order to convert footpath into cycletrack made and advertised: 2 objections received and sustained. • Order and objections referred to Department for Transport for determination. • Public Inquiry held in January 2016. • Order confirmed by Secretary of State.   Photos of route in Cycle Track Order	• Improvement works to be undertaken. • Public notice of confirmation of Order to be posted on completion of works.
H2 H3 S8	X14	**Local Transport Plan Cycling Schemes** • Contributions to LTP active travel cycling schemes. • Development of Cycling Strategy. • Assistance to local groups considering input to Neighbourhood Plans. • Initiation of monitoring at 10 sites around the borough to gather data on cycling usage. 	• Work ongoing.

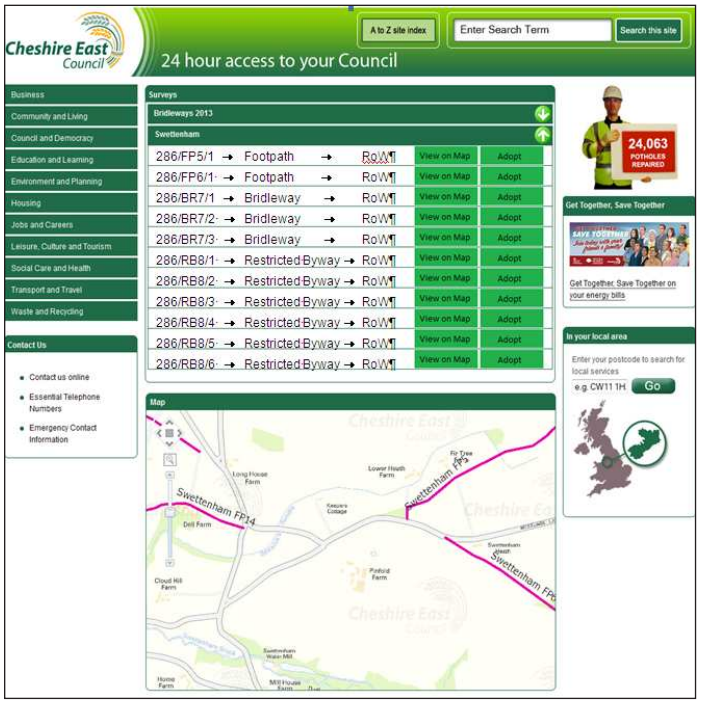
Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7 S8	T52	**Congleton Bridleway No. 31** • In response to requests for surfacing and improvement works to bridleway. • Route runs from residential area towards the local primary school and the Biddulph Valley Way linear country park which forms part of the National Cycle Network and a key access to the countryside. • Launch event held in partnership with Bromley Farm Wellbeing Group, the local community and Countryside Ranger Service.  Before  After  Before  After	• Local primary schools launching walking buses. • Project completed.

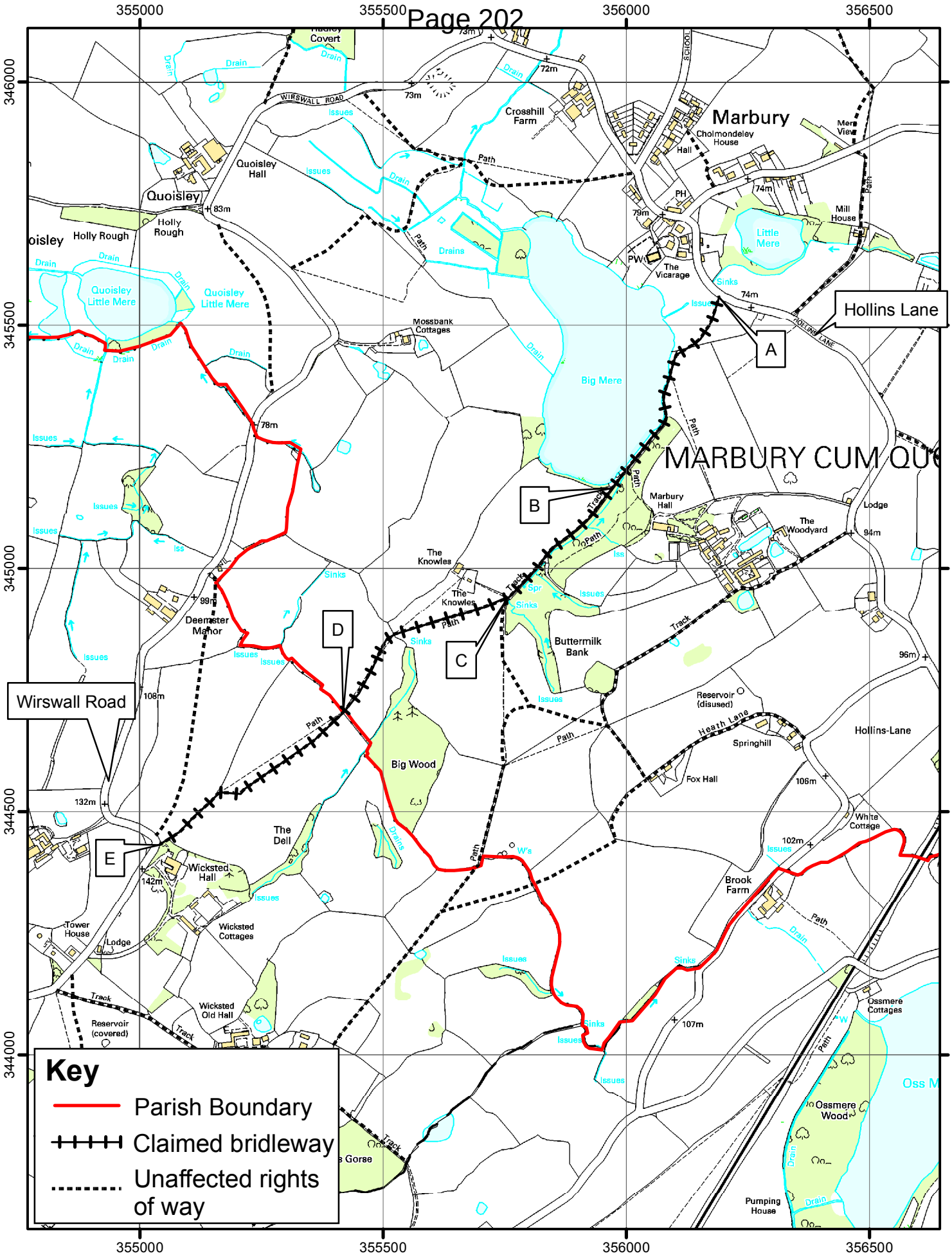
Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7	T145	**Knutsford Footpaths Nos. 14 &15 Sparrow Lane** • In response to requests for surfacing works to footpath to provide an all-weather walking route option. • Route runs from residential areas towards the town centre and is used by school pupils on daily journeys.  Before  After  Before  After	• Project completed.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7 S8	n/a	**Cheshire East Local Access Forum** • Secretariat duties for Forum, a statutory body, whose members are volunteers, which advises the Council on matters relating to countryside access. • Input into scheme design for Poynton Relief Road. • Monitoring of Rights of Way Improvement Plan delivery. • Monitoring of Public Rights of Way resources • Priority areas of work progressed by working groups on safety on rural lanes, publicity of the Forum, canals and waterways and accessibility of the countryside. • Frequent newspaper publicity secured, Knutsford Rural Police Day attended, pop-up banner and flyer published and presentation prepared for external groups. • Recruitment exercise appointed 2 new members.   	• Work ongoing.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
S7 S8	Various	**A556, SEMMMS A6-Manchester Airport Relief Road, Congleton Link Road and Poynton Relief Road Schemes** • Continued input of ROWIP aspirations into options and designs to maximise opportunities for improving routes for active travel and leisure walking, cycling and horse riding. • Influencing road scheme designs and Side Road Orders to achieve best possible outcomes for non-motorised users.  Congleton Link Road plan	• Work ongoing.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2, H3	X15	**Discover Cheshire Website** • www.discovercheshire.co.uk. • Website promoting walking, cycling and horse riding routes. • Also highlights nearby visitor economy facilities in the countryside, such as refreshment stops and accommodation. • Partners include Visitor Economy team, Marketing Cheshire, Cheshire West and Chester Council and the Mersey Forest. • Redeveloped website now mobile compatible and combined with other websites to act as the 'one-stop shop' for visitors to Cheshire. • Amends and updates to walking, cycling and horse riding routes made, as arising.  Screen image from website	• Ongoing as arising.

Policy Ref.	ROWIP Ref.	Achievements 2015-2016	Ongoing targets 2016-2017
H2 H3 S7 S8	n/a	**Rights of Way Consultative Group** • Twice yearly meetings between PROW team and user group representatives. • Ongoing management of register of volunteers and issuance of Letters of Authority for volunteers assisting with way marking and minor vegetation cutting. • Updates provided on Deregulation Act legislation changes. • Updates provided on long term closures of Public Rights of Way due to legal or resource issues. • Liaison with Cheshire East Local Access Forum. • Debate on multi-user route safety and surface management. • Review on Ramblers' Big Path Watch. • Monitoring of Public Rights of Way resources. • Review undertaken on bridlegate and catch safety. • Data cleansing undertaken in preparation of development of web portal to use in a volunteer network survey to gather path furniture and surface information. • Data entered into the CAMS GIS mapping database would then be available for use by officers initially, and, in the long term, by the public via Interactive Mapping on the Council's website.  Screen image of draft CAMS webportal	• Work ongoing.



Key

- Parish Boundary
- Claimed bridleway
- Unaffected rights of way

Application to Upgrade FP8 Marbury cum Quoisley & FP3 Wirswall to bridleway

Plan No. WCA/012

This is a working copy of the definitive map and should not be used for legal purposes

1:10,000

Cheshire East Council

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13th June 2016
Report of:	Public Rights of Way Manager
Subject/Title:	Wildlife and Countryside Act– Part III, Section 53 Application to Upgrade Public Footpaths Nos. 8 Marbury cum Quoisley and no. 3 Wirswall to Bridleways

1.0 Report Summary

1.1 The report outlines the investigation of an application made by Miss B. Hardern and Mrs A. Williams to amend the Definitive Map and Statement by upgrading footpaths in Marbury cum Quoisley and Wirswall to bridleways. This includes a discussion of the consultations carried out in respect of the claim, the historical evidence and the legal tests for a Definitive Map Modification Order to be made. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether an Order should be made to upgrade these footpaths to bridleways.

2.0 Recommendation

2.1 An Order be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by upgrading Public Footpaths nos. 8 Marbury cum Quoisley and 3, Wirswall to bridleway along the route shown between points A-B-C-D-E on plan number WCA/012.

2.2 Public notice of the making of the Order be given and, in the event of there being no objections within the specified period, or any objections received being withdrawn, the Order be confirmed in exercise of the power conferred on the Council by the said Acts.

2.3 In the event of objections to the Orders being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

3.0 Reasons for Recommendations

3.1 The evidence in support of this claim must show, on the balance of probabilities that public bridleway rights subsist along the existing public footpaths. It is considered that there is sufficient historical evidence to support the existence of public bridleway rights along the route A-B-C-D-E on plan no. WCA/012. It is considered that the requirements of Section 53(3)(c)(ii) have been met in relation to bridleway rights and it is recommended that the Definitive Map and Statement should be modified to show the route A-B-C-D-E as a Public Bridleway.

4.0 Wards Affected

4.1 Wrenbury

5.0 Local Ward Members

5.1 Councillor Stan Davies

6.0 Policy Implications

6.1 Not Applicable

7.0 Financial Implications

7.1 Not Applicable

8.0 Legal Implications

8.1 Under section 53 of the Wildlife & Countryside Act 1981 (WCA), the Council has a duty, as surveying authority, to keep the Definitive Map and Statement under continuous review. Section 53 (3) (c) allows for an authority to act on the discovery of evidence that suggests that the Definitive Map needs to be amended. The authority must investigate and determine that evidence and decide on the outcome whether to make a Definitive Map Modification Order or not.

8.2 Upon determination of this application, the authority must serve notice on the applicant to inform them of the decision. Under Schedule 14 of the WCA, if the authority decides not to make an order, the applicant may, at any time within 28 days after service of the notice, appeal against the decision on the Secretary of State and the authority. The Secretary of State will then consider the application to determine whether an order should be made and may give the authority directions in relation to the same.

8.3 The legal implications are contained within the report.

9.0 Risk Management

9.1 None

10.0 Background and Options

10.1 *Introduction*

10.1.1 This application was registered in May 2005 and made by Miss B. Hardern and Mrs A. Williams to modify the Definitive Map and Statement by upgrading two footpaths to bridleways along the route A-B-C-D-E (on plan no.WCA/012) in the parishes of Marbury cum Quoisley and Wirswall. The route applied for is currently recorded as public footpath no. 8, Marbury between points A-B-C-D; and public footpath no. 3, Wirswall between points D-E.

10.1.2 The applicant supplied a considerable amount of historical evidence with the application. Included were a diversion order from the 1812 Quarter Session files; extracts from the Marbury and Wirswall Tithe Maps; the Finance Act; the Pre- Definitive Map 'Green Book'; and the 1950's Parish Survey. There is no witness evidence in this case; the application was made solely on the historical evidence discovered.

10.2 *Description of the Claimed Bridleway.*

10.2.1 The claimed route comprises of Marbury cum Quoisley footpath no. 8 and Wirswall footpath no. 3. It runs from Hollins Lane Marbury, road no. C532, (point A on plan no. WCA/012) just to the south of St. Michael's Church, in a generally south-westerly direction. Part of the route between points A and B runs adjacent to the edge of the lake known as 'Big Mere'. Between points B and C the route runs along a field edge; it then crosses two fields to the parish boundary with Wirswall at point D. Footpath no.3 Wirswall is a continuation of the route, from point D it continues in a south-westerly direction to point E where it meets Wirswall Road (road no. UX768) near to Wicksted Hall.

10.2.2 There are currently a number of stiles and field gates along the route. Part of the claimed route, between points A and C, forms part of the long distance route The South Cheshire Way.

10.3 *The Main Issues*

10.3.1 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Cheshire East Borough Council shall keep the Definitive Map and Statement under continuous review and make such modifications to the Map and Statement as appear requisite in consequence of the occurrence of certain events.

10.3.2 The event relevant to this application is section 53(3)(c)(ii), this requires modification of the status of a right of way in the Map and Statement. The relevant section is quoted below:

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:-

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description;"

10.3.3 The evidence can consist of documentary/ historical evidence or user evidence or a mixture of both. All the evidence must be evaluated and weighed and a conclusion reached whether, on the 'balance of probabilities' the alleged rights subsist. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.

10.3.4 In this case the application is based solely on historical evidence dating from 1812 to 1954; there is no evidence of any use on horseback or bicycle.

10.4 *Consultations*

10.4.1 When the application was submitted in 2005 notice was served on four landowners/occupiers, Mr & Mrs Paton-Smith of Marbury Hall; Mr Maddocks of Deemster Manor Farm; the occupier of The Knowles and the owner/occupier of Wicksted Hall. Subsequently two letters were received in May 2005, one from Major W.R. Paton-Smith stating he would not be in a position to agree with the proposal for two reasons; because two of the fields were used for the grazing of thoroughbred racehorses and also because the Prince Albert Angling Club used the path bordering the mere and he understood there to be a health and safety risk. The other letter received was from J.P Maddocks of Deemster Manor, Wirswall. The letter states they object to the application as the route is very popular with walkers and they see no benefit to them having the path churned with horses hooves. They state they have owned the land since 1986 and the route has been marked as a footpath since that time. They also mention they have stock in the fields which would be affected.

10.4.2 When investigations began into the application consultation letters were sent to the local Councillor, Marbury and District Parish Council and landowners, user groups and statutory consultees in January 2016.

10.4.3 No response was received from Councillor Davies, the local member. Marbury and District Parish Council have responded and state that the public footpaths should remain as at present and not revert back to the previous status of horsecart track/bridleway. They state that Parish Council minutes supported this view when rights of way surveys had taken place. They further comment that *'when the character of the landscape is viewed and considered the proposal is obviously not viable'*.

10.4.4 Electricity North West responded to say that the application has no impact on the electricity distribution system infrastructure or other ENW assets.

10.4.5 The landowners of the southern section of the claimed route between points D and E on plan no. WCA/12 are Sheila Maddocks and Edward Maddocks. Officers had a telephone conversation with Mrs Maddocks, she did not object to the application, she did however raise a number of concerns which she followed up with a letter dated 15th February 2016. Mrs Maddocks' states that there is stock in the field all year round, her main concerns are if gates are left open the stock would escape onto the road or become mixed with the neighbours stock in the next field. Mrs Maddocks' questions what type of gates are proposed as she states the current ones are unsuitable; she also insists that the three stiles remain in place for walkers to use. She also mentions that on the plan it appears that the claimed bridleway is on a different alignment to the current footpath. One further concern is that as the claimed bridleway goes across the middle of one of the fields it will be difficult to keep to the path and the ground will become trampled especially in wet weather. Officers have responded and explained that a decision on this

application will be made on the historical evidence. Her concerns regarding the furniture and surface of the route would be assessed by Officers if the route were upgraded to a bridleway. It is also explained that the route of the claimed bridleway is on the legal line of the current public footpath.

10.4.6 The landowners for the northern part of the claimed bridleway, between points A and D on plan no.WCA/012 are Mr and Mrs Paton-Smith of Marbury Hall. Officers met with Mr Harry Paton-Smith, his wife Sophie and mother Caroline Paton-Smith at their request in January 2016. We walked the claimed route from point A to almost to point C on plan WCA/012. The landowners wanted to point out the physical characteristics of the route and the condition of the land; they believe it is unsuitable and, in parts, dangerous for use as a bridleway. It was explained that a decision on the application would need to be made on the evidence and issues of safety and suitability could not be taken into account.

10.4.7 Mr and Mrs Paton-Smith have also submitted written comments on the application. They refer to the first field at the northern end of the route which is used for the annual village fete, 'Merry Days'. They state the money raised from this is crucial in keeping the vicarage and the church going, they claim if the field is used by horses it will be churned up and could lead to a cancellation of the event. The field is also used for other planned events. They also state after several incidents of theft the church insurance is very high, it is part of the insurance that the field has a secure and locked gate, without this the cost of insurance would likely go up again.

10.4.8 Further Mr and Mrs Paton-Smith comment that members of the fishing club, who use the mere, would not feel safe with horses going by, they fear the consequences if a horse was spooked and claim that horses would ruin the path. The landowners refer to the field to the south of Big Mere as 'the yield', this field is very wet as the water collects there from the surrounding fields, they describe the conditions as 'lethal' and are extremely worried that a horse would sink and become stuck. They describe how their shepherdess has been stuck on three occasions in the last year when riding her quadbike across the field. Near to point C on plan no. WCA/012 there is a track which is used as access to their tenant's residence The Knowles; the landowners claim this section is also very wet and their tenant would struggle if it was churned up. The final field to the parish boundary is referred to as the 'Wirswall field'; this is where the landowners' shepherdess has yews and lambs. They state she has had multiple incidents of loose dogs chasing the yews; they are concerned that this problem would increase if the route were a bridleway. Finally they state that there are thoroughbred horses present on site and use of the route as a bridleway would pose a serious risk to them.

10.4.9 Officers have received comments from the Secretary of the Prince Albert Angling Society. He states that they have had the fishing rights on Marbury Mere for over 30 years; during this time there has never been a right of way for horses along the side of the Mere nor would they want to see such rights if at all possible. He does note that safety and security matters are not relevant to the decision but states it is difficult to comprehend how such old documents

can form the basis of a decision over and above current standards of environmental issues and safety. He goes on to say that horses on the path adjacent to the Mere are an accident waiting to happen as horses are bound to startle when they meet children, dogs and walkers.

10.4.10 A letter has been received from the Secretary of the Friends of Marbury Church Trust which expresses their deep concern regarding the application to upgrade the existing footpaths to a bridleway. They believe a bridleway would result in the ground being churned up and making it unsuitable for walkers. As mentioned above, they also refer to the annual two day event 'Marbury Merry Days' which raises vital money for the church. They state that the presence of a bridleway with the frequent passage of horses and riders would severely restrict, if not prevent the event taking place. They list all the events and activities which take place and claim that they are all capable of causing horses to panic and bolt. Also the main vehicle access to the church field is the same access proposed for the bridleway. They believe the bridleway would make the continued running of the Marbury Merry Days virtually impossible and urge the application be refused.

10.4.11 A letter has also been received from the church warden of St Michael & All Angels Church, Marbury. He raises concerns regarding the security of the church, stating that in recent years there have been incidents of theft of lead from the church roof. He states that the thieves gained access to the church through a gate leading on to the road from the Church Field, the gate is now kept locked. (Point A on plan no.WCA/012) He believes that open access from the road on to the field through the bridleway entrance would make it easier for thieves to target the church again. On behalf of the Parochial Church Council he requests that the application be refused. Councillors are reminded that issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision, see paragraph 10.3.3 above.

10.5 *Investigation of the Claim*

10.5.1 A detailed investigation of the evidence submitted with the application has been undertaken, together with additional research. The application was made on the basis of historical evidence. Copies of the following documents were supplied by the applicant; Marbury and Wirswall Tithe Maps and Apportionments (1837-1840); the Finance Act Plan, Field Book entries (1910, 1913); the National Parks and Access to the Countryside Act Parish Survey for Wirswall (1954); and copies of a diversion of part of the claimed route made through the Quarter Sessions dated 1812.

10.5.2 In addition to the submitted evidence a detailed investigation of the available historical documentation has been undertaken to try and establish the history and original status of the claimed route. The standard reference documents have been consulted; details of all the evidence taken into consideration can be found in **Appendix 1**.

10.6 *Documentary Evidence*

The documents referred to are considered by collective groupings.

County Maps 18th-19th Century

10.6.1 These are small scale maps made by commercial map-makers, some of which are known to have been produced from original surveys and others are believed to be copies of earlier maps. All were essentially topographic maps portraying what the surveyors saw on the ground. They included features of interest, including roads and tracks. It is doubtful whether map-makers checked the status of routes, or had the same sense of status of routes that exist today. There are known errors on many map-makers' work and private estate roads and cul de sac paths are sometimes depicted as 'cross-roads'. The maps do not provide conclusive evidence of public status, although they may provide supporting evidence of the existence of a route.

10.6.2 The route is not shown on *Burdett's Map (1777)* or *Greenwood's Map (1819.)* It is however shown on *Bryant's Map (1831)* the full length of the claimed route is shown on the correct alignment. It is not labelled but the dashed line is referred to in the key as *'Lanes & Bridle Ways'*.

10.6.3 *Quarter Sessions – Record of Diversion 1812*

Prior to the creation of County Councils, the administration of roads and bridges was the responsibility of the judiciary and diversions and extinguishments were dealt with at the Quarter Sessions. Records were kept of legal events associated with highways. Up to the creation of the Crown Court copies of all the "stopping -up" orders made by Magistrates Courts were deposited at the Quarter Sessions.

10.6.4 As part of the claim the applicant has submitted copies of diversion records from the Quarter Sessions relating to the claimed route; Officers have viewed the original documents at the County Records Office. There are two copies of the diversion order, they are not identical but very similar, both are signed by the landowner Domville Poole and the two Justices of the Peace William Wicksted and Edward Tomkinson; both orders have plans attached, are sealed and dated 31st March 1812.

10.6.5 The documents refer to Mr Poole giving his consent to a diversion on his land; the route is described as a *'public bridle and footway'* lying between the Township of Wirswall and the village of Marbury. One of the documents also refers to a Cartway to the Knowles Estate belonging to William Watson Esq. The maps show the northern section of the claimed route between points A and C on plan no. WCA/012. Both maps show this part of the claimed route, which forms part of the diversion, in the same way and with the annotation 'Bridle and footway'. One plan at point C says *'to the Knowles farm house'* where the other at this point states *'Road to Wirswall'.* The second plan covers a slightly larger area and includes an additional route to be stopped up that is not shown on the other plan. The second plan is also annotated with

the letters A-B-C-D-E and the distances between each are recorded in the top left corner of the plan. The width of the section of the claimed route is also stated on this plan as being 20ft. This diversion order is regarded as significant evidence, it is a legal document signed and sealed by the court and shows that the landowner at that time believed the route to be a 'bridle and footway'.

10.6.6 *Marbury Tithe Map and Apportionment 1840*

Tithe Awards were prepared under the Tithe Commutation Act 1836, which commuted the payment of a tax (tithe) in kind, to a monetary payment. The purpose of the award was to record productive land on which a tax could be levied. The Tithe Map and Award were independently produced by parishes and the quality of the maps is variable. It was not the purpose of the awards to record public highways. Although depiction of both private occupation and public roads, which often formed boundaries, is incidental, they may provide good supporting evidence of the existence of a route, especially since they were implemented as part of a statutory process. Non-depiction of a route is not evidence that it did not exist; merely that it did not affect the tithe charge. Colouring of a track may or may not be significant in determining status. In the absence of a key, explanation or other corroborative evidence the colouring cannot be deemed to be conclusive of anything.

10.6.7 The Tithe Map of Marbury dated 1838-9, shows the full extent of Footpath no. 8, as far as the parish boundary. The route is shown partly between two pecked lines and partly between a solid and pecked line. The route runs through five numbered plots. The apportionment shows that all are owned by Domville Poole and are described as either 'pasture' or 'meadows'.

10.6.8 *Tithe Map and Apportionment of Wirswall 1840*

On the Wirswall Map the route of Footpath No. 3 is shown as a double pecked line and it is annotated *'Bridle Road'*. At the edge of the map where the route crosses the parish boundary, it is annotated *'to Marbury'*. The route runs through plot number 186; the apportionment does state an owner for this plot and refers to it as *'Dovecote field'.* On the applicant's poor copy it is difficult to read but the description does have a word before the description of 'pasture', there is a possibility it reads 'Road and Pasture' although it is not clear. However the annotations on the map are clear and this is very good evidence that it was considered as a bridle road at that time.

Ordnance Survey

10.6.9 Ordnance Survey mapping was originally for military purposes to record all roads and tracks that could be used in times of war. This included both public and private routes. These maps are good evidence of the physical existence of routes, but not necessarily of status. Since 1889 the Ordnance Survey has included a disclaimer on all of its maps to the effect that the depiction of a road or way is not evidence of the existence of a right of way. It can be presumed

that this caveat applies to earlier maps also. These documents must therefore be read alongside the other evidence.

10.6.10 The *Ordnance Survey First Series 1 inch to 1 mile 1833*

The full length of the route is shown between solid boundaries; it appears as a route of some significance at this time.

10.6.11 *O.S. 1st Edition County Series 25" to 1mile c.1872*

The full length of the route is shown on this map; for the most part it is depicted as a double pecked line, with just the final section of the southern end of the route shown between two solid lines. The route itself is numbered 154, where it runs adjacent to the mere; unfortunately the corresponding Book of Reference was not available in the County Records Office.

10.6.12 *O.S 2nd Edition County Series 1896-1898*

The route is shown exactly the same as the 1st edition; one significant difference is that on the Marbury side of the route, at the southern end of the mere where the route enters the field, it is annotated B.R (approximately where point B is on plan no. WCA/012). Although the Ordnance Survey maps at this time did carry the disclaimer, referred to in paragraph 10.6.9 above, officers believe the reference to B.R meaning 'Bridle Road', indicates that the surveyor at the time must have found evidence of use by horse riders.

10.6.13 *O.S. 3rd Edition County Series 1909*

The route is shown the same as the 2nd edition with one further addition, there is also now a B.R. annotation on the Wirswall side of the route. This is just to the south of the parish boundary (just south of point D on plan no. WCA/012). The property known as 'Wicksted Hall' adjacent to the route at the southern end, also now appears on this edition.

10.6.14 *Estate Plans and Sale Particulars*
Map of an Estate in Marbury the inheritance of Domville Poole Esq 1783

A small section of the route from the start of the northern end is shown on this plan. It is not given a plot number.

Wicksted Estate, Wirswall Sales Particulars & Plans 1917

The claimed route is outside of the Lots that were for sale; however on the plan the first section of the southern end of the route (from point E on plan WCA/012) is shown between solid boundaries. Then into the next field the route becomes double dashed lines which then end half way across the field.

10.6.15 *Finance Act 1910*

The Finance Act of 1910 involved a national survey of land by the Inland Revenue so that an incremental value duty could be levied when ownership was transferred. Land was valued for each owner/occupier and this land was given a hereditament number. Landowners could claim tax relief where a highway crossed their land. Although the existence of a public right of way may be admitted it is not usually described or a route shown on the plan. This Act was repealed in 1920.

Two sets of plans were produced: the working plans for the original valuation and the record plans once the valuation was complete. Two sets of books were produced to accompany the maps; the field books, which record what the surveyor found at each property and the so-called 'Domesday Book', which was the complete register of properties and valuations.

10.6.16 Officers have viewed the working plans at the County Records Office. The working plans are on Ordnance Survey 3rd edition base maps; the claimed route covers two separate sheets. The one covering the northern end of the route does not have many hereditaments marked on it and the route is not included in any numbered plots. The other sheet shows the route; from the field boundary to the north of 'Big Wood', just south of the property known as 'The Knowles', to the parish boundary is included in plot no. 437. The remainder of the route from the parish boundary to its termination, where it meets Wirswall Road, (between points D-E on plan no. WCA/012) is included in plot no.585.

10.6.17 The two plot numbers were checked in the 'Domesday Book' however no deductions were made. The applicant submitted a copy of a plan believed to be the Record Plan, showing the claimed route going through the same two plot numbers. A copy of the field book for plot 585 (Wicksted New Hall) which is held at The National Archives in Kew was enclosed with the application. This field book has a deduction of £30 made for a 'Bridle Road', 392yds long. It is believed this correlates to this section of the claimed route. The Finance Act plans were prepared according to a statutory process and are generally regarded as good evidence of public rights; in this case the surveyor specifically recorded 'Bridle Road' in the field book rather than just stating 'right of way'.

10.6.18 *Marbury Parish Council Minutes*

Officers have viewed parish council minutes held at the County Records Office and also those from the period 1952-1990 which are held with the clerk of the parish council. There is reference to the claimed bridleway at a meeting held on 29th September 1910 which refers to *"the bad state of the gateplaces on the Bridleroad leading from Marbury to Wirswall, via the Knolls"*. It is believed this description is the claimed bridleway and 'the Knolls' is a spelling mistake of 'the Knowles'. It was resolved that the clerk see Mr Poole, the owner, personally, asking him would he kindly put it in good order.

10.6.19 Later minutes from between 1970-1974 refer to the survey of rights of way. In August 1973 it is stated there was a discussion about footpaths and the clerk said there was no objections received to the footpaths shown on the provisional maps.

10.6.20 *Pre-Definitive Map "Green Book" Index*

This is a Cheshire County Council internal document from before the time of the Definitive Map process referred to below. The plan has the claimed bridleway marked for its full length and numbered 72. In the notes there are two references for no.72, it reads '"See 5/712 Bridle Road and FP…Repaired by CCC Sept '45 est. cost £30. Also 5/781 O?/S instructed to make BR usable by public 1946".

10.6.21 *Cheshire County Council Roads & Bridges Committee Minutes*

Following the indication in the 'Green Book' (see paragraph 10.6.20 above) a reference has been discovered in the minutes of the Roads & Bridges Committee dated 6th September 1945. At that meeting there was a report from a meeting of the Nantwich Roads Area Advisory Sub-Committee on 5th July 1945 which states "Application by the Agent of the Marbury Estate for repairs to Bridle road and footpath leading from Marbury to Wirswall". It was resolved that the necessary repairs be carried out at an estimated cost of £30. This correlates with the notes in the Green Book. No minute could be found for the other reference '5/781' in 1946.

10.6.22 *Definitive Map Process - National Parks & Access to the Countryside Act 1949*

The Definitive Map and Statement is based on surveys and plans carried out in the early 1950s by each parish in Cheshire of all the ways they considered to be public at that time. The surveys were used as the basis for the Draft Definitive Map. The survey for parish of Marbury cum Quoisley is missing. The plan for the survey of the parish of Wirswall shows the route from its junction with Wirswall Road next to Wicksted Hall in a north-easterly direction to the parish boundary, it is annotated number 3. The schedule information for path no.3 is dated 6th September 1954 and refers to it as a 'bridleway'. In the description three field gates are recorded; under the third one there is a note stating posts at the side of this gate indicate the existence at one time of a bridle gate adjacent to the field gate. There are also further details noted; that this is indicated as a Bridle Road on the 1910 edition of the Ordnance Survey map; also that this path is shown on the Mid-Cheshire (Area No.2) Regional Planning Scheme as an existing highway over which the public have a right of way (other than main roads and streets repairable by the inhabitants at large). The Mid-Cheshire (Area No.2) Regional Planning Scheme map was unavailable to view at the County Record Office.

10.6.23 The Draft Map was the first step towards compiling the survey information into what would become the Definitive Map. On this map the route for Wirswall is shown in the same way as on the survey map and annotated the same with

the three field gates; it is however coloured pink for a footpath. The route on the Marbury Draft map is also coloured pink for a footpath, there are six wicket gates annotated on the route, next to wicket gate no.6 there is also a stile, and a field gate is marked on the parish boundary. There are no Draft Statements records available for the routes. The subsequent provisional and definitive maps show the routes as footpaths.

10.7 *Conclusion*

10.7.1 Once public rights of way have been created, they remain in existence unless legally changed by order. So where historical evidence shows that a public right of way came into being in the past, the rights will still exist even if the route is no longer suitable for the purpose for which it was created, or is no longer passable. How much a document will influence the determination of a route's status depends on the nature of the document, the information it contains, the purpose for which it was produced, and for whom.

10.7.2 The claimed route has appeared on a number of historical documents of good provenance. The Quarter Session diversion record (1812) is a significant piece of evidence as it is a legal document and is signed and sealed by the court; although it does not show the full length of the route, it clearly shows that the route continued and indicates a status of 'bridle and footway'. The Tithe Maps (1838-40) show a consistent alignment corresponding to footpath no.8 Marbury and footpath no.3 Wirswall with the route shown between double pecked lines or one pecked and one solid line. It is annotated as 'Bridle Road' on the Wirswall map and states 'to Marbury' at the edge of the map indicating a continuing route. The full length of the route appears on Bryant's map dated 1831 and is depicted as 'Lanes and Bridleways'. These early records raise a reasonable presumption that the route is a through route and of a higher status than footpath.

10.7.3 The Ordnance Survey First series from 1833 is consistent with the Tithe and Bryant's County map clearly depicting a through route from Marbury to Wirswall. The County series O.S. maps from around 1872 to 1910 consistently show a pecked double line for the route. The 25" first edition gives the route a number but unfortunately the book of reference was unavailable. On the 2nd and 3rd editions the route is annotated with B.R.

10.7.4 The documents from the Finance Act 1910 can be considered to be good supporting evidence of the existence of a public right of way dependent upon what is recorded. In this case the route is shown included within a hereditament for the Wirswall part of the route and the field book records an exemption for 'Bridle Road'. This is considered to be good evidence. The Marbury Parish Council minute from 1910 specifically refers to the route as a 'Bridleroad' and therefore confirms that the full length of the route was considered to have bridle rights at this time.

10.7.5 The minutes of the County Council Roads & Bridges Committee in 1945 suggest that the route was still considered a bridleway and was publicly repairable.

10.7.6 There is additional evidence of a presumption of the use of the route as a bridleway in the original survey report for Wirswall which led to the compilation of the Definitive Map. These were written by local people with knowledge of the local area and they indicate that the path was capable of being used by horseriders even if it was recorded as a footpath at the next stages of the Definitive Map process.

10.7.7 The evidence in support of this application must show, on the balance of probabilities that public bridleway rights subsist along the claimed route. The balance of evidence supports the allegation that a bridleway subsists along the route A-B-C-D-E (Plan no. WCA/012). Therefore it is considered that the requirements of Section 53(3)(c)(ii) have been met and it is recommended that a Definitive Map Modification Order is made to upgrade footpaths nos. 8, Marbury cum Quoisley and no.3 Wirswall to bridleway and thus amend the Definitive Map and Statement.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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Appendix 1

DMMO DOCUMENTARY RESEARCH CHECKLIST

District	Parish	Route
Crewe & Nantwich	Marbury cum Quoisley Wirswall	FP8 Marbury cum Quoisley FP3 Wirswall

Document	Date	Reference	Notes
County Maps			
Burdett PP	1777	CRO PM12/16	Not shown
Greenwood C	1819	CRO PM13/10	Not shown
Bryant A	1831	CRO Searchroom M.5.2	Full length shown as 'Lanes and Bridleways'
Tithe Records			
Marbury cum Quoisley Apportionment	1838	CRO EDT/260/1	Plots 141, 145, 157, 177 and 179 list owner as Domville Halstead Cudworth Poole; occupier of plot 141 Thomas Hale others all occupied by Domville Halstead Cudworth Poole.
Marbury cum Quoisley Map	1838-9	CRO EDT/260/2	Route shown between two pecked lines/ one pecked line and one solid line, through plots 141, 145, 157, 177 and 179
Wirswall Apportionment	1837	SRO P303/T/1/2	Plot 186 Dovecote field, * and Pasture 249 Public roads
Wirswall Map	1840	SRO P303/T/1/1	Route shown as double pecked lines, annotated 'Bridle Road' At the edge of map annotated 'to Marbury'
Ordnance Survey			
Surveyors' Drawings	1830	British Library Combermere	Appears to be a route along the full length
1" First Edition	1833	PROW Unit	Route shown between solid boundaries
6" First Edition 6" Second Edition 6" Third Edition	1872-5	PROW Unit	Route shown as single/double pecked line, last section of southern end shown as double solid lines. As above, with the addition of B.R just to the south of Big Mere. As above, with the addition of B.R annotated on the Wirswall side of the route

Appendix 1

25" County Series 1st Edition 25" County Series 2nd Edition 25" County Series 3rd Edition	c. 1872 1896-1898 1909	CRO Sheets LX1 13, LXV 1	Route shown as single/double pecked line, last section of southern end shown as double solid lines. Numbered 154 next to Big Mere. Route shown as single/double pecked line, last section of southern end shown as double solid lines. Annotated B.R just to the south of Big Mere next to the Boat House. As second edition with the addition of B.R also shown on the Wirswall side of the route.
Book of Reference		CRO/BML	N/A
Finance Act 1910			
Working Sheets	1910	CRO NVB/ Sheet LX1 13 Sheet LXV 1	No plots annotated. Large plot coloured blue around Wicksted Hall, route included in plot 585/4 up to the parish boundary, then plot 437/6 to edge of the sheet.
Domesday Book	1910	CRO NVA/2/12	Plot 585 Wicksted New Hall, no deductions Plot 437 Marbury Hall
Record Plan Marbury Wirswall		 TNA IR 132/2/212 TNA IR 132/2/238	 B/W copy submitted by applicant
Field Book	1913	TNA IR/58 242/2	Wicksted New Hall Occupier Ethelstone Deduction made for Bridle Road 392 yds
Quarter Sessions			
Records	Easter session 1812	CRO QJF 240/2 A10 A11	'Bridle and footway' from Marbury diverted, Landowner Domville Poole. Part of claimed route shown as diverted, continuation of claimed route annotated as 'Road to Wirswall' Also refers to 'Cartroad' to the Knowles estate
Records	1945	CRO QJF 373/1-4	No records relating to the route
Records	1946	CRO QJF 374/1-4	No records relating to the route

Appendix 1

Estate Papers: eg Maps, Leases, Conveyances, Sales Particulars

DDX 490 (1783) - Map and Survey of Marbury Hall, small section of northern end of route shown.

DDX 256 (1917) – Sale Particulars & Plans Wickstead Estate Wirswall; Wirswall end the start of the route is shown between solid boundaries then into the next field double dashed lines which then end half way across the field. Route is outside of Lots for sale.

DMD/A/18 (1821) – Sale Particulars Belvidere and Wirswall; no mention of route.

Minute Books/Files of County & District Councils and their Committees

ZRRM/1-7 (1894-1936) Malpass Rural District Council Minutes

ZRRM/4 (1909-1916) minutes checked, no mention of claimed path.

LRN/1/26 (1935-36) Nantwich Rural District Council Minutes – no mention of claimed path.

LRN/2952 (1940) Nantwich RDC Map Part of Mid-Cheshire Regional Planning Scheme (referred to on Wirswall walking survey schedule) – Area 2 map coving this area not available, Area 1 map viewed.

LRN/7168/1 (1936-1947) Nantwich RDC Register of Plans – register of planning applications in the area, no mention of claimed path. References to plans.

Cheshire County Council Roads and Bridges Committee (6th September 1945) – Reference to Nantwich Roads Area Advisory Sub-Committee (5th July 1945)
- Application by the Agent of the Marbury Estate for repairs to Bridle Road and footpath leading from Marbury to Wirswall.
(4) Resolved – That the necessary repairs be carried out at an estimated cost of £30.

Parish Records

PC 38/1 (1894-1959) Wirswall Parish Council Minutes

No mention of claimed path.

PC 36/1-2 (1894-1951) Marbury Parish Council Minutes

- 29th September 1910 – refers to a bridle road leading from Marbury to Wirswall via The Knolls
- 25th March 1915 – refers to a road on Marbury side of Mr Poole's Lodge.
- Oct 1947/Dec 1947/Feb 1948 – refers to roads to the Knowles and Fox Hall.

1952-1990 Marbury PC Minutes held with the Clerk

- 22nd January 1970 – Survey of Rights of Way notices published, clerk had no enquiries.
- 13th August 1973 – Discussion about footpaths, clerk said no objections received to the footpaths shown on the provisional maps which had been brought to parish meetings some time ago.
- 25th March 1974 – Definitive Footpath Maps were laid before the meeting.

Deposited Plans

Railway Plans	1883-4	CRO QDP/609	Route outside of limit of deviation
	1845	CRO QDP/235	Route outside of limit of deviation
	1845	CRO/QDP/250	Route outside of limit of deviation

Local Authority Records

Pre-Definitive Map "Green Book" index record	Early 1950s	PROW Unit	Map – whole of claimed route annotated no.72 Refers to path no.'s 68-72 Tarvin FP map

Appendix 1

			Bridle paths 72 – 5/712 – 'Bridle road and FP past Marbury repaired by CCC Sept '45 5/781 – 'O/S? instructed to make BR useable by public 1946'
Original Parish Surveys	Wirswall 6th Sept 1954 Marbury	PROW Unit	Path No.3 referred to as BR, shown from Wicksted Hall to the Parish Boundary. Schedule refers to posts which would indicate the existence at one time of a bridle gate adjacent to the field gate. States path is indicated as a bridle road on the 1910 Ed of OS and also shown on Mid-Cheshire (Area No.2) Regional Planning Scheme as an existing highway over which the public have a right of way (other than main roads and streets repairable by the inhabitants at large). States repaired by CCC in 1945. There is no survey available for Marbury
ROW Field Notebooks	1950s	PROW Unit	FP8 Marbury, description well defined with 6 wicket gates and a field gate.
Draft Definitive Map & Statements	1953-1956	PROW Unit	Draft Definitive Map shows 3 field gates on Wirswall side, (path no.3). Marbury side shows route (path no.8) 6 wicket gates, one stile and one field gate. No draft definitive statements available.
Draft Map Objections	1950s-1960s	PROW Unit (box files)	none
Provisional Definitive Maps and Statements	1960s	PROW Unit	Route shown as FP
Definitive Map and Statement	1960s-1970s	PROW Unit	Route shown as FP

CRO – Cheshire Record Office
SRO – Shropshire Record Office
TNA – The National Archives, Kew
PROW – Public Rights of Way Unit

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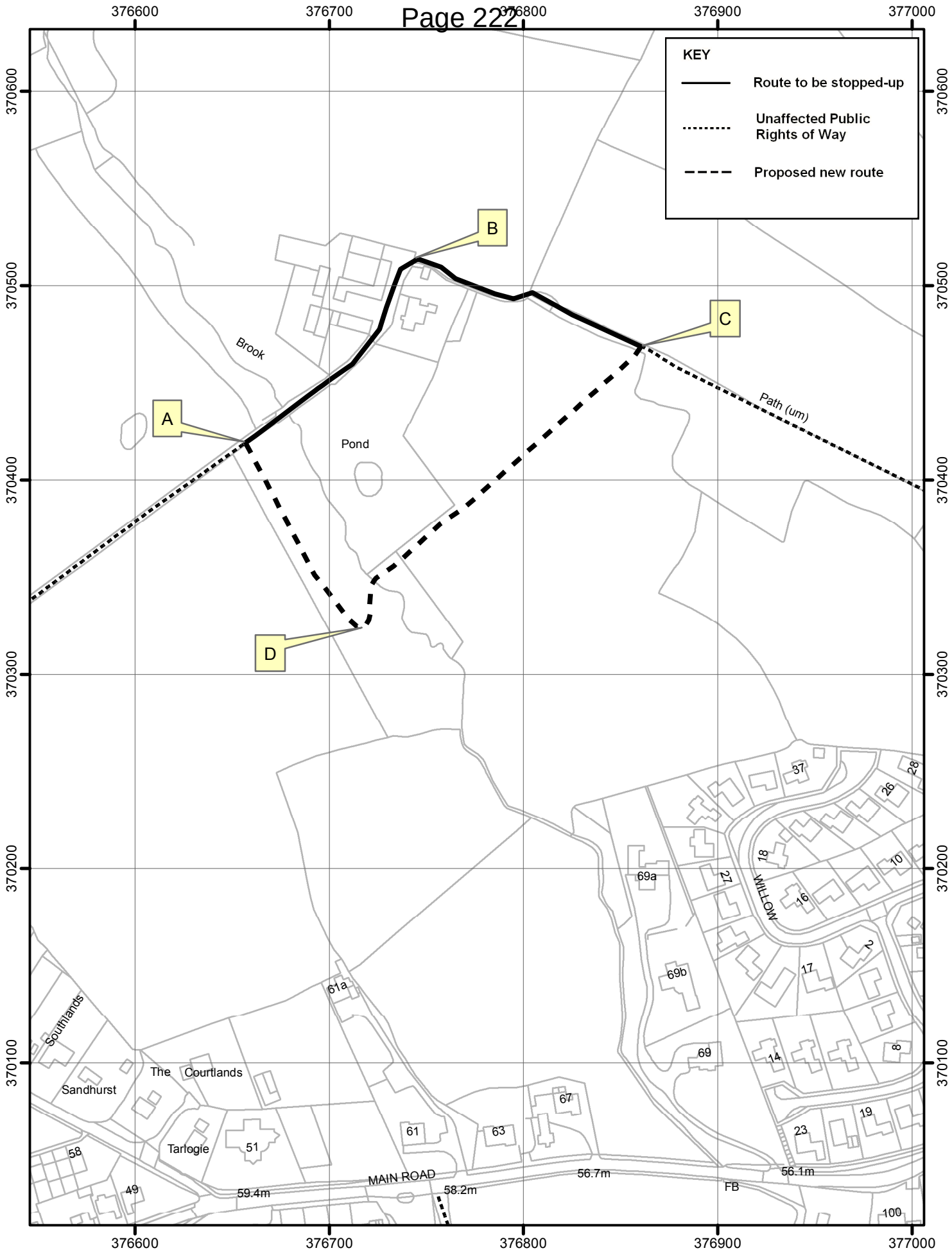

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Highways Act 1980, s119
The Cheshire East Borough Council
(Footpath 12 (part) Parish of Goostrey)
Public Path Diversion Order 2016

Plan No.
HA/110

Cheshire East Council

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 13th June 2016
Report of: Public Rights of Way Manager
Subject/Title: Highways Act 1980 s.119
Application for the Diversion of Public Footpath Nos. 12 (part), Parish of Goostrey

1.0 Report Summary

1.1 This report seeks to assist Members in the determination of an application to divert part of Public Footpaths No.12 in the Parish of Goostrey as shown on Plan 1 attached to the report.

1.2 The report includes the outcome of consultations carried out in respect of the proposal and the legal tests to be considered before a diversion order to be made. The proposal has been put forward by the Public Rights of Way Unit because an application has been made by the landowner concerned. The report makes a recommendation based upon the above information, to enable a quasi-judicial decision to be made by Members whether or not to make the requested Order.

2.0 Recommendation

2.1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert part of Public Footpaths No.12 Goostrey by creating a new section of public footpath and extinguishing the current path as illustrated on Plan HA/110 attached to this report on the grounds that it is expedient in the interests of the owner of the land crossed by the path.

2.2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

2.3 In the event of objections to the Order being received, and not subsequently withdrawn the Order be referred to the Secretary of State to be determined.

3.0 Reasons for Recommendations

3.1 In accordance with Section 119(1) of the Highways Act 1980 it is within the Council's discretion to make the Order if it appears to the Council to be expedient to do so in the interests of the public or of the owner, lessee or occupier of the land crossed by the path. It is considered that the proposed

diversion is in the interests of the landowner for the reasons set out in Section 10 below.

3.2 Where objections to the making of an Order are made and not withdrawn, the Order will fall to be confirmed by the Secretary of State. In considering whether to confirm an Order the Secretary will, in addition to the matters discussed at paragraph 3.1 above, have regard to:

- Whether the path is substantially less convenient to the public as a consequence of the diversion.

And whether it is expedient to confirm the Order considering the effect to which:

- The diversion would have on public enjoyment of the path as a whole
- The effect on other land served by the path
- Any provisions for compensation
- Any material provision within a Rights of Way Improvement Plan
- The needs of agriculture and forestry; biodiversity; and disability discrimination legislation

3.3 Where there are no outstanding objections, it is for the Council to determine whether to confirm the Order in accordance with the matters referred to in paragraph 3.2 above.

3.4 The proposed route will not be 'substantially less convenient' than the existing route and diverting the footpath will increase the perception of both the security and privacy of the property. It is considered that the proposed route will be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order can be satisfied.

4.0 Wards Affected

4.1 Dane Valley

5.0 Local Ward Members

5.1 Councillors Les Gilbert and Andrew Kolker

6.0 Policy Implications

6.1 Not applicable

7.0 Financial Implications

7.1 Not applicable

8.0 Legal Implications

8.1 Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the local highway authority to confirm the order itself, and may lead to a hearing/inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources

9.0 Risk Management

9.1 Not applicable

10.0 Background and Options

10.1 The application has been received from Robin Carr Associates (agents) on behalf of Mr & Mrs Dick of Swanwick Hall, Booth Bed Lane, Goostrey, Cheshire CW4 8NB. The application requests that the Council make an Order under section 119 of the Highways Act 1980 to divert part of Public Footpath Nos. 12 in the Parish of Goostrey as shown on Plan HA/110 attached to this report.

10.2 The land over which the current path and the proposed diversion run belongs to Mr & Mrs Dick. Under section 119 of the Highways Act 1980 the Council may accede to an applicant's request, if it considers it expedient in the interests of the landowner to make an order to divert the footpath.

10.3 The section of footpath proposed for extinguishment is the whole width of that part of Public Footpath, Goostrey No 12 shown by a solid black line on Plan HA/110 and commencing at O.S. grid reference SJ 37665 37041 (Point A) and running in a generally north easterly direction along the driveway to Swanwick Hall (passing over a bridge) and then through the farm yard (passing between the Hall and farm outbuildings) to a double hand gate structure at O.S. grid reference SJ 37674 37051 (Point B). The footpath then turns and runs along the field boundary in a generally south easterly direction, crossing a boardwalk with a hand gate at each end, and then again in the same general direction along the field boundary to O.S. grid reference SJ 37686 37046 (Point C). The length of this section of footpath (A – B – C) is approximately 265 metres.

10.4 The proposed new footpath is shown by a broken black line on Plan HA/110 and commences at O.S. grid reference SJ 37665 37041 (Point A) where it leaves the driveway to Swanwick Hall and passes through a hand gate before running along the field boundary in a generally south south-easterly direction to O.S. grid reference SJ 37671 37032 (Point D) where it turns in an arc and proceeds down a re-graded slope and runs in a generally north easterly direction crossing a footbridge over the brook and then continue up a further slope initially along the field boundary and then across the open field passing through a hand gate to O.S. grid reference SJ 37686 37046 (Point C). The length of the proposed new footpath is approximately 315 metres. The new route would be 2 metres wide and unenclosed. The surface of the new route

would be grass with some stoning/surface improvements on gradients and in the vicinity of any gate ways should this prove necessary.

10.5 The proposed new route was established in 2014 on a permissive basis (prior to a formal diversion application being submitted) in full consultation with the Goostrey Footpath Group and Officers of the Council. At this time the Footpath Group were broadly in favour of the proposal, but they did express reservations regarding issues surrounding access for people with mobility problems.

10.6 Following the submission of the application a number of objections were received, again relating to accessibility issues for people with mobility problems. These are discussed in more detail below. In response to these objections an access audit was commissioned by the applicant from a specialist in countryside access for people with disabilities. The subsequent "Access Report" (Appendix 1) recommended various improvements (including additional improvements to gradients etc) which have been implemented. The Access Report was circulated as part of a second consultation exercise on the revised proposal, which is the matter members are being asked to consider.

10.7 The current path runs immediately in front of the residential property and then between it and the adjoining barns/ farm buildings through what was originally an area of farm yard, but is now more akin to the driveway, parking area and garages to the house. Moving the footpath out of such an area will clearly increase the perception of both security and privacy of the property. As such the proposal is considered to be in the interest of the owner of the land and that the diversion of the footpath is a suitable and appropriate (expedient) means of addressing these issues.

10.8 Whilst the proposed new route is approximately 50 metres longer than the existing route, and any such increase in distance may be considered to have an impact on the convenience of the route, this must be considered in context taking into account factors such as the primary use that a path receives (e.g. to get to local amenities or recreation) and the overall length of the path or journey to be undertaken. In this instance the increased distance of 50 metres is not considered unreasonable given the rural setting of the footpath and the generally recreational use that it receives.

10.9 Consideration may also be given to the number of structures (e.g. stiles and gates etc) that have to be negotiated when using the route. The Access Report identified that the affected section of the existing footpath has a number of difficult structures (including a double gate structure and a difficult board walk) and, in part, a potentially problematic (gravelled) surface. The proposed new route will have only two gates, a footbridge which is more accessible than the board walk and better surface. In addition, work has been undertaken to improve drainage and gradients towards meeting acceptable access standards. In considering the proposal overall it is considered that the proposed new route is not substantially less convenient than the existing footpath.

10.10 With regard to the enjoyment of the route, the proposed new route affords walkers excellent views of the surrounding area, along with access down to the stream. Whilst views of the front of the Hall are lost, these are replaced by views of different aspects of the property and wildlife areas to its rear. On balance it is not therefore considered that the diversion will have a detrimental effect on the enjoyment of the path as a whole.

10.11 The land crossed by the existing and proposed routes is all in the same ownership and no private rights of access will be affected by the proposals. There is therefore no adverse effect on any land served by the footpath. Similarly, as the land is all in the same ownership, and the land owners are the applicants, no compensation issues should arise.

10.12 An assessment of the ROWIP for the Cheshire East Council area has been made and there are no material provisions within the document that adversely affect the proposals, and the proposal is not considered to have any detrimental effect on the needs of agriculture, forestry or biodiversity.

10.13 The Ward Councillor was consulted about the proposal and no objections have been received to the proposal.

10.14 Goostrey Parish Council has been consulted and no objections have been received to the proposal.

10.15 The statutory undertakers have also been consulted and have raised no objections to the proposed diversion. If a diversion order is made, existing rights of access for the statutory undertakers to their apparatus and equipment are protected.

10.16 The Council's Nature Conservation Officer has been consulted and raised no objection to the proposals.

10.17 A detailed and thorough assessment in relation to Disability Discrimination Legislation has been carried out, including an access audit and the production of an Access Report (Appendix 1).Overall and on balance it is considered that the proposed diversion offers an improvement over the old route.

10.18 The user groups have been consulted. Following the first consultation exercise the Peak and Northern Footpath Society objected as did the Ramblers Association and the Goostrey Footpath Group. The objections may be summarised as relating to:

a) accessibility issues, and in particular the gradients on the proposed new route
b) loss of enjoyment and convenience as a result of the above;
c) loss of views of the 17th Century Hall; and
d) the proposed new route potentially running in part next to a proposed new housing development.

10.19 The objections raised in respect of accessibility issues prompted the applicant to commission the specialist access audit and Access Report, many of the

findings and recommendations of which have been implemented. Whilst walkers will not be able to view the front of the 17th Century Hall referred to in the objections however, views of different aspects of the Hall would be available from the new path. The merits or otherwise of a possible development on adjoining land are primarily a matter for the planning process and as the planning application is yet to be determined it should not be considered as part of this proposal. However if such development does take place it will not have an impact of views along the footpath or indeed over the stream etc. There will be an impact on views in a south westerly direction back towards the village but these will be no different than if the footpath remained on its current alignment.

10.20 Following completion of the Access Report a revised proposal was the subject of further consultation. The local representative of Ramblers Association has maintained his objections despite many of these being addressed. The Goostrey Footpath Group have suggested further changes including an alternative alignment for much of the length of the proposed route which the applicant has advised are not viable, nor indeed desirable in light of the findings of the Access Report. The Peak and Northern Footpath Society have not responded.

10.21 The Access Report (Appendix 1) assesses the requirements of the legislation in respect of public paths, assesses both the existing route and the proposed route and provides recommendations to improve both routes towards meeting recommended non statutory access standards. It then offers a subjective conclusion measuring the merits of both routes. It should be noted that there are no specifically measureable criteria required to be introduced by the legislation, (The Equality Act 2010). Rather the legislation requires that "reasonable adjustments" be made and "auxiliary aids" are provided to support equality of opportunity. It also makes it clear that landscape topography may well impact on what is deemed "reasonable". When the merits of both routes are assessed from an accessibility perspective it is the view of officers that the proposed route is, overall, more acceptable than the current route. Therefore it is regarded that an objective assessment of the proposals suggests that the criteria of the legislation can be met, and that an Order, if made, is capable of confirmation.

12.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

Name: Mike Taylor
Designation: Public Path Orders Officer
Tel No: 01270 686 155
Email: mike.taylor@cheshireeast.gov.uk
PROW File: 132D/507

Background Paper -
Appendix 1: The Access Report by Phil Chambers Consultancy

Re: Public Footpath, Goostrey No 12 - Diversion Proposals - Access Assessment & Report

Author: Philip Chambers 6th April 2016

1. Introduction

My name is Philip Chambers and I operate a countryside access consultancy service specialising in access to the countryside and heritage environments with disabled people. My trading name is Phil Chambers Consultancy and my website is www.philchambersconsultancy.co.uk

2. Experience and Background

I was a founder member of the Fieldfare Trust in 1987 and key contributor to the BT Countryside for All Standards and Guideline[1] publication in 1977. This guidance was agreed in consultation with national and local countryside and disabled peoples' charitable organisations including the Countryside Commission (now Natural England), Ramblers Association, National Trust and the Countryside Landowners Association, together with the Royal National Institute for the Blind, MENCAP and RADAR (Royal Association of Disability) now Disability Rights UK. This guidance, which is still widely regarded as best practice, was used in assessing access needs at Goostrey.

Since 2001 I have operated independently carrying out numerous outdoor heritage access audits and providing countryside disability access training across the UK. I have previously been commissioned as a Groundwork Trust Facilitator (2008-2012), DEFRA agri-environement peer reviewer (2015) and was formerly until the panel closure, a Heritage Lottery Fund Expert Advisor – access and learning (2005 -2008) and a member of the CRT Towpath Design Guidance Document Panel (2008 – 2011) I am presently a Design Council/CABE expert advisor, working across built environment and greenspace guidance.
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3. Instructions

Phil Chambers Consultancy (PCC) was asked by Robin Carr Associates on behalf of Mr Cameron Dick of Swanwick Hall, Goostrey to assess a footpath network at Swanwick Hall in terms of providing a convenient public path and particularly to assess the usability by people with a range of disabilities. Mr Dick would like to realign part of the footpath and has provided an optional permissive footpath, as an alternative to the original designated footpath. PCC was asked to identify current barriers to access along the existing footpath and the proposed footpath. The full report is provided at Appendix 2

[1] [1] BT Countryside for All Standards & Guidelines – a good practice guide to disabled peoples access to the countryside. BT & Fieldfare Trust 1997

4. Site Visit

A site visit was arranged on Sunday 7th February 2016. The day was bright after a period of poor winter weather, so the land was quite wet. On the day of the visit a number of visitors were encountered along the permissive footpath route, but, none along the existing section, including the boardwalk. Mr Dick and Steven Chambers, who often assists me with access audits, accompanied me on the visit. I was cognizant of key legal requirements and principles of access with disabled people along footpaths, when carrying out the site survey.

5. Legislative Framework

The key legislative considerations are the Equality Act (2010) which incorporated the principles of the Disability Discrimination Act (2006) and the Countryside Rights of Way Act – CROW (2000) and Section 119 of the Highways Act(1980).

The Equality Act (2010) sets out the requirements to meet the needs of people defined as having "protected characteristics" within the law, including people with disabilities. The Act sets out a requirement for service providers to ensure that "reasonable adjustments" are made and auxiliary aids are provided to support equality of opportunity objectives. The landscape topography or history of a place may well impact on what is deemed "reasonable". The Act outlines four options for overcoming a barrier caused by a physical feature. These are:

1) Removal of the feature;
2) Alterations to the feature;
3) Providing a reasonable means of avoiding it;
4) Providing the service by a reasonable alternative method if none of the preceding options is viable

The Countryside Rights of Way Act - CROW Act (2000) makes provision for public access to the countryside and promotes increased and better opportunities for disabled people.

Section 119 of the Highways Act (1980) state that:-

"In deciding whether or not it is expedient, the authority must have regard to the extent to which the way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area and, the effect which the creation of the way would have on the rights of persons interested in the land"[2].

[2] The Planning Inspectorate Rights of Way Section General - Guidance on Public Rights of Way Matters Advice Note 9 (2001)

In determining the level of convenience for disabled people it is helpful to take into consideration the principles outlined below which affect access to outdoor opportunities to people with disabilities.
It is also necessary to be aware that wheelchair and mobility scooters are legally entitled to use footpaths and bridle paths. Wheelchairs and Mobility Scooters fall into three categories of “invalid carriages” which are covered in the Highways Regulations (1988).

- Class 1 - manual wheelchair, (i.e.) self-propelled or attendant-propelled, not electrically powered;
- Class 2- powered wheelchairs and scooters, for footway use only with a maximum speed limit of 4 mph;
- Class 3- powered wheelchairs, and other outdoor powered vehicles, including scooters, for use on roads/highways with a maximum speed limit of 8 mph and facility to travel at 4 mph on footways.

Class 1, 2 &3 vehicles can be used:-

- On footpaths, pavements, bridleways and pedestrian areas at a maximum speed of 4 mph;
- On most roads at a maximum speed of 8 mph

6. **Diversity of Need**

It is necessary to consider the physical, sensory and intellectual needs of all potential visitors to the site. The aim should be to think in terms of inclusive design rather than trying to second guess what individual “*problems*” a disabled visitor may present. The objective should be to, where reasonably practical, to design the footpath network so that visitors are not restricted; or “handicapped”, by their physical and social surroundings. Social surroundings would include opportunities for disabled people to conveniently enjoy the footpath and natural environment alongside friends and family and other countryside visitors. In terms of impairment it is worth noting that people with disabilities represent approximately 15% of the population and of those about 6% are people who use wheelchairs or outdoor mobility vehicles. Predominantly people with sensory impairments and learning disabilities contribute to the disabled community and their requirements are often more related to information; way-marking and interpretation than physical access needs.

7. **Principle of Least Restrictive Access**

The Principle of Least Restrictive Access is implicit within the Equality Act (2010). It recognises that it is not necessary to make everywhere and all facilities fully accessible to all disabled people, but asserts that reasonable adjustments are made to provide the best quality of access for as many people as possible, given the constraints presented at a site or facility. Access work should aims to meet the

Countryside for All Rural Standard (See Appendix 2) where practical, to exceed it where possible and to apply the principle of least restrictive access where it is not practical to meet the minimum of the Rural Standard. It is possible that it may not be practical to achieve a gradient of not steeper than 1:10 on the slope after the bridge, but the best quality of surface and optimum gradient should be the aspiration at this point. It is a relatively short stretch and the slope might be mitigated by providing a leaning post and resting point mid-way up the slope. The route would comply with Natural England's By All Reasonable Means Zone C (See Appendix 2.).

There is a clear need in a landscape such as the Swanwick Hall estate to balance the access needs of visitors with the conservation of the landscape. On balance most disabled people would prefer to see reasonable and practical modifications made rather than inappropriate interventions which might ultimately negate the heritage character of the site and the enjoyment of visitors. The aim should be to provide equitable services which reflect the principle of making reasonable adjustments set out in the Equality Act (2010). This should be an objective when designing and improving services and facilities currently and in the future.

8. Methodology

The site assessment methodology, regarding disabled people is based on the Countryside for All Standards and complemented By All Reasonable Means (See Appendix 2.) which is supported by Natural England and the Disabled Ramblers.

The aim is to identify barriers to access and formulate a time critical improvement plan. This might range from immediate "quick fix to extensive groundwork e.g. from replacing the gate fastening latch at the entrance to the permissive route with an easier to operate one to resurfacing the original route and replacing the boardwalk and gateways with accessible alternatives. The process was as follows:

I. The Date the survey and weather conditions are recorded as some areas may present barriers at certain times of the year when affected by the weather
II. Determine the Countryside Setting – See Appendix 2
III. Carry out an Assessment of the landscape against the Standard for the Setting - some tracts of land might include more than one setting See Appendix 2
IV. Record the Barrier and its location – photographic evidence is helpful
V. Provide recommendations for improvement

It is necessary for the landowner to determine the time frame for removing barriers and the resources necessary and to periodically monitor the site accessibility and make any improvements required in the future.

9. Assessment of the Current Footpath Route (Sections ABC on the Plan)

The existing path route commences at Booth Bed Lane in the village of Goostrey and leads to the stable yard at Swanwick Hall Farm, a distance of approximately 450m. The good quality footpath is used by vehicles, visiting the equestrian centre

and house and by pedestrians. The owner Mr Dick has installed traffic lights to establish a safe shared- space route for pedestrians and vehicles. The path is more than 2.5 wide and a mix of trackway with some minor potholes and a tarmac section. The path enters the yard of Swanwick Hall Farm where it passes between the main house, barns and outbuildings, which are now primarily used for equestrian purposes. Visiting riders and vehicles share the space in the yard with pedestrians, including disabled people on the definitive footpath, which has safety implications. It is pertinent to point out that such as wheelchair users may not be able to move quickly if confronted by vehicles and people with sensory impairments are disadvantaged in such environments. The Guide Dogs Society advocate separate delineated routes where there is conflict between blind users and vehicles and deaf and hard of hearing people may not hear approaching vehicles in the stable yard. These are important safety considerations.

The path which is then constructed of loose grave intersects the main buildings and leads to a field gate on an existing residential/equestrian area. The field gate leads to an earth track which follows a field boundary and eventually towards Mill Lane, Goostrey.

Figure 1 Exit gate from the farm/stable yard.

After the gateway the footpath turns and runs parallel to the boundary of the house and garden and a field fence -line. It is initially a grass path before deteriorating into a less defined route.

Figure 2 Grass Route

The subsequent rough grass and earthen path has some undulation and is not an easy going route for disabled people to access. A grass path can be suitable if, for example grazed by sheep, into a consistent firm swaithe, but longer grass is difficult to access by people with mobility impaimensta and blind or visually impaired users. A grass paath should be mown to keep a surface which meets the Standard.

Figure 3 Undulating Footpath

Pedestrians and in particular disabled people are soon confronted by a series of barriers; including two difficult to negotiate field gates and a board walk with stepped access. The entrance point to the boardwalk is restricted by an uneven and poorly maintained path with a step onto the boardwalk of approximately 20cm. The design of the field gate is a barrier to some people with mobility impairments and probably those with visual impairments, as it opens towards the user and the step access will impede independent wheelchair users and people with outdoor mobility scooters.

Figure 4 Field Gate and Step to Boardwalk

The boardwalk is not well maintained and moss, leaf litter, undergrowth and overgrowth encroachment have reduced the useable width and a clear walking tunnel of 1200m x 2100mm is not provided, so the route does not meet the Countryside for All Standard. Boardwalks are prone to becoming slippery surfaces when leaf litter etc. accumulates and it is always best to provide a non-slip safety

surface on the decking to reduce the potential hazard, this has not been provided. The wooden hand rails which a visually impaired or blind person would grip are rough and abrasive.

Figure 5 Poorly Maintained Board Walk

There is a second gate at the other end of the board walk. The second gate is an absolute physical barrier to most wheelchair and mobility scooter users as the box hurdle has been designed with insufficient space to permit a convenient turning space. A gate rail appears to have been broken off to try and create easier access to and from the boardwalk.

Figure 6 Difficult to Negotiate Gate

After the boardwalk the path continues alongside the edge of a field where it is reasonably level and made up of a mix or earth and grass. It does not meet the Standard. As an independent wheelchair users, I found that the combination of the Boardwalk and gates detract from the pleasure of the journey and I would normally have been dissuaded from this route, mainly due to the physical man-made constructions which cause access barriers.

Figure 7 Erath and Gras Path after Boardwalk

The footpath provides a pedestrian route, along an earth path continuing towards Mill Lane Goostrey, where it finishes at a field gate, which does not provide wheelchair or outdoor mobility scooter accessibility.

10. Permissive Footpath Route ADC on Plan

The route, (See Figure 1) followed in assessing the landscape started at the house and stable yard and progressed in a westerly direction along the drive and public right of way where. The good quality path continued to Booth Bed Lane with access to Goostrey village.

After approximately 200m, the permissive footpath was signposted and access provided to a pasture, through an accessible gateway where the path follows the field boundary and fence line.

Figure 8 Field Gate leading to Permissive Path

The path, which is a mix of earth and grass is fairly level, although at the time of the survey was quite muddy. This part of the route provides good views of the open fields and overlooks Shear Brook.

Figure 9 Level Muddy Earth Path

The path turns about 180degrees and the footpath slopes down to a footbridge over Shear Brook, situated in a pleasant valley setting. The slope is steeper than 1:10 and is an earth path so does not meet the Countryside for All Rural Standard. Seating has been provided to assist people who need to take a rest when or after approaching the slopes.

Figure 10 Seating Adjacent to Footbridge

The footbridge is of a good quality with flush access to and from the footpath. The handrail should be extended to enable blind or visually impaired users to navigate more easily and to appreciate when they are leaving the bridge and returning to the footpath. On leaving the footbridge the footpath is muddy and rises at a gradient of steeper than 1:10, so does not meet the Standard.

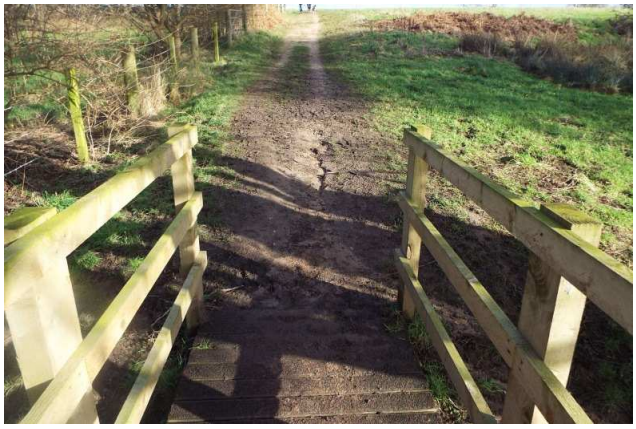


Figure 11 After leaving bridge Path does not meet Standard

The path levels off and although remains an earth structure and it was firm. There are good views of the surrounding rural countryside and over an attractive nature pond which the landowner has opened up near to the path.

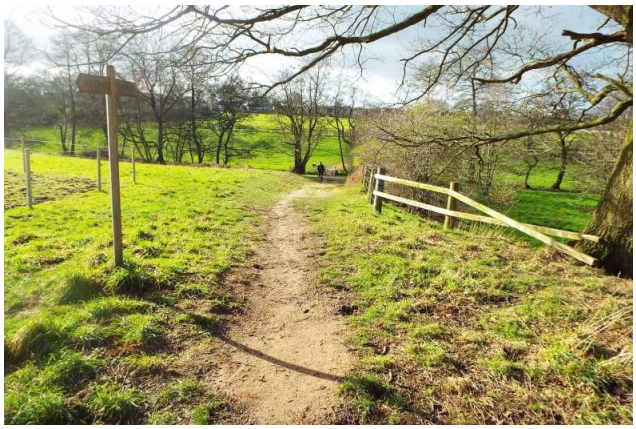


Figure 12 Path provides good countryside views and experiences

The earth path remains level and after approximately 1,000m from the start, the path culminates at an accessible field gate where recent wet weather and regular footfall had caused a muddy gateway. At this point the definitive footpath and the permissive footpath join.

Figure 13 Easy Access Gate – Restricted by Muddy surface

The adjoining footpaths continue towards Mill Lane Goostrey. The path width is narrower than 1000mm and is an earth path which is muddy in parts, but it is level, although it does not meet the Standard. The path meanders past a redundant fence line and stile, eventually culminating at a field gate adjacent to Mill Lane. The field gate is in good condition, but the design precludes wheelchair access.

Figure 14 Path Does Not Meet rural Standard

Figure 15 Footpath finishes at field gate - design restricts wheelchair access

11. Interim Conclusions

In comparing the existing route (Sections ABC) on the plan and the permissive route (Sections ADC on the plan) I considered the level of accessibility and barriers to access for people with a range of disabilities, including wheelchair and outdoor mobility scooter users and people with sensory impairments, including blind and visually impaired path users. I have also thought about conflicts in terms of vehicles and pedestrians accessing shared spaces and particularly the safety implications for disabled people. I have also thought about why visitors wish to visit the site and the levels of enjoyment and convenience that each of the two routes might provide.

I feel that the existing route requires a significant degree of modification to improve the quality to meet the Countryside for All Rural Standard. The access to the boardwalk with the two gates is a major concern as the gates will certainly need to be replaced by wheelchair accessible designs, with level or ramped access to the structure to the boardwalk. The boardwalk is in a poor state of maintenance and will require upgrading and on-going maintenance into the future, to ensure it is fit for purpose. Additionally the full footpath will need be upgraded and constructed to meet the minimum of the Countryside for All Standard.

It is the safety implications of keeping a shared space in the yard where vehicles and pedestrians will be mixing that is a major concern. Traffic lights have been introduced on the drive to mitigate the danger and I feel the risk is potentially greater in the yard. People with sensory impairments are at clear risk, perhaps not seeing or hearing (or both) visiting vehicles and farm and equestrian traffic.

In term of enjoyment of the countryside environment, the stress of crossing the shared space area may deter some disabled people. The route along the field edges were visited in February when the hedgerows were bare, so it is hard to compare the aesthetic and natural history value later in the year, but as the route currently exists it is not a healthy or enjoyable option.

In comparison the permissive footpath does not require pedestrians to enter the farm/equestrian area, so the conflict between vehicles and pedestrians is effectively removed.

There is barrier free access leading from the drive the footpath route. As with the existing route the full permissive path will need to be upgraded to meet the Countryside for All Rural Standard. The route is barrier free throughout and the only place where the Rural Standard will be difficult to meet will be on either side of the footbridge over the brook. The gradient of the slopes may be mitigated by contouring the design of a new footpath where practical and by providing additional resting points and seats.

The permissive route is attractive and enjoyable as it offers a mix of natural features, brook, ponds, open spaces and hedgerows and good countryside views. On the day

of visiting, there were many more visitors using the permissive path, none were encountered on the existing path.

12. Conclusion

In taking into account the points outlined in Section 11 Interim conclusions I feel that the most suitable route from an accessibility perspective in the permissive footpath (ADC) as it already exists as a barrier free route with countryside furniture which is fit for purpose, this cannot be said of the board walk and gates at each end of the existing route. It is fair to say that both footpaths require significant construction work and surfacing to meet a minimum of the Rural Standard. Appendix 2 provides details of the access audit, of both footpaths, identifying barriers to access and provides recommendations for improvement to each section of the existing and permissive footpath.

In terms of the landscape the slopes leading to and from Shear Brook at the footbridge are steeper than 1:10 in places and the existing footpath (ABC) does not include any slopes steeper than 1; 10 so meets that characteristic of the Rural Standard. It is likely that the slopes may be mitigated with landscaping and that additional strategically positioned seating and rest points will be required.

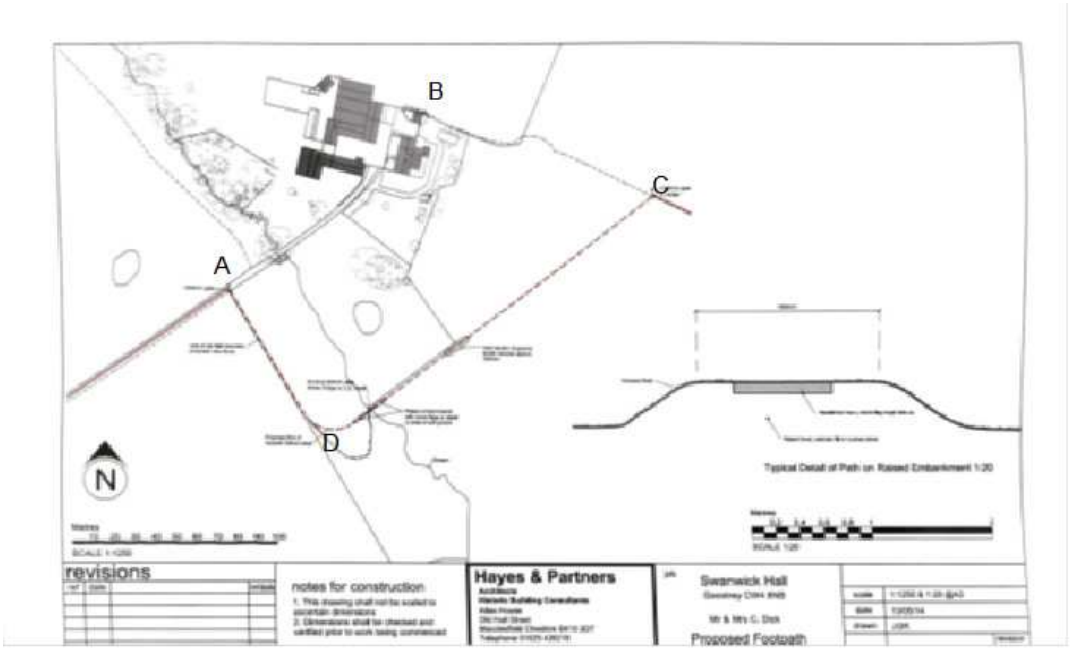
On balance, although subjective, I feel the permissive footpath provides more countryside and natural features than the existing route and for this reason may be more enjoyable to visitors including disabled people.

The most significant reason for recommending the permissive route as the preferred one is based on safety. I feel that if the existing footpath is upgraded to the Countryside for All Standard, then it will attract more visitors with disabilities and there are inherent dangers of mixing people with physical disabilities and sensory impairments with moving traffic and machinery in a shared space environment such as the yard of the equestrian centre.

However, if it is decided to maintain the existing route; then recommendations set out in the access audit report at Appendix 2 should only be implemented on condition that full consultation with disability led organisations is arranged and only on gaining their support for a shared space safety protocol for pedestrians and vehicles in the equestrian yard should the access improvement work be carried out.

Appendix 1

Site Plan (ABC Existing Route & ADC Permissive Route)



Appendix 2

Full Access Survey Report with Recommendations to reduce Access Barriers

Swanwick Hall Access Survey February 2016

Introduction

Phil Chambers Consultancy (PCC) was asked by Robin Carr Associates on behalf of Mr Cameron Dick of Swanwick Hall, Goostrey, Cheshire to assess a footpath network at Swanwick Hall in terms of providing a convenient public path and particularly to assess the usability by people with a range of disabilities. Mr Dick would like to realign part of the footpath and has provided an optional permissive footpath, as an alternative to the original designated footpath (Figure 1). PCC was asked to identify current barriers to access and to make recommendations for improvements.

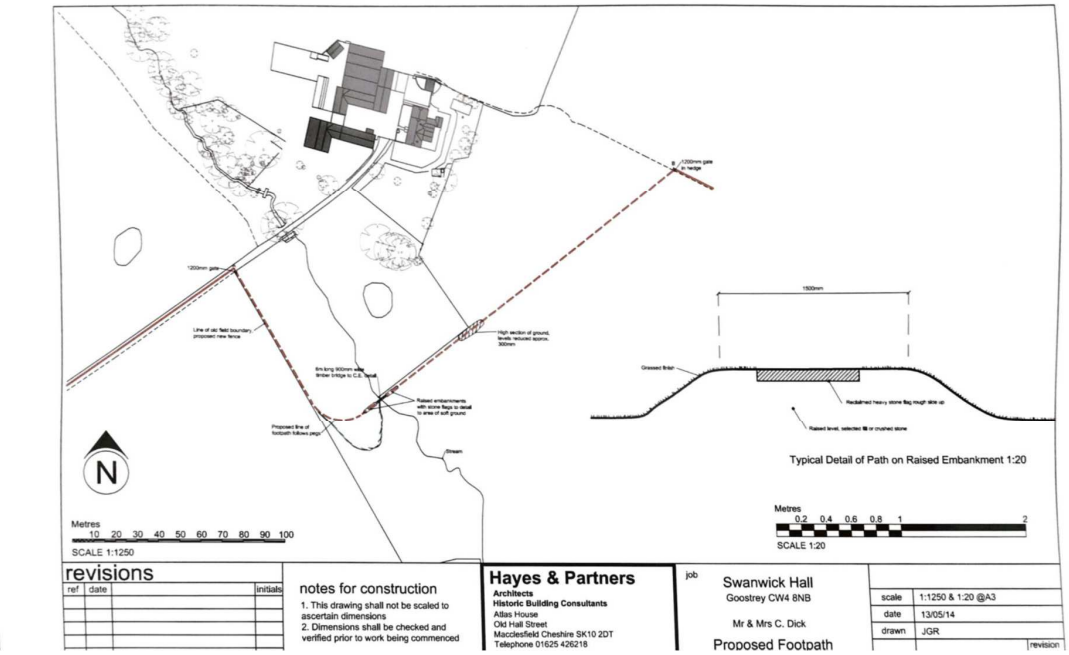


Figure 16 Existing Footpath & Permissive Path

Legislative Framework

The two key legislative considerations are the Equality Act (2010) which incorporated the principles of the Disability Discrimination Act (2006) and the Countryside Rights of Way Act – CROW (2000).

The Equality Act (2010) sets out the requirements to meet the needs of people defined as having “protected characteristics” within the law, including people with disabilities. The Act sets out a requirement for service providers to ensure that “reasonable adjustments” are made and auxiliary aids are provided to support equality of opportunity objectives. The landscape topography or history of a place may well impact on what is deemed “reasonable”. The Act outlines four options for overcoming a barrier caused by a physical feature. These are:

5) Removal of the feature;
6) Alterations to the feature;
7) Providing a reasonable means of avoiding it;
8) Providing the service by a reasonable alternative method if none of the preceding options is viable

The CROW Act (2000) makes provision for public access to the countryside and promotes increased and better opportunities for disabled people.

Diversity of Need

It is necessary to consider the physical, sensory and intellectual needs of all potential visitors to the site. The aim should be to think in terms of inclusive design rather than trying to second guess what individual "*problems*" a disabled visitor may present. The objective should be to, where reasonably practical, to design the footpath network so that visitors are not restricted; or "handicapped", by their physical and social surroundings. Social surroundings would include opportunities for disabled people to conveniently enjoy the footpath and natural environment alongside friends and family and other countryside visitors. In terms of impairment it is worth noting that people with disabilities represent approximately 15% of the population and of those about 6% are people who use wheelchairs or outdoor mobility vehicles. Predominantly people with sensory impairments and learning disabilities contribute to the disabled community and their requirements are often more related to information; way-marking and interpretation than physical access needs.

Principle of Least Restrictive Access

The Principle of Least Restrictive Access is implicit within the Equality Act (2010). It recognises that it is not necessary to make everywhere and all facilities fully accessible to all disabled people, but asserts that reasonable adjustments are made to provide the best quality of access for as many people as possible, given the constraints presented at a site or facility. It is recommended that the access work planned aims to meet the Countryside for All Rural Standard (See Appendix 2.) where practical, to exceed it where possible and to apply the principle of least restrictive access where it is not practical to meet the minimum of the Rural Standard. It is possible that it may not be practical to achieve a gradient of not steeper than 1:10 on the slope after the bridge, but the best quality of surface and optimum gradient should be the aspiration at this point. It is a relatively short stretch and the slope might be mitigated by providing a leaning post and resting point mid-way up the slope. The route would comply with Natural England's By All Reasonable Means Zone C (See Appendix 2).

There is a clear need in a landscape such as the Swanwick Hall estate to balance the access needs of visitors with the conservation of the landscape. On balance most disabled people would prefer to see reasonable and practical modifications made rather than inappropriate interventions which might ultimately negate the heritage character of the site and the enjoyment of visitors. The aim should be to provide equitable services which reflect the principle of making reasonable adjustments set out in the Equality Act (2010). This should be an objective when designing and improving services and facilities currently and in the future.

Methodology

The site assessment methodology, regarding disabled people is based on the Countryside for All Standards[3] and By All Reasonable Means (See Appendix 2.2-4) which is supported by Natural England and the Disabled Ramblers.

The aim is to identify barriers to access and formulate a time critical improvement plan. This might range from immediate "quick fix to extensive groundwork e.g. from replacing the gate fastening latch at the entrance to the permissive route with an easier to operate one to resurfacing the original route and replacing the boardwalk and gateways with accessible alternatives. The process was as follows:

13. The Date the survey and weather conditions are recorded as some areas may present barriers at certain times of the year when affected by the weather
14. Determine the Countryside Setting – See Appendix 1
15. Carry out an Assessment of the landscape against the Standard for the Setting - some tracts of land might include more than one setting See Appendix 2
16. Record the Barrier and its location – photographic evidence is helpful
17. Provide recommendations for improvement

It is necessary for the landowner to determine the time frame for removing barriers and the resources necessary and to periodically monitor the site accessibility and make any improvements required in the future.

Swanwick Hall Access Survey

The access survey was carried out on dry winter day in February 2016. The site was assessed meeting the Countryside for All Rural Setting, with a score of 17 (See Appendix 1) for method of determining setting and Appendix 2.3 for minimum Rural Access Standard. The table below identifies the key barriers to access and the recommendations for improvements. It is recommended that where practical the minimum standard should be bettered and if it cannot be achieved the Principal of Least Restrictive access is applied - see Appendix 2.4 By All Reasonable Means. To aspire to meeting the minimum standard it is recommended that a new path is constructed along the complete route.

Comments/ Barrier	**Recommendation**	**Photographic Location**
It is quite difficult, particularly for wheelchair users to operate gate latch	Provide Centrewire access gate or an equestrian latch in the short term See: http://centrewire.com/product-category/pedestrian-and-mobility-access-	

[3] Fieldfare Trust

to gain access to the permissive route	gates/ for example the gate opposite provides access for wheelchairs and most outdoor mobility scooters	
Some drainage work has been done, but the earthen path is not firm in wet weather	Provide a firm and compact surface to meet the Countryside for All Urban and Formal Standard Appendix 2.2 on this level section Address drainage issues to maintain quality of path	
Slope down to bridge is steeper than 1:10 and does not meet Rural Standard (Initially 1:9 steepest 1:6)	Aspire to contouring the slope to meet a minimum of the Rural Standard See Appendix 2.3 with a gradient not steeper than 1:10, provide level resting pads of 1500mm x 2000mm every 9.6m If resources permit a boardwalk over the grass/reed-bed might be provided	
There is flush access from the path to the bridge and safety treads have been provided. The bridge handrail is functional, but would be	Extend handrails on the bridge to meet specification below: Handrails should be 1000mm from the ground. A secondary rail of 7500mm may be provided for children; Hand rails should be smooth and non-abrasive; Grips should be between 40mm – 50mm. Grip designed in children's areas should be 25mm-32mm; Hand	

improved by extending the length at each end and tapering downwards at the star/finish to advise users with visual impairments that they are moving to a different surface.	rails should extend at least 300mm beyond the end of a hazard, bridge or any access ramp. Handrail should be made visible by providing colour/tonal contrast with the surrounding space. The height of the hand rail should be gradually reduced to 850mm as it culminates to alert visually impaired people that they are re-joining the main pathway.	
A bench is provided close to the bridge which assist people with mobility needs to access slopes more easily As an alternative to seats leaning posts might be provided from time to time See example opposite	Seating or leaning posts should be provided every provided every 300m to meet the Rural Standard – this might be bettered to mitigate slopes on long open stretches. Leaning posts such as the one opposite can be alternatives to formal seats – these are often constructed from recycled timber and windfall Passing places should be provided every 150m along the route and additionally at pinch points See Appendix 3	 

The gradient after the bridge is steeper than 1:10 in parts	Aspire to designing the path to a minimum of Rural Standard. If this is not practical meet the Principle of Least Restrictive Access and By All Reasonable means standard See Appendix 2.4 A resin bond surface, in parts, might add to the traction for wheelchair users Provide resting point on the slope with a minimum specification of 1200mm x 15000mm and provide a leaning post mid-point	
Straight and level 50m path from crest of hill from brook; good views including over the nature pond	Resurface the path to meet the minimum of the Rural Standard and aspire to an improved quality if practical Provide resting point to benefit from view of pond and provide searing or leaning post Resting places should be provided every 350m	
There is good clear signage provided at this point and generally good directional markers	Signage should be clear concise and consistent in design	

The path is muddy leading to the field gate which needs modifying to meet the Rural Standard. A pothole has been formed due to heavy pedestrian use of the earthen path. A finger post shows the original footpath route	Resurface the footpath to meet a minimum of the Rural Standard, although as the gateway is heavily used then aspire to better Standard. Address the pothole and drainage issue Replace the field-gate with an accessible Centrewire alternative or improve access to the latch e.g. equestrian latch	
The footpath extension (to the right) towards the village does not meet the Rural Standard. An old stile and fence-line is a physical barrier, although it has been avoided by a pedestrian desire line.	If this path constitutes part of the access development plan resurface to meet the Rural Standard and provide centre wire gates at the end of the path leading to the village If the original gateway, now unused needs to be kept provide Centrewire option.	

		
The original footpath is potholed and muddy. Towards the boardwalk, there are two gates that are barriers to outdoor mobility scooters and wheelchair users and require replacing with an accessible Centrewire alternative The boardwalk requires remedial work or better replace There is a 20cmstep onto the boardwalk	Upgrade the footpath to meet a minimum of the Rural Standard Provide level or ramped access to/from the boardwalk Replace the two existing gates with accessible alternatives See Appendix 3 Path Widths Carry out remedial work or replace boardwalk, remove moss and leaf litter to aspire to maintaining a sustainable accessible route	 

The path to the yard of stables and house is earthen and of poor quality ending at a field-gate In the yard there is a real shared space danger, where vehicles and people mix. There is a loose gravel surface leading back to boundary of the house and stable yard boundary A tarmac road joins the access lane from to the permissive footpath Traffic lights have been provided for control	Upgrade and resurface the path to a minimum of the Rural Standard Provide a formal footpath to meet the minimum of the Rural Standard Across the yard and adopt a shared space protocol to safeguard pedestrians Seek to find an alternative route to avoid the shared space dangers	 

of vehicles on lane to safeguard users		

Appendices

Appendix 1 Determining the Countryside Setting

Scoring system for choosing setting			
Feature	**Expectation**	**Criteria**	**Score**
Visitor centre, encouraging or helping people enjoy the countryside	More chance of meeting other people. Evidence of management. Less challenge or risk	Visitor centre less than 500m away	+10
		Visitor centre between 500m and 1000m away	+5
Parking areas of 20 spaces or more (including lay-bys and roadside parking)	More chance of meeting other people. Less naturalness.	Parking area less than 500m away	+8
		Parking area between 500m and 1000m away	+4
Parking areas of 20		Parking area less than 500m away	+6

spaces or less (including lay-bys and road-side parking)			
		Parking area between 500m and 1000m away	+3
How the land lies	More naturalness. Greater challenge or risk	Steepest slope of ground on which the path lies greater than 1:6	-3
Habitation	Less naturalness. More chance of meeting other people.	Group of at least 100 buildings within 1000m	+8
		Group of at least 25 buildings within 500m	+6
		Group of at least 25 buildings within 500m and 1000m	+3
Character of path	Some naturalness. Management. Need to rely on yourself more.	Path surface tarmac or concrete	+2
		Path surface not constructed (earth trodden by use, or across open ground)	-4
Public transport	More chance of meeting	Bus stop, station etc. within	+5

point	other people. Need to rely on yourself more.	1000m	

Scoring for table Setting = Sum of all scores measured against the rows below

Score	
Up to 15	Urban and formal
15 to 22	Urban fringe and managed
10 to 17	Rural and working
Less than 17	By All Reasonable Means Zone C & D

Appendix 2 Countryside Standards

Appendix 2.1 Urban and Formal Standard

1. Path Surface must be hard, firm and smooth with very few loose stones (none bigger than 5mm).
2. Path Width 1200mm minimum width.
3. Width Restrictions 815mm minimum width for no more than 300mm along length of path – 1000mm width for no more than 1600mm along the length of the path.
4. Barriers No stiles, steps, fences, hedges etc., blocking the path.
5. Ramp Gradient 1:12 maximum.
6. Rise of ramps Where the place is steeper than 1:20 (i.e. a ramp), a level resting place should be provided. The maximum height rise between landings is 750mm.

Maximum distance between landings for 750mm vertical climb	
Gradient	**Max Distance between Landings**
1:18	13.5
1:16	12.0
1:14	10.5
1:12	9.0

7. Cross Slope 1:50 maximum
8. Steps 5mm maximum.
9. Surface Break Breaks in path surface as in boardwalks, grates, grills etc., should be no more than 12mm measured in the direction of travel along the path.
10. Clear Walking A tunnel clear of overhanging or encroaching Tunnel vegetation, and other obstructions should be a minimum of 1200mm wide and 2100 high.
11. Passing Place There should be a passing place every 50 metres along the path. The minimum width of the path should be 1500mm for 2000mm along the length of the path.

12. Resting Places There should be a resting point every 100m along the path. Each resting point should have a seat or perch, which is placed on surfaced, level ground. These should be set back from the path and, in addition to path width, be at least 1200mm wide and 1500mm long.

Appendix 2.2 Urban Fringe and Managed Standard

1. Path Surface must be hard and firm with very few loose stones (none bigger than 10mm)
2. Path Width 1200mm minimum width.
3. Width Restrictions 815mm minimum width for no more than 300mm along the length of path – 1000mm width for no more than 1600mm along the length of the path.
4. Barriers No stiles, steps, fences, hedges etc., blocking the path.
5. Ramp Gradient 1:12 maximum.
6. Rise of ramps Where the place is steeper than 1:20 (i.e. a ramp), a level, resting place should be provided. The maximum height rise between landings is 830mm.

Maximum distance between landings for 830mm vertical climb	
Gradient	**Max Distance between Landings**
1:18	14.94
1:16	13.28
1:14	11.62
1:12	9.9

7. Cross Slope 1:45 maximum.
8. Steps 10mm maximum.
9. Surface Break Breaks in path surface as in boardwalks, grates, grills etc., should be no more than 12mm measured in the direction of travel along the path.
10. Clear Walking A tunnel clear of overhanging or encroaching
11. Tunnel vegetation, and other obstructions should be a minimum of 1200mm wide and 2100 high.
12. Passing Place There should be a passing place every 100 metres along the path. The minimum width of the path should be 1500mm for 2000mm along the length of the path.

13. Resting Places There should be a resting point every 200m along the path. Each resting point should have a seat or perch which is placed on surfaced, level ground. Resting points should be set back from the path and, in addition to the path width, be at least 1200mm wide and 1500mm long.

Appendix 2.3 Rural and Working Landscape Standard

1. Path Surface must be hard but may have some loose stones but not covering the whole surface (stones no bigger than 10mm).
2. Path Width 1000mm minimum width.
3. Width Restrictions 815mm minimum width for no more than 300mm along the length of path – 915mm width for no more than 1600mm along the length of the path.
4. Barriers No stiles, steps, fences, hedges etc., blocking the path.
5. Ramp Gradient 1:10 maximum.
6. Rise of ramps Where the place is steeper than 1:20 (i.e. a ramp), a level, resting place should be provided. The maximum height rise between landings is 950mm.

Maximum distance between landings for 950mm vertical climb	
Gradient	**Max Distance between Landings**
1:18	17.10
1:16	15.2
1:14	13.3
1:12	11.4
1:10	9.5

7. Cross Slope 1:35 maximum.
8. Steps 15mm maximum.
9. Surface Break Breaks in path surface as in boardwalks, grates, grills etc., should be no more than 12mm measured in the direction of travel along the path.

10. Clear Walking A tunnel clear of overhanging or encroaching Tunnel vegetation, and other obstructions should be a minimum of 1000mm wide and 2100 high.
11. Passing Place There should be a passing place every 150 metres along the path. The minimum width of the path should be 1500mm for 2000mm along the length of the path.
12. Resting Places There should be a resting point every 300m along the path. Each resting point should have a seat or perch which is placed on surfaced, level ground. Resting points should be set back from the path and, in addition to the path width, be at least 1200mm wide and 1500mm long.

Appendix 2.4 By All Reasonable Means Access Zones

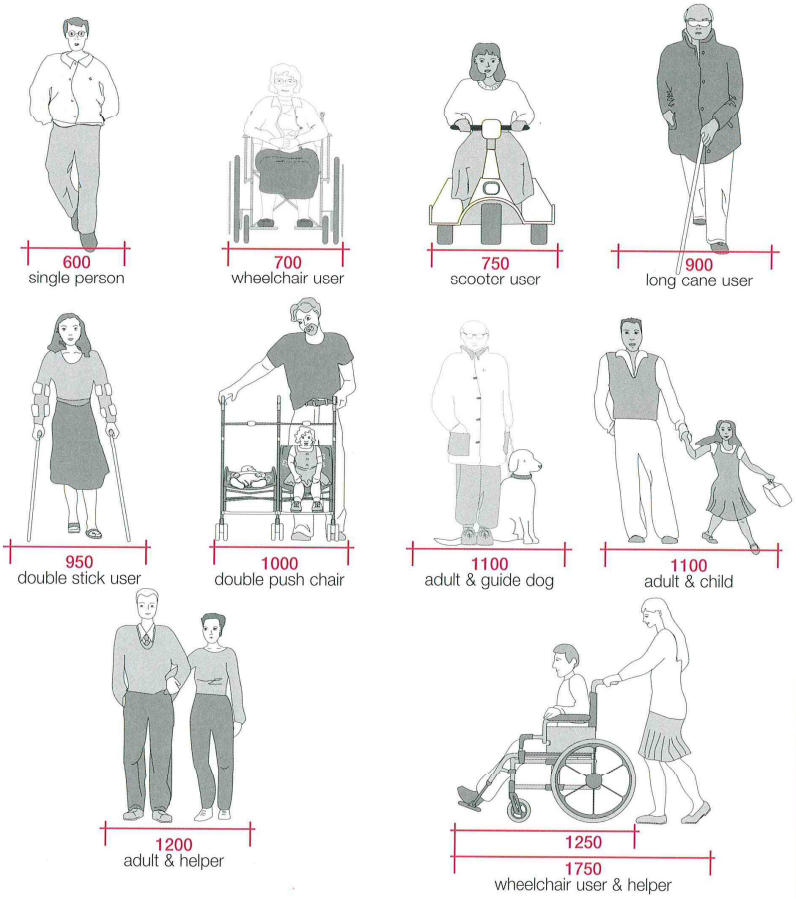
By All Reasonable Means Access Zones – Access Guidance

Zone A - Countryside for All Standard. Zone B provides paths which may have been modified and are generally hard and firm throughout the year and are at least 900mm wide and with step changes not higher than 40mm (1.5 inches). Gradients of not steeper than 1:10, for natural paths and 1:8 for constructed paths are acceptable. Cross slopes should not be steeper than 1:35. Zone C includes paths of a minimum width of 900cm, with no barriers such as stiles, but step changes are permissible of 100mm (4 inches). Paths need not necessarily be hard and firm in all weathers, with occasional tree routes protruding and occasional potholes and gradients not steeper than 1:8. Cross slopes should not be steeper than 1:25. It was found that NRW sites offered a mix of physical access provision ranging from the Countryside for All - Urban Formal to By All Reasonable Zone C.

Appendix 3 Path Width Specifications

Path Users/Path Width 1.1

BT Countryside for All



The width of paths in the countryside will depend on a number of factors:

- Who you expect to use it. For example, pedestrians only, cyclists, horse riders, motorised vehicles or a combination of some or all of these.
- How many users you expect. Busy paths need to be wider.

N.B. All measurements are in millimetres

Path Users/Path Width

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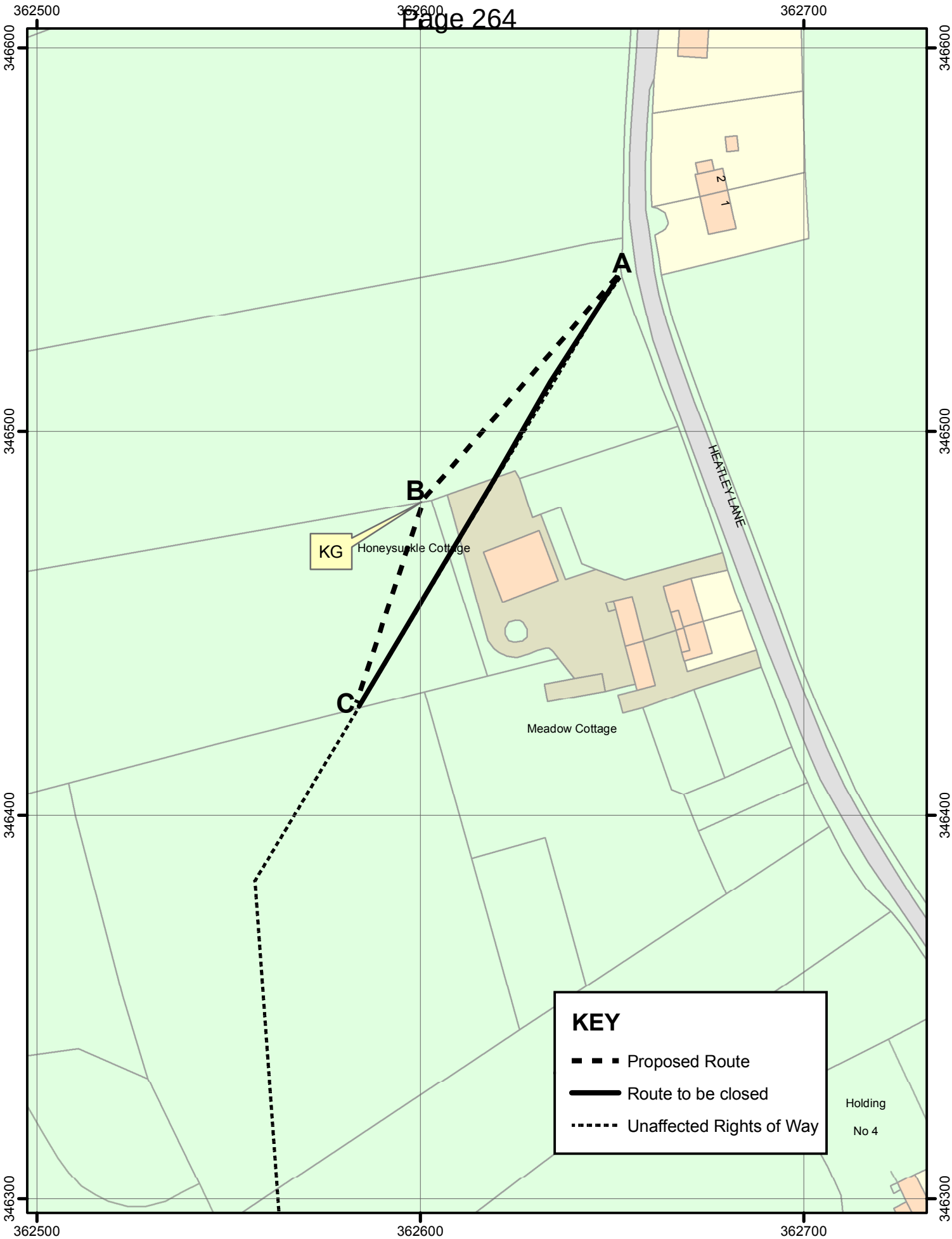

N

S.119 Highways Act 1980
Proposed Diversion of Broomhall Footpath no. 5 (pt)

Plan No. HA/105

This is a working copy of the definitive map and should not be used for legal purposes

1:1,250

Cheshire East Council

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13th June 2016
Report of:	Public Rights of Way Manager
Subject/Title:	Highways Act 1980 s.119 Application for the Diversion of Public Footpath no. 5 (part), Parish of Broomhall

1.0 Report Summary

1.1 The report outlines the investigation to divert part of Public Footpath No.5 in the Parish of Broomhall. This includes a discussion of consultations carried out in respect of the proposal and the legal tests to be considered for a diversion order to be made. The proposal has been put forward by the Public Rights of Way Unit as an application has been made by the landowner concerned. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether or not an Order should be made to divert the section of footpath concerned.

2.0 Recommendation

2.1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert part of Public Footpath No.5 by creating a new section of public footpath and extinguishing the current path as illustrated on Plan no. HA/105 on the grounds that it is expedient in the interests of the owner of the land crossed by the path.

2.2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

2.3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

3.0 Reasons for Recommendations

3.1 In accordance with Section 119(1) of the Highways Act 1980 it is within the Council's discretion to make the Order if it appears to the Council to be expedient to do so in the interests of the public or of the owner, lessee or occupier of the land crossed by the path. It is considered that the proposed diversion is in the interests of the landowner for the reasons set out in paragraph 10.7 below.

3.2 Where objections to the making of an Order are made and not withdrawn, the Order will fall to be confirmed by the Secretary of State. In considering whether to confirm an Order the Secretary will, in addition to the matters discussed at paragraph 3.1 above, have regard to:

- Whether the path is substantially less convenient to the public as a consequence of the diversion.

And whether it is expedient to confirm the Order considering:

- The effect that the diversion would have on the enjoyment of the path or way as a whole.

- The effect that the coming into operation of the Order would have as respects other land served by the existing public right of way.

- The effect that any new public right of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

3.3 Where there are no outstanding objections, it is for the Council to determine whether to confirm the Order in accordance with the matters referred to in paragraph 3.2 above.

3.4 The proposed route will not be 'substantially less convenient' than the existing route and diverting the footpath will offer the most efficient land and stock management capability for the landowner on their smallholding. It is considered that the proposed route will be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order are satisfied.

4.0 Wards Affected

4.1 Audlem

5.0 Local Ward Members

5.1 Councillor Rachel Bailey

6.0 Policy Implications

6.1 Not applicable

7.0 Financial Implications

7.1 Not applicable

8.0 Legal Implications

8.1 Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the local highway authority to confirm the order itself, and may lead to a hearing/inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources.

9.0 Risk Management

9.1 Not applicable

10.0 Background and Options

10.1 An application has been received from Mr Peter Hollinshead of Honeysuckle Cottage, Heatley Lane, Broomhall CW5 8BA requesting that the Council make an Order under section 119 of the Highways Act 1980 to divert part of Public Footpath no. 5 in the Parish of Broomhall. The alignment of the current footpath has been inadvertently obstructed by the recent erection of an agricultural building designed for storage and potentially housing cattle. Honeysuckle Cottage comprises of a smallholding with attached grazing land. The building has been sited in order to best utilise the available land. A retrospective planning application was made to the Council and it was the consultation for this application that brought the matter to the attention of the PROW Unit. A site meeting was arranged with the landowner during which it became clear that the available route of the footpath had been slightly offline and hence the misunderstanding regarding the siting of the building. The application for planning permission has since been withdrawn until the diversion order has been processed.

10.2 Public Footpath No. 5 Broomhall commences at its junction with Heatley Lane (C 509) at O.S. Grid Reference SJ 6265 4654 and runs in a generally south westerly then southerly direction across pasture to its junction with Broomhall Footpath no. 8 and continuing south westerly to its junction with Newhall FP 14 at the parish boundary at Grid Reference SJ 6242 4581. The section of path to be diverted is shown by a solid black line on Plan no. HA/105 between points A-C. The proposed diversion is illustrated on the same plan with a black dashed line between points A-B-C.

10.3 The land over which the section of the current path to be diverted and the proposed diversion run belongs to Mr Hollinshead. Under section 119 of the Highways Act 1980 the Council may accede to an applicant's request, if it considers it expedient in the interests of the landowner to make an order to divert the footpath.

10.4 The section of Public Footpath No. 5, Broomhall to be diverted commences at Heatley Lane (Point A on Plan no. HA/105). The footpath runs in a south-westerly direction across a field then via a stile, cutting across the corner of the hard standing area of the yard, where the building is sited, it then crosses by a second stile into a paddock continuing in a south westerly direction to

Point C on Plan no. HA/105 at Grid Reference SJ 6258 4642. It is shown as a bold black solid line between points A-C.

10.5 The proposed diversion for this part of Footpath no. 5 would run from Heatley Lane (Point A on Plan no. HA/105) also in a generally south westerly direction to the corner of the fenced yard area (Point B on Plan no. HA/105) at Grid Reference SJ 6260 4648; through a kissing gate and continue south south-westerly across the paddock to Point C on Plan no. HA/105 and its junction with the unaffected length of Footpath no. 5 at Grid Reference SJ 6258 4642. It is shown as a bold dashed line between points A-B-C (on Plan no. HA/105).

10.6 The new route would have a width of 2 metres and would not be enclosed; it would be a grass surface. There would be one kissing gate required at point B. On the current route there are 2 stiles to accommodate the path where it crosses the yard. Therefore in terms of accessibility the new route is considered no less easy to use than the original. The proposed route is approximately 135 metres in length; the current route is approximately 132 metres so in terms of convenience there is no negligible difference.

10.7 This diversion is therefore in the landowners' interest and required for land and animal management reasons. The diversion would also allow the landowner to improve security around the farm and would have benefits for the landowner's privacy.

10.8 The Ward Councillor was consulted about the proposal. No comments were received.

10.9 Sound and District Parish Council has been consulted and has responded to say that they unanimously support the proposal.

10.10 The statutory undertakers have also been consulted and have raised no objections to the proposed diversion. If a diversion order is made, existing rights of access for the statutory undertakers to their apparatus and equipment are protected.

10.11 The user groups have been consulted. At the time of writing no comments were received.

10.12 The Council's Nature Conservation Officer has been consulted; no comments have been received.

10.13 An assessment in relation to the Equality Act 2010 has been carried out by the PROW Maintenance and Enforcement Officer for the area and it is considered that the proposed diversion would be no less convenient to use than the current route.

12.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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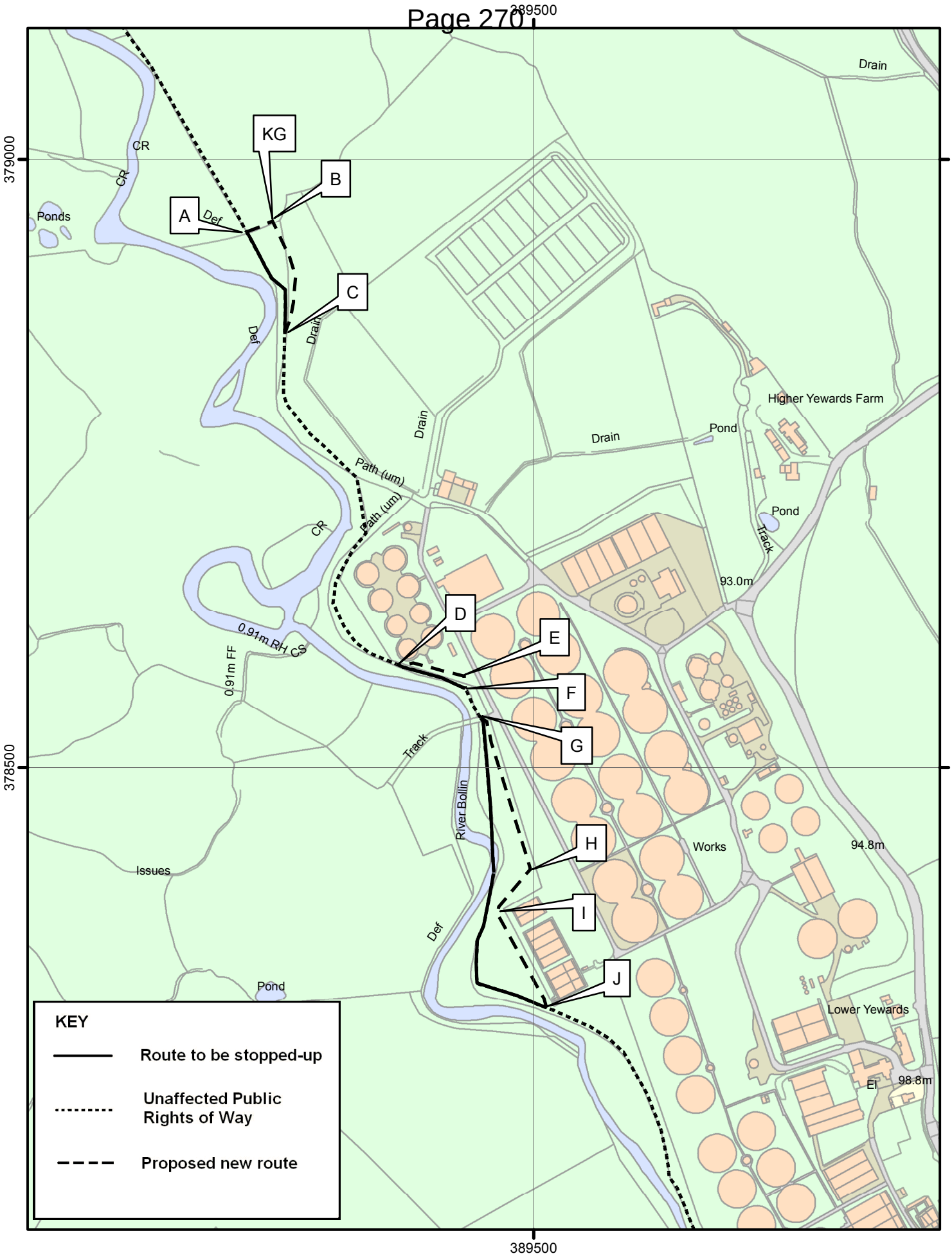

Proposed Diversion of FP5 Prestbury

Plan No. HA/109

This is a working copy of the definitive map and should not be used for legal purposes

1:4,000

Cheshire East Council

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13th June 2016
Report of:	Public Rights of Way Manager
Subject/Title:	Highways Act 1980 s.119 Application for the Diversion of Public Footpath no. 5 (parts), Parish of Prestbury

1.0 Report Summary

1.1 The report outlines the investigation to divert parts of Public Footpath No.5 in the Parish of Prestbury. This includes a discussion of consultations carried out in respect of the proposal and the legal tests to be considered for a diversion order to be made. The proposal has been put forward by the Public Rights of Way Unit as an application has been made by the landowners concerned; however the diversion is considered to be in the public interest. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether or not an Order should be made to divert the sections of footpath concerned.

2.0 Recommendation

2.1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert parts of Public Footpath No.5 by creating new sections of public footpath and extinguishing parts of the current path as illustrated on Plan No. HA/109 on the grounds that it is expedient in the interests of the public.

2.2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

2.3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

3.0 Reasons for Recommendations

3.1 In accordance with Section 119(1) of the Highways Act 1980 it is within the Council's discretion to make the Order if it appears to the Council to be expedient to do so in the interests of the public or of the owner, lessee or occupier of the land crossed by the path. It is considered that the proposed diversion is in the interests of the public for the reasons set out in paragraph 10.4 below.

3.2 Where objections to the making of an Order are made and not withdrawn, the Order will fall to be confirmed by the Secretary of State. In considering whether to confirm an Order the Secretary will, in addition to the matters discussed at paragraph 3.1 above, have regard to:

- Whether the path is substantially less convenient to the public as a consequence of the diversion.

And whether it is expedient to confirm the Order considering:

- The effect that the diversion would have on the enjoyment of the path or way as a whole.

- The effect that the coming into operation of the Order would have as respects other land served by the existing public right of way.

- The effect that any new public right of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

3.3 Where there are no outstanding objections, it is for the Council to determine whether to confirm the Order in accordance with the matters referred to in paragraph 3.2 above.

3.4 The proposed route will not be 'substantially less convenient' than the existing route and diverting the footpath would have no detrimental effect on the enjoyment of the route as a whole. It is considered that the proposed route will be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order are satisfied.

4.0 Wards Affected

4.1 Prestbury.

5.0 Local Ward Members

5.1 Councillor Paul Findlow

6.0 Policy Implications

6.1 Not applicable

7.0 Financial Implications

7.1 Not applicable

8.0 Legal Implications

8.1 Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the local highway authority to

confirm the order itself, and may lead to a hearing/inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources.

9.0 Risk Management

9.1 Not applicable

10.0 Background and Options

10.1 An application has been received from United Utilities Plc, requesting that the Council make an Order under section 119 of the Highways Act 1980 to divert parts of Public Footpath no. 5 in the Parish of Prestbury.

10.2 The majority of the land over which the current path to be diverted, and the proposed diversion runs, belongs to the applicant; with the exception of approximately 23 metres of the proposed route between points A and B (on plan no. HA/109). This small section of the proposed route is on land belonging to Mr T. O'Connor, who has provided his written consent to the diversion. Under section 119 of the Highways Act 1980 the Council may accede to an applicant's request, if it considers it expedient in the interests of the public to make an order to divert the footpath.

10.3 Public Footpath No. 5 Prestbury is a long path to the north west of Prestbury, for most of its length it follows the River Bollin. The full length is approximately 2.84 kilometres, it runs from its junction with footpath no.19 Prestbury near to Bonis Hall Lane (road no.B5358) at O.S. grid reference SJ 8934 7975, and runs in a generally southerly direction to where it meets footpath no.15 Prestbury at Bollin Grove (road no.UW2780) at O.S. grid reference SJ 8995 7740. The sections of path to be diverted are mid way along the footpath adjacent to the United Utilities Sewerage works; they are shown by solid black lines on Plan No. HA/109 between points A-C; D-F and G-J. The proposed diversions are illustrated on the same plan with black dashed lines between points A-B-C; D-E-F; and G-H-I-J.

10.4 The current sections of Public Footpath no.5 to be diverted are partly not available on the ground; the River Bollin has moved alignment and the adjacent land has suffered erosion due to the active nature of the river. The sections shown with solid black lines are either not available at all due to the land slip or they run extremely close to the river bank. The diversion of the right of way is therefore in the interest of the public as it is needed on health and safety grounds; the proposal will ensure the safety of the general public by moving the footpath away from the edge of the river bank ensuring the continued enjoyment of this well utilised route.

10.5 The proposal is to divert the effected parts of the footpath onto a new route that is slightly further to the east of the current route; and therefore a safer distance away from the river bank.

10.6 The new route would be 1.2 metres wide and have a rolled gritstone surface for this width. The route would remain unenclosed as it is currently. The only requirement for furniture is at point B on plan no. HA/109, where a kissing gate is already in situ.

10.7 As stated above this diversion is in the interest of the public. To make the definitive route available would be impossible due to the effect of the river erosion. The landowners believe the alternative route is not substantially less convenient than the definitive path and that the enjoyment of the path as a whole is not affected.

10.8 The Ward Councillor was consulted about the proposal, no comments have been received.

10.9 Prestbury Parish Council has been consulted; at the time of writing no comments have been received.

10.10 The statutory undertakers have also been consulted and have raised no objections to the proposed diversion. If a diversion order is made, existing rights of access for the statutory undertakers to their apparatus and equipment are protected.

10.11 The user groups have been consulted. The Peak and Northern Footpath Society stated they had reservations about the proposed route being so close to the fencing which surrounds the sewerage works as they believe this makes the walk less enjoyable. Officers have acknowledged the comments; however, it is believed that because the section next to the fence is only a short distance compared to the full length of the route, this would not have a detrimental effect on the overall enjoyment of the route. Further, Officers believe this is the most suitable position for the proposed route to ensure the longevity of this very popular footpath, also the tree and foliage coverage on this section would make it difficult to divert the route elsewhere. The Peak and Northern Footpath Society have stated they would not object to the proposals. No further responses from the user groups have been received.

10.12 The Council's Nature Conservation Officer and Natural England have been consulted and have raised no objection to the proposals.

10.13 An assessment in relation to the Equality Act 2010 has been carried out by the PROW Network Management and Enforcement Officer for the area and it is considered that the proposed diversion would be no less convenient to use than the current route.

12.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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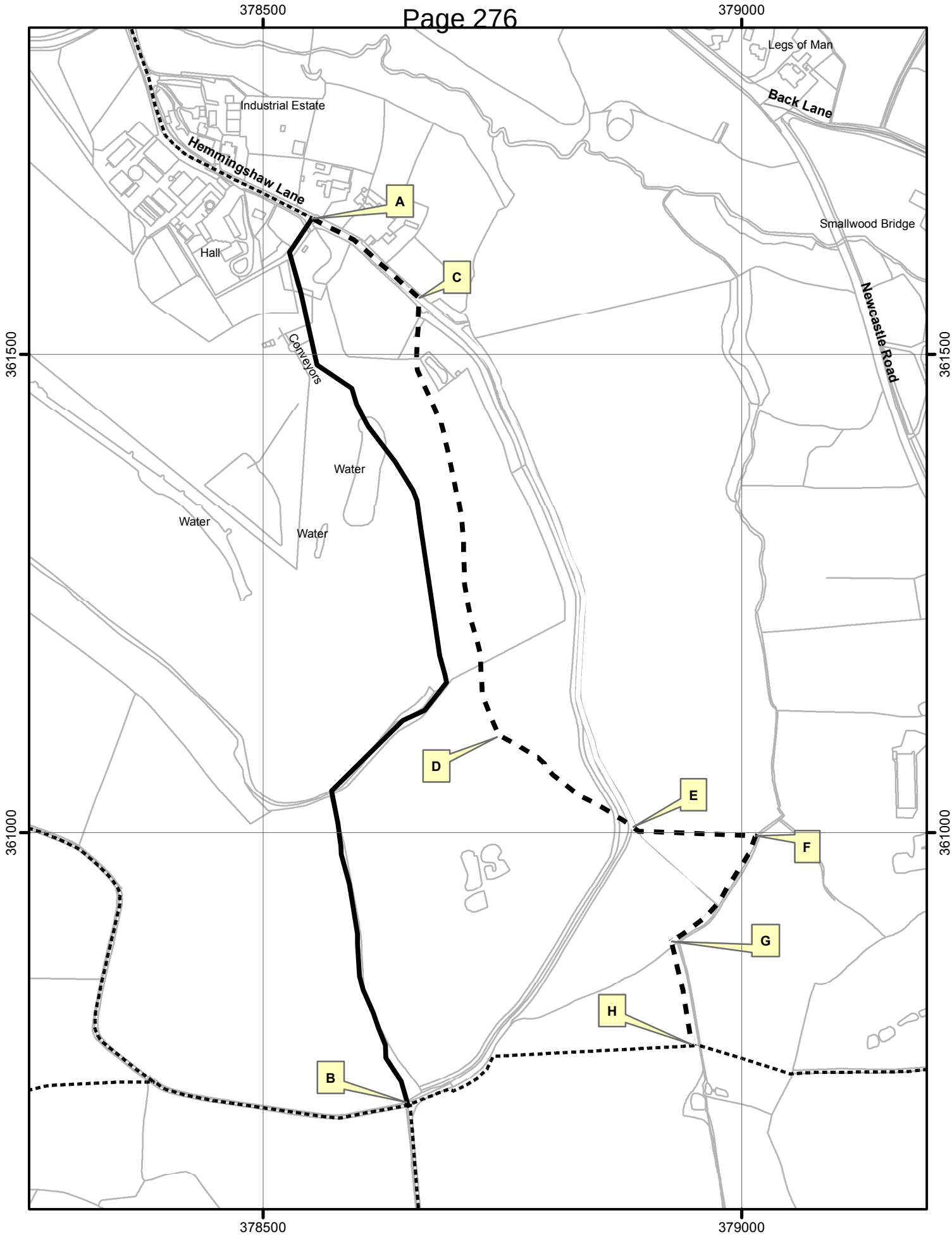

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Town and Country Planning Act 1990 s257
The Cheshire East Borough Council
(Footpath 9 (part) Parish of Arclid)
Public Path Diversion Order 2016

Plan No.
TCPA/030

Cheshire East Council

1:4,965

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13th June 2016
Report of:	Public Rights of Way Manager
Subject/Title:	Town and Country Planning Act 1990 Section 257: Application for the Diversion of Public Footpath no. 9 (part), Parish of Arclid

1.0 Purpose of Report

The report outlines the investigation to divert part of Public Footpath No. 9 in the Parish of Arclid. This includes a discussion of consultations carried out in respect of the proposal and the legal tests to be considered for a diversion order to be made. The proposal has been put forward by the Public Rights of Way Unit as a response to a planning application. The application has been submitted by Mr D Robinson of Archibald Bathgate Silica Sand Ltd., Arclid Quarry, Congleton Road, Sandbach, Cheshire, CW11 4SN to apply for a 'Southern eastern extension to existing silica sand workings at south Arclid, Arclid Quarry' (Planning reference: 09/2291W). The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether or not an Order should be made to divert the section of footpath concerned.

2.0 Recommendations

2.1 That after 4fth July 2016 when a long term temporary diversion of the definitive route for Public Footpath No 9 Arclid will expire, an Order be made under Section 257 of the Town and Country Planning Act 1990 to divert part of Public Footpath No. 9 Arclid, as illustrated on Plan No TCPA/030 on the grounds that the Borough Council is satisfied that it is necessary to do so to allow development to take place. That this Order be confirmed and made operable on condition that planning permission is granted.

2.2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.

2.3 In the event of objections to the Order being received and not resolved, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

3.0 Reasons for Recommendation

3.1 In accordance with Section 257 of the Town and Country Planning Act 1990 as amended by Section 12 of the Growth and Infrastructure Act 2013:

"(1A) Subject to section 259, a competent authority may by order authorise the stopping up or diversion in England of any footpath, bridleway or restricted byway if they are satisfied that—

(a) an application for planning permission in respect of development has been made under Part 3, and

(b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out."

Thus the Borough Council, as Planning Authority, can make an Order diverting a footpath if it is satisfied that it is necessary to do so to enable development to be carried out in accordance with a planning permission before that permission is granted, providing that the application has been formally registered with the Council.

3.2 It is considered that it is necessary to divert part of Footpath No. 9 Arclid as illustrated on Plan No. TCPA/030 to allow for the excavation of sand beneath land that lays south easterly to the exisiting silica sand workings at Arclid Quarry, as detailed within planning reference: 09/2291W.

3.3 Consultations have not elicited objections to the proposal and it is considered that the legal tests for the making and confirming of a Diversion Order under section 257 of the Town and Country Planning Act 1990 are satisfied.

4.0 Ward Affected

4.1 Brereton Rural

5.0 Local Ward Members

5.1 Councillor J Wray

6.0 Financial Implications

6.1 Not applicable

7.0 Legal Implications

7.1 Objections received to the proposed order, if not withdrawn, could lead to a public inquiry or hearing with attendant legal involvement and use of resources.

8.0 Risk Assessment

8.1 Not applicable

9.0 Background and Options

9.1 An application has been received from Mr R Bright (agent) of Bright & Associates on behalf of Bathgate Silica Sand Ltd. (applicant), c/o Langtons,

The Plaza, 100, Old Hall Street, Liverpool, L3 9QJ requesting that the Council make an Order under section 257 of the Town and County Planning Act 1990 to divert part of Public Footpath No. 9 in the Parish of Arclid.

9.2 As shown on the attached plan entitled 'Parish of Arclid, Proposed stopping up and diversion of footpath N^{o} 9', part of Public Footpath No. 9 Arclid is temporarily aligned on a different route to its definitive alignment since it was diverted 30 years ago in 1986 under the Town and Country Planning Act, Sections 257 & 261, to enable sand extraction beneath its definitive alignment.

Consequently, the full length of Public Footpath No. 9 Arclid currently commences at its junction with Congleton Road at O.S. grid reference SJ 7835 6187 and runs in a generally south, south easterly direction, the majority of which is along Hemmingshaw Lane (approximately 1000 metres) except at the southern end when it runs across pasture land (290 metres) to terminate at its junction with Public Footpath No. 7 Arclid and Public Footpath No. 10 Smallwood, at O.S. grid reference SJ 7895 6077.

The definitive alignment of this footpath also commences at its junction with Congleton Road at O.S. grid reference SJ 7835 6187 and runs in a generally south easterly direction for a shorter distance along Hemmingshaw Lane (approximately 313 metres) before bearing in a generally southerly direction through the quarry site, to terminate at its junction with Public Bridleway No's 10 and 11, and Public Footpath No. 7, Arclid, at O.S. grid reference SJ 7864 6072.

The 30 year temporary diversion of this Public Footpath No. 9 Arclid will end on 4th July 2016. Thereafter, the legal right of way for the public will revert to the definitive alignment which is currently unavailable. On that date, it will be formally closed via a temporary 6 month closure, to protect the public from dangers posed by ongoing quarry operations, on condition that an alternative route will be provided for the public by Archibald Bathgate so that a walkable route is available at all times whilst the definitive route is closed. It is understood that this will initially comprise Hemmingshaw Lane until the route of the proposed diversion has been made available on the ground which may then be used on a permissive basis until the legal process has been completed.

Given the expiry date of the 30 year temporary diversion, should an Order be made, it will be made after the expiry date and detail the diversion of the definitive alignment, not the 30 year temporary alignment. Consequently, the remainder of this report will discuss the proposed diversion and the definitive alignment with occasional reference to the 30 year temporary diversion route that is currently in place.

The section of the definitive alignment of Public Footpath No. 9 Arclid required to be diverted by Archibald Bathgate Silica Sand Ltd, is shown by a solid black line on Plan No. TCPA/030 running between points A-B. The proposed diversion is illustrated with a black dashed line on the same plan, running between points A-C-D-E-F-G-H.

9.3 The land over which the current route runs and over which the proposed route would run is part owned by Archibald Bathgate Silica Sand Ltd. and partly owned by Mrs E Beresford of Arclid Hall Farm. Mrs Beresford has consented to the diversion going ahead across the parts of land in her ownership.

9.4 Planning permission for the sand excavation was granted to Mr D Robinson of Archibald Bathgate Silica Sand Ltd., on 20th February 2013. The application is cited as Planning Permission Ref: 09/2291W. The details of the application are for the continued excavation of sand beneath land to the south east of the exisiting silica sand workings at Arclid Quarry and include a full restoration plan for the site once excavations complete.

9.5 The land over which runs the existing alignment of the footpath section proposed for diversion by Archibald Bathgate Silica Sand Ltd. would be re-developed on completion of the sand excavations to recreate and re-landscape the excavated area accommodating the proposed diversion route for Arclid FP9.

9.6 Referring again to plan No. TCPA/030, the proposed new route would follow a generally southerly direction along Hemmingshaw Lane in a generally south easterly direction (points A-C) after which it would bear in a generally southerly direction to descend into a landscaped area to follow alongside a lake (points C-D). It would then ascend in a generally south easterly direction and then run in a generally easterly direction to a hedge boundary (points D-E-F). It would then bear in generally south westerly and southerly directions along hedge boundaries to terminate at its junction with Public Footpath No. 7 Arclid and Public Footpath No.10 Smallwood (points F-G-H). This proposed new route is shown on the plan by a dashed bold black line between points A-C-D-E-F-G-H.

The new route would have a width of 4 metres throughout and would have a stoned surface. It would be accommodated in part, within a landscaped area that will include views across lakes and undulating rural countryside that should blend within the surrounding landscapes of the area.

9.7 Given that the temporary diversion route for Public Footpath No. 9 Arclid has been used by the public for almost 30 years, the proposed diversion route was initially consulted on against this temporary diversion route. However, because after 4th July 2016, this route will no longer exist as the right of way for the public, consultees have also had the opportunity to consider the proposed diversion route against the original definitive route.

9.8 The local Councillor has been consulted about the proposal and has registered his support.

9.9 Arclid Parish Council has been consulted about the proposal and any comments will be reported verbally.

9.10 The statutory undertakers have also been consulted and have no objections to the proposed diversion. If a diversion order is made, existing rights of access for the statutory undertakers to their apparatus and equipment are protected.

9.11 The user groups have been consulted. Following a site visit with representatives for Archibald Bathgate Silica Ltd. to discuss the proposed diversion route, representatives from the Congleton Group of the Ramblers Association and the Peak and Northern Footpath Society registered that they do not object to the proposal, the former believing it to be the best solution achievable under the circumstances. Separately, the Sandbach Footpath Society registered that they also have no objection to the diversion. No other comments were received.

9.12 The Council's Nature Conservation Officer has been consulted and has raised no objection to the proposals.

9.13 An assessment in relation to the Equality Act 2010 has been carried out by the PROW Maintenance and Enforcement Officer for the area and it is considered that the proposed diversion would not be significantly less convenient to use than the current route.

10.00 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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Background Documents: PROW file 016D/509

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Parish of Arclid

Proposed stopping up and diversion of Footpath Nº9

Highway to be closed

New Highway

Existing Highway

Scale 1/2500

Plan Nº SD/180

Date drawn:- 7/85 PAD

Revised :-

Based upon the Ordnance Survey Map with the Sanction of the Controller of H.M. Stationery Office

Director of Highways & Transportation
Cheshire County Council

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CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13th June 2016
Report of:	Public Rights of Way Manager
Subject/Title:	Public Inquiry to Determine Cycle Tracks Act 1984 The Cheshire East Borough Council (Crewe Footpath Nos. 3 (part) and 11 (also known as Footpath No. 36)) Cycle Tracks Order 2014

1.0 Report Summary

1.1 This report is an informative item to brief members on a recent public inquiry and the outcome.

2.0 Recommendation

2.1 No decision is required by Committee.

3.0 Reasons for Recommendations

3.1 N/A

4.0 Wards Affected

4.1 Crewe East

5.0 Local Ward Members

5.1 Councillor Brookfield, Councillor Chapman and Councillor Newton.

6.0 Policy Implications

6.1 Not Applicable

7.0 Financial Implications

7.1 Not Applicable

8.0 Legal Implications

8.1 Not Applicable

9.0 Risk Management

9.1 Not Applicable

10.0 Background and Options

10.1 The Council had been aware of a long-held aspiration of local cyclists and the sustainable transport charity Sustrans to permit cycling along certain paths on which the public has rights of access on foot only at present, although the paths are already used by cyclists.

10.2 Under the Cycle Tracks Act 1984, the Council has the power to make an order to designate a footpath as a cycle track, over which the public has a right of way on pedal cycles and a right of way on foot.

10.3 On 18th March 2014 a paper titled "Cycle Tracks Act 1984 Proposed Cycle Tracks Order: Crewe Footpaths Nos. 3 (part) and 36" was presented to the Public Rights of Way Committee, detailing the background to the proposal, the legal context and the consultation results. The Committee resolved that:

> "*(1) An Order be made under Section 3 of the Cycle Track Act 1984 to convert to cycle track those lengths of public footpath between points A-B-D, as illustrated on Plan No.CTA/001".*

10.4 Following the decision of the Committee, on 11th December 2014 an order was made, entitled "The Cheshire East Borough Council (Crewe Footpath Nos. 3 (part) and 11 (also known as Footpath No. 36)) Cycle Tracks Order 2014". The advertising of the Order, as required in Regulation 4 of the Cycle Tracks Regulations 1984, was undertaken.

10.5 Public notice of the Order attracted three objections, one of which was withdrawn. The grounds of the sustained objections were:

- concern that the expense was unjustified;
- concern that a cycle track would diminish unfairly the facilities available to pedestrians;
- concern regarding the lack of demarcation between pedestrians and cyclists; and,
- concern regarding the lack of lighting along the route.

10.6 As two objections were sustained, the case was submitted to the Department for Transport National Casework team in May 2015. The case was assessed and a date for a public inquiry set. Proofs of Evidence were submitted to the Department for Transport National Casework team. The Council's Proofs of Evidence comprised two parts: the legal process witness statement of Genni Butler, Countryside Access Development Officer, Cheshire East Council; and, the technical input witness statement of David Wilkinson, Principal Consultant, Jacobs.

10.7 The inquiry was held on 19th January 2016 at Municipal Buildings, Crewe, with the appointed Inspector, Mike Moore. The Council was represented by Alistair Mills of Counsel, who called Genni Butler, (Countryside Access Development

Officer) and David Wilkinson (Transport Planning Principal Consultant, Jacobs). The objectors represented themselves. Ben Wye (Chair of Governors, Hungerford Primary School) also spoke in support of the Order.

10.8 Following the inquiry, the Inspector issued a report to the Secretary of State for Transport. The report stated that:

- "*the expense is justified and the facilities for pedestrians would not be unfairly diminished*"
- "*lighting along the route is not essential and the cost would not be justified*";
- "*Having regard to the technical guidance available as to the appropriate circumstances for shared use a non-segregated facility is justified*"; and,
- "*Having regard also to the low level of usage and the way in which technical guidance should be applied in the context of local circumstances, I am satisfied that the width of the route is acceptable.*"

10.9 The Inspector recommended that the Order be confirmed, and the report concluded that:

> "*Overall, I conclude that none of the factors put forward in opposition to the Order are of such significance, individually or in combination, that they would amount to reasons not to confirm the Order*."

10.10 The Secretary of State then considered this recommendation and confirmed the Order on 29th February 2016. The Council is now required to give public notice of this decision.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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