

**APPLICATION BY BIRTLES CONSERVATION FORUM TO
REGISTER AS A TOWN/VILLAGE GREEN LAND KNOWN AS “THE
FIELD”, BIRTLES ROAD, WHIRLEY, MACCLESFIELD, CHESHIRE.**

REPORT AND RECOMMENDATION

The Application

1. On 2 October 2008, the Birtles Conservation Forum ("the Applicant"), whose address is given as 56. Birtles Road, Whirley, Macclesfield, Cheshire submitted to Cheshire County Council an application made under section 15 of the Commons Act 2006. The application is dated 30 September 2008. The application has been identified as application number 47 by the Registration Authority.
2. By that application, the Applicant sought an amendment to the register of town and village greens maintained by Cheshire County Council, in its capacity as registration authority pursuant to the Commons Act 2006, so as to include on the register land described in the application form as "The Field on Birtles Road", the location of which is described as "Whirley, Macclesfield, Cheshire. SK10 3JQ".
3. The application is made pursuant to section 15(2) of the Commons Act 2006. That requires the Applicant to demonstrate that the land the subject of the application ("the land") was:
 - a. used for lawful sports and pastimes for a period of at least 20 years and that this use continued to the date of the application;
 - b. by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
 - c. as of right.
4. It was common ground that the qualifying period for the purposes of the application is the 20 year period between 30 September 1988 and 30 September 2008.
5. The Application was advertised in accordance with the relevant statutory requirements.
6. An objection was made to the application by Macclesfield Borough Council who, following local government reorganisation, became Cheshire East Borough Council ("the Objector"). The Objector was and remains the owner of the land.

7. Following local government reorganisation, Cheshire East Borough Council became registration authority and was therefore charged with determining the application.
8. I was instructed by East Cheshire District Council as registration authority to conduct a public inquiry into the application and thereafter to produce a report and recommendation in respect of that application.
9. A public inquiry was held on 12 to 14 October 2010 and 21 October 2010.
10. In advance of the opening of the public inquiry, I issued several sets of directions with a view to ensuring the smooth running of the inquiry. A considerable interchange took place between the Applicant, the Objector and the Registration Authority in respect of procedural matters before the opening of the inquiry. The correspondence in respect of this interchange is in the possession of the Registration Authority. It is not relevant to the substance of the application and I therefore do not propose to elaborate upon that correspondence within this report.
11. At the public inquiry, the Applicant was represented by Mrs. Peggy Bentham. The Objector was represented by Miss Ruth Stockley, of counsel. I am grateful to both advocates, as well as those assisting them, for their contribution to the smooth running of the inquiry.
12. In advance of completion of this report, and as is my usual practice, I forwarded to my Instructing Solicitor a draft of the report. I requested that Mrs. Goddard proof read the document with the objective of identifying any typographical and drafting errors which she considered required attention and correction. I did not invite Mrs. Goddard to comment or express any opinion upon my findings of fact or my conclusions nor did she do so.

The Land

13. The land which is the subject of the application comprises a field of approximately 0.714 acres (document O3). At the time of my site inspection it comprised rough grassland with occasional trees and shrubs. It was boggy to the point of being waterlogged in places.

14. The land has a frontage to Birtles Road, which comprises the southern boundary of the land. That frontage is enclosed by a substantial hedge. There is a prominent entry point onto the land from Birtles Road through a gap in the hedge. This gap had the appearance of having been established through use. An accumulation of fencing lay to one side of the gap, as shown in photograph 9 within document O12. Other lengths of fencing which remained largely in fact were visible elsewhere within the hedge along the Birtles Road frontage (see eg. photographs 8 and 9 within document O12).
15. The eastern boundary of the land coincides in part with the gardens of houses on Drummond Way and fronting Birtles Road. The northern section of this boundary gives access onto what appears to be the verge of the western extremity of the Drummond Way carriageway. Along much of this boundary are two parallel fences. The outermost fence comprises post and wire. The innermost fence comprises post and barbed wire. The fence appears in tact along much of the western boundary. However, at its northern end, there is an obvious gap. Examination of this opening at the accompanied site inspection revealed clearly that the fence either side of this opening had been cut or otherwise damaged so create the gap. There were lengths coiled or crudely folded fencing to one or other side of the opening which were plainly consistent with the both fences having at some stage closed the boundary (see for example photographs 4, 5 and 6 in document O 12).
16. The northern boundary of the application site comprises a substantial hedge beyond which are the rear gardens of houses in Hamble Way. This boundary was largely if not wholly impenetrable.
17. The eastern boundary comprises in the main a somewhat overgrown hedge or tree line. There are remnants of a stone wall and an old fence and/or gate. Beyond the boundary is 70, Birtles Road, derelict house of some apparent age.
18. The most prominent feature within the land is a worn path which crosses the land from the opening at about the mid-point in the

Birtles Road boundary to the opening in the fences at the northern end of the eastern boundary, giving access onto Drummond Way. This path has the appearance of being very well used. The path was worn to bare earth and was muddy in places. The grass immediately adjacent to the worn path had the appearance of being used by those who diverted off the path. At the time of my unaccompanied site visit which I undertook before the opening of the inquiry on day 1, I observed several school children – some in groups – walking along this worn path from Birtles Road in the direction of Drummond Way. I also observed several adults – some with young children – using the path in both directions.

The Burden and Standard of proof

19. The onus of proof lies on the applicant for registration of a new green. It is no trivial matter for a landowner to have land registered as a green and all the elements required to establish a new green must be “properly and strictly proved”¹. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof, namely the balance of probabilities.

Report of Evidence

20. In the following paragraphs of this report, I summarise the main points arising from the evidence of the witnesses who appeared at the public inquiry. I will also refer briefly to the written evidence before the inquiry. I emphasise that what I set out is a summary of the principal points of the evidence. I have not sought, nor would it be appropriate, effectively to transcribe the totality of the evidence produced.

Mrs. Karen Baskerville

¹ *R v Sunderland City Council ex parte Beresford* (2004) 1 AC 889 per Lord Bingham at paragraph 2.

21. Mrs.Baskerville lives at 45, Drummond Way. She has known the land since 1997 and has used the land since 1999. She has used the land for a variety of activities including for general exercise and to play with her children. Mrs.Baskerville described the land as providing a safe environment for children to play.
22. Mrs.Baskerville began using land in 1999, shortly after her eldest child was born. In cross-examination, Mrs.Baskerville confirmed that she would use the path to cross the land and that her main use of the land was as a walking route along the path. Mrs.Baskerville enters the land through the gap in the fence at Drummond Way. She does not recall any fence obstructing use of this gap. Mrs.Baskerville's children have used the land to play.
23. Mrs.Baskerville confirmed that she had not seen furniture on the land earlier than two to three weeks before she gave her evidence to the inquiry.

Peter Sadler

24. Mr.Sadler lives at 87, Birtles Road. He has lived at his current address since 1999. Between 1990 and 1999 he lived at St.Austell Avenue. He began to use the land in 1999 after moving to his current address. While living at St.Austell Avenue, his children could play near home as there was less traffic. Mr.Sadler has used the land to walk his dog. It was also used for his children to play.
25. His children would use the land on four or five occasions per week. Kite flying was occasional – 2 to 3 occasions per summer. Mr.Sadler described kite flying as “not a frequent activity”. He recalls bonfires taking place occasionally, approximately on four occasions since 1999. These bonfires were not community events but were arranged by “a few individuals”.
26. Mr.Sadler would see other dog walkers when he was using the land.
27. Mr.Sadler confirmed that the appearance of the land had changed over time. Sometimes the vegetation was much denser than at the present time. He described the path and the area either side of the

path as “open” and the areas to the “north, west and east” as “overgrown”.

Julie Ward

28. Mrs. Julie Ward lives at 65, Birtles Way. She has lived at this address since 1997. Mrs. Ward's use of the land began in 1997.
29. Mrs. Ward confirmed that her main use of the land was to “walk from A to B”. In cross-examination, Mrs. Ward confirmed that “from what I see”, the majority of those visiting the land used the worn track. She also agreed that “quite a large” majority of those using the land did so to pass between Birtles Road and Drummond Way. Mrs. Ward confirmed that the path was “the main route that people used so the grass gets worn”. Mrs. Ward used the land other than for walking and cycling “several times per month”.
30. Mrs. Ward agreed that “sometimes the land was very overgrown” and that she “would see very few adults going into the overgrown areas”, although she was not put off.
31. Mrs. Ward had not noticed a lot of dog walkers on the application site unlike on the Bodmin Avenue play area where dog litter is frequently found.
32. Mrs. Ward confirmed that her children used the land to play including for bike riding, making dens, nature observation. They would use the land up to two to three times per week depending on the weather.

Ken Goodwin

33. Ken Goodwin lives at 167, Birtles Road. Mr. Goodwin moved to this address in 1975. Mr. Goodwin began to use the land in 1987. He used the land on two or three occasions each week to walk his dog or his neighbour's dog between 1987 and 2002. He would frequently see other dog walkers on the land. He would see children using the land “infrequently” since he would use the land

during the school day. His experience was that kite flying was “unsuccessful” on the land.

34. Mr.Goodwin completed a form in support of the application to include the path on the land within the definitive map of footpaths, bridleways etc. in Cheshire East. Mr.Goodwin recalls cattle grazing on the land but not since 1987.
35. Mr.Goodwin recalled barbed wire fencing at the Drummond Way end. He stated that “it did not take long to dismantle ... it was dismantled by kids”. He recalled that this was in the late 1980s and early 1990s.
36. Mr.Goodwin was asked about the post and rail fence at Drummond Way at p.98 of the Objector’s bundle (dated 26 November 1997). He recalls this fence but again stated that “it did not last long”. He agreed that “it was replaced on a few occasions” but that it was quickly “destroyed”. He added in the same answer that “children were great users” of the land.
37. Mr.Goodwin considered that Drummond Way was building in 1980s and not the 1990s. He did not use the land at this stage. He does not recall any temporary road being present when he was using the land.
38. Mr.Goodwin considered that both adults and children would stray off the path. He stated that “I have seen adults using the whole site to exercise dogs”. The path was used by children to go to and from school.
39. Mr.Goodwin recalls one bench on the land for several years in late 1980s. He does not know if it was replaced.

Amanda Spencer-Pickup

40. Mrs.Spencer-Pickup lives at 47, Birtles Road. She has known the land since 1965 and has used the land since 1988. Mrs.Spencer-Pickup’s children were born in 1994, 1999 and 2005.
41. Mrs.Spencer-Pickup used the land to walk the family dog in the 1970 until the end of the 1980s. More recently, she has used the

land to play with her children and, occasionally, to pick blackberries.

42. In cross-examination, Mrs.Spencer-Pickup confirmed that the majority of users of the land – both adults and children – used the path. The children in particular used the track en route to and from School.
43. Mrs.Spencer-Pickup does not recall her access to the land ever having been impeded. She was asked about fencing and confirmed that she recalled fencing being erected in the gap at Birtles Road but that it “may well have been rolled back”. She stated that that “I don’t recall not getting access”.
44. Mrs.Spencer-Pickup was asked about the fencing at Drummond Way by reference to the 1997 photographs at p.98 of the Objector’s bundle. Mrs.Spencer-Pickup does not recall the barbed wire fencing but stated that in 1997 she would not generally enter or leave the land at Drummond Way.

Mary Grindey

45. Mrs.Grindey lives at 88, Birtles Road. Mrs.Grindley’s children grew up at this address and her grandchildren are frequent visitors. Mrs.Grindey has known the land since 1959 and used the land since 1986. Mrs.Grindey has used the land once or twice a week depending on the weather. Mrs.Grindey’s main use of the land has been to pick blackberries and to pick flowers for the purposes of her hobbies of floral art and flower pressing.
46. Mrs.Grindey confirmed that the path is used “very regularly daily by the public, by children and adults”. In effect Mrs.Grindey has confirmed this information which she set out on the user form which she submitted in support of the application to include the path on the definitive map (objector’s bundle p.133).
47. Mrs.Gindey stated that she had no recollection of fencing at the Birtles Road gap. She was asked about the photograph of the fence at Drummond Way which appears at p.98 of the Objector’s

bundle. She has no recollection of this fence as she “never stood there”. She added that “ it was taken down and never put back”.

48. Mrs.Grindey was asked about the original map showing what the Applicant considered to be the boundaries of Whirley at page 19 of the Applicant’s bundle. Mrs.Grindey was asked whether she agreed with the boundaries shown on that map. Her response was “near enough, I don’t know to be truthful. That is what I would interpret as Whirley. I know it very well. The east side would be Whirley”.

Elaine Cragg

49. Mrs.Cragg lives at 75, Birtles Road. Mrs.Cragg has known the land since 1982 and used the land since 1986, the year in which she acquired a dog. Mrs.Cragg has used the land for a variety of activities including walking, blackberry picking and exercising her dog. Mrs.Cragg attended bonfire and Halloween parties on the land over a period of 4 to 5 years in the mid 1990s.
50. Mrs.Cragg completed a user form in support of the application to modify the definitive map of footpaths, etc. to include the path crossing the application site. Mrs.Cragg states in that user form that “[t]he path is very clearly defined due to the high number of people over many years using this route, also by children for safety while playing and walking to school ...” (objector’s bundle p.129).
51. In oral evidence, Mrs.Cragg stated that she used the path to walk her dog but would also use the whole field for this purpose. She would stay on track if walking from Birtles Road to Drummond Way with her dog but “for the majority of the time ... would stay on the field”.
52. Mrs.Cragg has no recollection of fencing or of the land being inaccessible during the construction of the Drummond Way houses. Mrs.Cragg does not recall a temporary construction road across the land.

Philip Potts

53. Mr.Potts lives at 54, Birtles Road. He has lived at this address since May 1999. Between 1943 and 1999, Mr.Potts lived at Fir

Tree Farm, Whirley Lane. He confirmed that Fir Tree Farm lay beyond the boundary of Whirley contended for by the Applicant as shown on the plan at page 19 of the Applicant's bundle.

54. Between 1987 and 2008 Mr.Potts would use the land up to twice a week when visiting his daughter, who lived at Drummond Way. He would use the land for exercising, for exercising his dog and for playing with his grandchildren.
55. Mr.Potts explained that when dog walking, he would use the whole of the land and would not confine himself to the path. He confirmed that there had been some clearance of the land since the 2008 photograph produced by the Objector (Objector's bundle p.363).
56. Mr.Potts was asked about Fir Tree Farm. He confirmed that he regarded his former address as being within what he regarded as Whirley.

Colin Craig

57. Mr.Colin Craig lives at 63, Birtles Road. He has lived at this address since 1981. Mr.Craig's personal use of the land was confined to the period between 1983 and 1993 when he used the land for afternoon strolls with his daughter. By 1993 his children were old enough to play unaccompanied after school and during the holidays.
58. Mr.Craig confirmed that his children would use the path across the land to walk to and from school. Mr.Craig was asked about the user form which he had completed and submitted in support of the application to modify the definitive map (Objector's bundle p.137). He confirmed the accuracy of the statement which he made in that user form, namely that there had been "constant usage [of the path] for at least 22 years". He confirmed that this included his own usage, that of his children and use by others whom he saw use the path. Mr.Craig stated that he used "a number of routes" when enjoying his "constitutional" including around the "shippon and across the field itself".
59. Mr.Craig does not recall any fencing obstructing use.
60. In terms of vegetation, he considers that the amount of vegetation on the land has "grown significantly from the early period of use".

He describe the land as being “left to fall into disarray ... not mown or cultivated”.

David Orme

61. Mr.Orme lives as 52, Hamble Way. He has lived at this address since 2005. Mr.Orme has three children born respectively in 1998, 2001 and 2008. Mr.Orme has used the land with his children and to exercise a dog whom he inherited 12 months previously. Mr.Orme stated that Hamble Way was constructed around 2000.
62. Mr.Orme confirmed that he has seen users confine themselves to the path and others who used the whole field. He estimated that the proportion of each would be around 50/50. He referred to football being played on the land and picnics occasionally.
63. Mr.Orme was asked about the vegetation growth by reference to the 2008 picture at Objector’s bundle p.363 and 367. He confirmed that the level of vegetation growth was less now than in 2008. He confirmed that it was easier to access the area to the right (Drummond Way) side of the path. He confirmed that part of the land was “overgrown” from 2005 until it was cut during the current year.
64. Mr.Orme confirmed that his recollection was that the Drummond Way fence was erected in 2005 but he did not know how long it was there.
65. The first time that Mr.Orme saw benches on the land was about six months previously

Peter Cornford

66. Mr.Cornford lives at 71, Birtles Road. He has lived at this address since 2005 and used the land since that time at least twice a week to walk. During these walks he would observe wildlife. He would confine himself to the path and would cross the land as part of a longer walk. He would sometimes be accompanied by his daughter. He or they, as the case may be, would “keep an eye out for nature”. He has seen others use the worn track across the land.

Mr. and Mrs. J.W.Potts

67. Mr. and Mrs.J.W.Potts live at 73, Birtles Road and have lived at this address since 1982. Mr.Potts' use of the land was, in the main, between 1982 and 1990 after which he would cross the land intermittently as part of a longer walk. He would observe wildlife while walking. Mr.Potts walked the family dog between 1994 and 2000. He tended to keep to the path during these walks while his dog would run off the path to chase balls. Mr.Potts confirmed that the land had become "more uneven in recent times".
68. Mrs.Potts stated that she had seen badgers on the land. She stated that the land had been overgrown until recently so she would not have seen the sett.

Terry Mottershead

69. Mr.Mottershead lives at 60, Birtles Road. He has know and used the land since 1988. Mr.Mottershead has used the land to walk his dogs since that time. Mr.Mottershead completed a user form in support of the application to amend the definitive map to include the path across the land. He confirmed that the user form was accurate and "it is a footpath used regularly by the public". He confirmed that children would use the path en route to and from school and to and from the Leisure Centre. He had seen dog walkers walking along the path, as indeed he had done.
70. Mr.Mottershead was asked about the photograph at page 96, said to be taken in 1997, of the Objector's bundle showing a post and rail fence at Drummond Way. He recalled that it was in tact near the houses but not as shown in the photograph at p.96.
71. Mr.Mottershead stated that the land was cleared during the last year.

Rachel Fowler

72. Mrs.Fowler lives at 77, Birtles Road. Mrs.Fowler has lived at 77, Birtles Road since 2002. She has used the land since September 2003. Mrs.Fowler stated in her questionnaire that she had used the land once or twice a year. In oral evidence, she suggested that this was conservative and that on average her use may have been once or twice a month but was "sporadic". These trips would

involve a variety of activities including nature observation and blackberry picking. Mrs.Fowler would use the land more often when using the path to walk to and from the Leisure Centre. Her family would use the land to fly kites.

73. Mrs.Fowler was asked about the 2008 photograph produced at p.363 of the Objector's bundle. Mrs.Fowler confirmed that the condition of the land either side of the path was as shown in that photograph. Mrs.Fowler confirmed that the photograph at page 363 of the Objector's bundle was of a "very overgrown part of the land".
74. Mrs.Fowler wrote a letter to object to a planning application for development of the (Objector's bundle p.357). She confirmed that she did not raise any concern about loss of recreational space in that objection.

Diane McIntyre-Scott

75. Mrs.McIntyre-Scott lives at 56. Birtles Road. Mrs.McIntyre-Scott has lived at this address since 2004. Prior to this she lived variously since 1971 on Bodmin Avenue and St.Austell Avenue. Mrs.McIntyre-Scott has used the land to play as a child and latterly with her children, to use the path, to pick blackberries. She has attended bonfires on the land on two occasions in the late 1970s and 1980s.
76. Mrs.McIntyre-Scott confirmed that the worn path had been present for many years. She has used it to walk to the pool and latterly, on a couple of occasions every month, to walk to the gym. She has seen others using the path. Mrs.McIntyre-Scott completed a form in support of the definitive map modification application which confirmed use of the path. Mrs.McIntyre-Scott stated that the about 50% of use of the land was on the path and 50% off the path.
77. Mrs.McIntyre-Scott had no recollection of the post and rail fence at Drummond Way shown in the photograph at p.96 of the Objector's bundle or of any fence at Birtles Road.
78. Mrs.McIntyre-Scott was involved in a "bramble blitz". The "bramble blitz" began in the "last few years" and occurred approximately annually.

Mrs. Carol Jones

79. Mrs. Jones lives at 4, Hamble Way. She has lived at this address since 2005 and has known and used the land since that date. Mrs. Jones would use the land with her children once or twice a week when they were younger. She visits the land less frequently now but her children still visit the land independently.
80. Mrs. Jones confirmed that her house had been built for 10 years when she purchased it during 2005. It was a show home and had therefore been the first house in Hamble Way which had been completed.
81. She considered that 50% of uses of the land would confine themselves to the path and 50% would use the whole field.
82. Mrs. Jones was asked about the area which she would regard as Whirley. She states that from Drummond Way she would "go through to Whirley". She considered Whirley to be the "area of open land off Sandy Lane including the allotments".

Mr and Mrs. Broadhurst

83. Mr. and Mrs. Broadhurst live at 57, Birtles Road. They have lived at this address since 1976. They spend part of each year elsewhere. Their use of the land is confined to the period between November and April. They have used the land regularly particularly to observe wildlife.
84. They confirmed that the land became overgrown particularly in the summer but that this "did not deter youngsters". They acknowledge the presence of the worn track. They considered the use of the track and the use of the rest of the field divided at about 50/50.
85. Mrs. Broadhurst does not recall the post and rail fence shown on page 96 of the Objector's bundle but that do recall a fence at Drummond Way.
86. At Birtles Way, Mrs. Broadhurst recalls the Council erecting a fence but that this was "quickly taken down again". She recalled that "when the houses were built at Hamble Way he saw it on the ground". She stated that it was put back up on two or three occasions subsequently but was "quickly taken down again". She

considered that people objected to the footpath being blocked. Mrs. Broadhurst stated that this process of erection and removal took place over a period of several weeks. The fence was put up and taken down where the access now is from Birtles Road. She confirmed that the type of fencing involved was "beech palling" of the type shown on the photograph at p.102 of the Objector's bundle.

87. Mrs. Broadhurst confirmed that when Drummond Way was being built the land was not "as accessible" and children did not go there that often.
88. The "bramble blitz" began a "few years ago".
89. Mrs. Broadhurst was asked about Whirley. She stated that Whirley was an area of open land which extended from the top of Birtles Road past the Primary School and up to the water tower. She stated occasionally Whirley was included in her address but not always.

Vivien Hampton

90. Mrs. Hampton lives at 109, Birtles Road and has done so since May 1990. She has known and used the land since that date. Mrs. Hampton would use the land regularly for walking, often as part of a longer walk.
91. Mrs. Hampton referred to the overgrown nature of the land. She had to "flatten thistles to get to blackberries". However, some parts of the land were "smoothed out" where children played. Many people used the path however as a route to and from school and to other facilities. Mrs. Hampton referred to the use of this path within her user form in support of the application for modification of the definitive map. She stated in that form that "this route is used on a regular basis by many of the local community". She also described the path as a "flattened grassed area – cut out by walkers mainly. - footpath composed of mainly flattened grass with areas of soil/mud" (Objector's bundle p.165).
92. Mrs. Hampton described the land now as being "much better than it was". She would prefer to stick to path rather than walking in the longer grass to "avoid getting wet". The vegetation became more

worn down “in the 1990s as people started to use it”. Mrs.Hampton was involved in the “bramble blitzes” organised by Mrs.Grindey over the last few years.

93. Mrs.Hampton stated that “mostly people were walking along the path”.
94. Mrs.Hampton recalls fences at Drummond Way and Birtles Road but does not recall access being prevented.
95. Mrs.Hampton described Whirley as an area including Whirley Barns near the water tower and as taking in part of Broken Cross and extending to Sandy Lane and including the Rugby Club and Whirley Lane.

Stewart Heath

96. Mr.Heath lives at 4, Tamar Close. Mr.Heath has lived at this address since 1989. Prior to moving to Tamar Close, Mr.Heath lived at 83, St.Austell Avenue from 1974. Mr.Heath has used the land daily to walk his dog.
97. Mr.Heath described the land including the path as “overgrown until 1989. In 1989 access onto the land from Drummond Way was difficult or impossible due to the on-going building works at Drummond Way. This lasted for several weeks.
98. Mr.Heath was asked about the photograph at page 363 of the Objector’s bundle, taken in 2008. Mr.Heath confirmed this was typical of the appearance and condition of the land at that time. The photograph at p.362 was not “representative of the whole of the site”.
99. Mr.Heath has used land both on and off the path.
100. In respect of fencing, Mr.Heath recalls a post and wire fence at Drummond Way in 1989. He does not recall the post and rail fence shown and objector’s bundle p.96 or any fencing at Birtles Road.
101. Mr.Heath recalls Drummond Way being constructed in late 1990 to 1991.

Peggy Bentham

102. Mrs.Bentham has lived at 56, Birtles Road since 1997. Mrs.Bentham has known the land since 1986 when she visited the area for professional reasons.
103. Mrs.Bentham explained the basis for the boundaries of Whirley shown on the original plan produced at page 19 of the Applicant's bundle. It was related, she said, to examination of the tithe maps. Later in her evidence, Mrs.Bentham described Whirley as a "hamlet with the town built around it".
104. Mrs.Bentham would use the land on average two to three time per week when she visited her daughter. Mrs.Bentham indulged in a variety of activities on the land including dog walking, nature observation and playing with her grandchildren. She did not confine herself to the footpath.
105. Mrs.Bentham completed a user form in support of the application to modify the definitive map to included the path. In that form, Mrs.Bentham states that "... the footpath is a well worn track across the field from Birtles Road to the top of the Drummond Way Estate". Mrs.Bentham also stated that "it is used by the public on a daily basis".
106. Mrs.Bentham was asked about the Birtles Conservation Forum's objection to a proposal for residential development on the land submitted in 2008 (ref:08/0773P). Within that objection it is stated that "... many children from the surrounding estates gather in the evening, at weekends and during school holidays around the green spaces off the bottom of Birtles Road, Bodmin play area and the back of the Leisure Centre. We don't find children meet on the field where the development is proposed because it is too wet, marshy, often with little ponds" (Objector's bundle p.230 (reverse)). Mrs.Bentham responded, when this reference was put to her, that "when it became wet and muddy children did not meet on the field – some were put off some were not".

George Cantrell

107. Until 2003, Mr.Cantrell lived at 70, Birtles Road which is the now-derelict dwelling to the west of the land. Mr.Cantrell was involved in farming the land, including in his capacity as bailiff for the

Parkside Hospital. The land was sold to the former Macclesfield Borough Council in 1980 and was used by a variety of farmers.

108. Mr.Cantrill recalls a well worn track on the land and that children used the track regularly.
109. Mr.Cantrill recalls that the water level in the area, including on the land, is high.

Sir Geoffrey Sparrow

110. Sir Geoffrey Sparrow is the local representative for the Campaign for the Protection of Rural England.
111. Sir Geoffrey has known the land for just over a year. He has no knowledge of the land before that. His evidence was largely concerned with the development pressures in the Cheshire. His evidence is not therefore relevant to the determination of the application.

Michael Fairhurst

112. Mr.Fairhurst lives at "The Rowans", Birtles Road. He has lived at this address since 2003. Before that, he lived at 10, Chelford Road, Macclesfield.
113. Mr.Fairhurst has used the land since 2003. Mr.Fairhurst describes the land as "the cut through". He explained that this referred to the fact that it is used by school children to walk to and from school and that he used it to access the Leisure Centre. He uses the path "very regularly" – twice to three times each month. His sons also use the path to go to school. He also uses the remainder of the land particularly to play with his daughter. However, Mr.Fairhurst confirmed that his main use of the land was to access the Leisure Centre.
114. Mr.Fairhurst described the condition of the land now as being "a bit more grassy ... less wild than in the early days".

Robert Harrison

115. Mr.Harrison lives at 82, Birtles Road. He has lived at this address since 2002. Between 1991 and 2002 he lived at 77, Birtles Road.

116. Mr.Harrison completed a user form in support of the application to add the path crossing the land to the definitive map. Mr.Harrison described the path as having “been used by “Harrisons” for 18 years as a route to family, Fallibroome School, Leisure Centre, dog walking and rugby club”. In his oral evidence, Mr.Harrison described how he has used the path to walk his dogs.
117. Mr.Harrison stated that he did not recall the post and rail fencing at Drummond Way as seen in the Objector’s 1997 photograph.
118. Mr.Harrison stated that the land had formerly been “overgrown” and that it had been “tidied up during the last six to twelve months”. He stated that the land was “more presentable now than it was 12 months ago”.

Amanda Robins

119. Mrs.Robins has lived at 73, Drummond Way since 1992. She lived at 11, Drummond Way between 1988 and 1992. There is clear view of the land from 73, Drummond Way.
120. Mrs.Robins has used the land to walk to Whirley Primary School. Her children have used the land to play. Mrs.Robins stated that there was a “a large amount of pedestrian traffic”.
121. Mrs.Robins was asked about the post and rail fence at Drummond Way shown in the Objector’s 1997 photograph. Mrs.Robins stated that this fence was in place when she moved to 73, Drummond Way in 1991. She recalled the fence but stated that there was always a gap. Later in her oral evidence she accepted that the fence was intact for a short period – to her recollection, a matter of hours. She stated that she “assumed that the gap was created by children”. Mrs.Robins stated that “she had seen it [ie. the fence] put up more than once but for not more than an hour or so”. Later she suggested that this may have happened twice. However, in response to a question which I put, Mrs.Robins accepted that “she could not be precise”.
122. Mrs.Robins described the condition of the land as “tidier and trimmed back now compared to 1991”.

Grace Neilson

123. Mrs.Neilson lives at 2, Tamar Close and has lived at his address since 1989. She has known and used the land since then.
124. Mrs.Neilson has used the land to walk with her dog and to walk dogs belonging to others. She has also used the land for nature observation and to take photographs.
125. In her user form, Mrs.Neilson referred to a fence having been erected for a short period. When asked about this reference during cross-examination, Mrs.Neilson elaborated. She stated that she recalls a fence at the Birtles Road and Drummond Way end of the land. She could not recall if this was the same type of fencing. She recalls that sections of this fence were taken down or pulled down by that they were in tact for a while. Mrs.Neilson could not recall how long ago this was. Mrs.Neilson was asked for how long the fences remained intact. She replied that she would “go one day and it was impossible to get access ... would go another day and it was pushed down or out”.
126. Mrs.Neilson was asked about the post and rail fence shown on the photograph at the Objector’s bundle p.96. She recalled that fence. She recalled that the fence was in tact for a short period. She recalled that thereafter it appeared to have been sawed “near the supporting post in the middle and two rails were removed”. The rails had been thrown into the thorn bushes. Mrs.Neilson recalls that paling fencing was then put into the gap – “like at Birtles Road” – but this was removed. Mrs.Neilson stated that there were further attempts to block the gap but these were removed “in less than a day ... children came through all the time”. In re-examination she restated this evidence and added that she recalled barbed wire being put along this boundary sometime after 1997.
127. When asked about the fencing in the Birtles Road hedge, Mrs.Neilson stated that she recalled the fencing. She recalled that the wire was cut and it was rolled to one side. She does not recall replacement of this fencing but it “probably was”. Mrs.Neilson stated that when she saw fencing put up “it deterred her from using the land”.

128. Mrs. Neilson was asked about the character and appearance of the land. She stated that there were now "a lot of bushes missing". She stated that the land "gradually changed with children doing things. A few months ago, a lot disappeared".

Applicant's Written Evidence

129. In addition to the witnesses called to the inquiry to give evidence, the Applicant produced user forms from other residents and users. Those are reproduced within the Applicant's bundle. Much of this written evidence is consistent, broadly at least, with the written evidence of those witnesses who gave evidence at the public inquiry in support of the application. I have had regard to that written evidence. However, I have given materially less weight to the written evidence compared to that which I have attached to the evidence from witnesses from whom I heard oral evidence since written evidence is not the subject to testing through cross-examination. Moreover, the cross-examination of the witnesses from whom I heard oral evidence, taken together with the oral elaboration of their written evidence which they volunteered, presented what those witnesses had set out in writing in advance of the inquiry in a rather different light, in particular as to the extent to which they used the path and its margins as opposed to the land as a whole and the extent to which they were aware of fencing. I consider it likely that, had the Applicant's other written evidence been the subject to the same degree of examination, much of it would also have undergone the same refinement. This factor too leads me to attach only limited weight to the written evidence of those who did not attend the public inquiry

Evidence for the Objector

Charlotte Roper

130. Miss Roper is a valuer employed within the Asset Management Department of Cheshire East Borough Council.
131. Miss Roper explained how the land was acquired by the former Macclesfield Borough Council on 16 September 1960 as part of a

larger parcel of land. The land acquired formed part of the Parkside Mental Hospital.

132. Miss Roper explained how the land so acquired has been developed over time. The land to the north of the application site on which Hamble Way now stands was sold to Alfred McAlpine Limited in 1989.
133. Miss Roper produces as her appendix 3 a "Record of Condition" of the land produced by North West Water on 24 October 1997. This record contains photographs taken of the land which are dated 24.10.97. The Record also contained the following description of the land:

"Access taken off Drummond Way, through timber post and rail/barbed wire fence. Field is currently down to rough pasture and not cropped or grazed. Boundary adjoining Birtles Road is partly fenced (in poor condition) with barbed wire, some mature (Ash) and semi-mature (Elder and Holly) trees, which have not been maintained." (Objector's bundle p.94).
134. Miss Roper produced photographs of the land taken by an Estates Officer of the predecessor Council on 26.11.1997 which show lengths of complete fencing along the Drummond Way and Birtles Road frontages (Objector's bundle pp.98-102).
135. Miss Roper stated that on the occasions that she has visited the land she has not seen it in use for recreational purposes. These tended to be about once a month usually between 7 am and 10am or 4 pm and 7 pm.
136. Miss Roper states that the western part of the land had been recently cleared of shrubs and mowed without the Council's consent. Miss Roper described the land before this work was undertaken as "filled with brambles and mature shrubs ... an impassable boundary between this area of land and the cottage".
137. Miss Roper states that a picnic bench which had been noted on the land during a site inspection by officers in September 2010 had been removed by the Council.

Cllr. John Goddard

138. Cllr.Goddard is the ward councillor for Broken Cross ward.

139. In his capacity as secretary to the Allotment Association he crossed part of the land on most days. He is aware that it is used as a short-cut but has not seen it used for any other recreational purposes.
140. Cllr.Goddard recalls a temporary road being constructed across the land for use by construction traffic involved in the development of Hamble Way. The route of this road penetrated the Birtles Road hedge. He recalls that some residents requested an ecological survey before the opening was made in the hedge. He recalls that this was done but did not reveal anything of ecological significance. The construction of the temporary road went ahead. As agreed with the developers of Hamble Way, the temporary road was removed following completion of the development and the hedge was restored with hawthorn and a fence.
141. Cllr.Goddard recalls that the Council erected a fence at Drummond Way and at Birtles Road to prevent access onto the land. He considers that this was done between 1998 and 2000. He recalls that these fences were broken down. He attributed this to those who were accustomed to use the path as a shortcut. He recalls that the fence was repaired on at least two occasions but was subsequently pulled down.

Nick Turpin

142. Mr.Turpin is a development manager at Cheshire East Borough Council. He is a qualified town planner with many years of professional experience as such.
143. Mr.Turpin's evidence is largely factual and sets out the planning history of the land.
144. The land has been allocated for residential development in successive versions of the Macclesfield local plan.
145. Mr.Turpin refers to an application made on 30 May 2003 for outline planning permission for residential development of the land. This application was withdrawn. 13 letters of objections to the application were received by the Council including 3 letters from residents of Hamble Way. The letters of objection refer to the land as a cut through between Drummond Way and its environs and

- Birtles Road but do not object to the proposed residential development on the basis of loss of recreational open space.
146. Applications for planning permission made in 2005 and 2008 elicited similar objections.
 147. Mr.Turpin lived on the Greenside Estate between 1997 and 2004. He knew the land during this period. He would cross the land as part of a circular walk "every couple of weeks". He would pass the land three to four times per week and would see people using the path on these occasions. He knew that the land was used as a cut through between Birtles Road and Drummond Way particularly by children attending Fallibroome High School. He never saw recreational use of the land. He never saw football or kite flying. Mr.Turpin described the land on either side of the path as overgrown. He considered it too dangerous for children to play in as it contained dog faeces which had not been collected. It was also uneven with hidden obstacles. In his oral evidence he described the land as "very overgrown ... clearly it had not been maintained, a lot of undulations, loose footing ... if rainy the area became marshy".
 148. Mr.Turpin's access to the land was never impeded by the presence of fencing.
 149. Mr.Turpin produced some photographs taken in 2008. Mr.Turpin stated that what is shown in these photographs is representative of what he saw when he knew the land.
 150. When he visited the land in September 2010 for the purposes of preparing for the public inquiry the land had been mowed and picnic tables had been placed on the land. He said that the land had been "completely transformed ... tidied up dramatically ... looked like a different site".
 151. As a local resident, Mr.Turpin is not aware of an area of Macclesfield which is recognised as Whirley nor is Whirley recognised as an area within the Council's planning policies. When cross-examined, Mr.Turpin stated that when he was a resident of the Greenside Estate he did not consider himself to be living in Whirley. If someone asked him the direct them to Whirley he would

send them to the water tower, Whirley Barn or Whirley Mere. He did not recognise Whirley as a community or neighbourhood.

Mr. Robert Hodgkinson

152. Mr. Hodgkinson lives at Dane Moss Farm, Congleton Road, Gawsorth. Mr. Hodgkinson held a mowing/grazing licence over several fields including the land between 1988 and 1994.
153. Mr. Hodgkinson did not graze animals on the land but used the land for hay production. He would visit the land at least seven times a year including when he was administering fertiliser, rolling and cutting the hay.
154. Mr. Hodgkinson stated that the land was securely fenced during this period. The condition of the grass was such that recreational uses had not, in his view, occurred.
155. Mr. Hodgkinson encountered problems on other fields over which he had a licence which involved children attempting to set fire to his tractor.

Dorian Belt

156. Mr. Belt is the Streetscape and Bereavement Services Manager at Cheshire East Borough Council. Mr. Belt is a resident of Broken Cross and has been for the whole of his life.
157. Mr. Belt stated that the land had been fenced at both the Birtles Road entry point and at the Drummond Road entry point on several occasions in an attempt to prevent its use as a short-cut. Mr. Belt stated that fencing works were done on at least six to seven occasions during the 18 years of his professional engagement with the land (ie. since 1992). His experience was that the fencing was pulled down in a matter of weeks of its erection. Mr. Belt considered that the last time he was asked to carry out fencing work on the land was approximately five to six years ago.
158. Mr. Belt would receive instructions to replace or repair the fence. He would then instruct the Council's "DLO" or direct labour organisation to complete the works. Before doing so, he would have inspected the land to establish what works were required. Mr. Belt would not inspect the works after completion. However, as

a local resident, he would drive regularly along Birtles Road and would see the fencing works. He would also visit Drummond Way for other reasons eg. surveying and arranging for maintenance of road verges.

159. At Drummond Way originally a post and rail fence was erected with barbed wire on the field side of the fence. Mr.Belt explained that the Council would not install barbed wire adjacent to the public realm. This was replaced by a post and wire fence with an internal post and barbed wire fence.
160. Along Birtles Road there was, originally, a post and non-barbed wire fence. The wire was removed. A chestnut paling fence was then erected with the paling either attached to existing posts or to new posts which were inserted.
161. Mr.Belt referred to an internal "works order" which refer to maintenance of the land and repair and other works to fences (see Objector's bundle tab d).
162. At my request, before the final day of the inquiry, the Objector investigated its records further and as a result produced four order or commissions for fencing on the land (Document O13).
163. An order dated 12 July 2000 refers to Drummond Way and states as follows:

"Remove existing old fencing and under growth. Erect new fencing with a twin smooth wire top and stock proof fence base to Drummond Way side and a three stranded barbed wire fence to the rear (field side) approximately 1 ft gap apart".
164. The works are described as "very urgent". It is recorded that this work was completed on 21 July 2000. The document is signed by Mr.Belt.
165. An order was produced concerning Birtles Road. It is dated 7 December 2000. The works described are:

"As per plan fill in gap with small amount of new chestnut pile fence to prevent access".
166. It is stated that the completion date was 21 December 2000. The document is signed by Mr.Belt. The plan referred to in this order was not produced.

167. A different form of order concerning Birtles Road dated 5 July 2001 was produced. This order described the relevant works as being "erect chestnut pile fence to other side of posts and repair gap in fenced already erected". The start date for this work is stated to be "ASAP". A plan has been drawn on the document showing diagrammatically an old and new fence.
168. A further order in the same format as those dated 12 July 2000 and 7 December 2000 is produced which refers to Birtles Road and the works described are "erect chestnut fence as per plan". This document is unsigned and undated.

Kathy Swindells

169. Mrs.Swindells is a landscape officer employed by the Council. She has held this office for 14 years. Mrs.Swindells manages the Council's allotments. Mrs.Swindells was also formerly an allotment holder.
170. She has visited the land and its vicinity regularly. She describes it as "a rough piece of land with little or no maintenance, long grass, tall weeds and brambles". She recalls that there were signs of access and that it appeared to be used as a shortcut. However, she saw no other recreational use nor did she consider the land as suitable for such use. Mrs.Swindells has never been on the land however.
171. Mrs.Swindells recalls fencing works to secure the Drummond Way boundary and that, following damage, repairs were carried out. She did not however see this work but is aware of it following discussion with colleagues.
172. Mrs.Swindells does recall the erection of chestnut paling at Birtles Road but that this was pulled down within a week or two. She recalls this from her regular trips to and from the allotments.

Findings of fact

173. I begin with the issue of the fencing of entry points onto the land. For all relevant purposes there appear to be and, during the qualifying period to have been, only two points of entry onto the land. The first is through a gap located approximately centrally within the Birtles Road boundary. The second point of entry is

located at the north-east corner of the land and gives access onto Drummond Way. This much is common ground. I do not consider that entry via western boundary has occurred in any meaningful way during the qualifying period.

174. I am satisfied that, on the balance of probabilities, the Objector has on several occasions during the qualifying period, fenced those two points of entry onto the land with the intention of preventing access.
175. I find as a matter of fact that at the Drummond Way point of entry, and indeed along much or all of the eastern boundary, there was first a post and rail fence with barbed wire field-side. Subsequently, a post and wire fence was installed with a parallel post and barbed wire fence on the field-side of the land.
176. At Birtles Road I am satisfied that a post and wire fence was installed and subsequently replaced or adapted into a chestnut-paling form of fencing.
177. I conclude that when erected or repaired these fences, at the points of entry, rapidly became the subject of interference and damage by those whose route across the land had become blocked. These fences only served to exclude access for a limited period of time.
178. In considering this issue and in reaching my conclusion, my starting point is the photographic evidence with which I have been provided.
179. The Objector has produced two sets of photographs taken in 1997 (Objector's bundle pp.95 to 102²). The photographs show clearly a post and rail fence along the part of the eastern boundary which closes off the Drummond Way point of entry. What is shown on the photographs demonstrates that access onto the land at the Drummond Way access point would only be possible by climbing over the fence or otherwise dismantling the rails.
180. The Birtles Road boundary is shown in the 1997 photographs (Objector's bundle pp.95 (top), 101 (top) and 102) as containing some paling style fencing. I am not able to identify from the

² Clearer copies of the photographs contained within these pages of the Objector's bundle were produced at my request and comprise document O4.

photograph at p.102 what section of the Birtles Road frontage is shown. However, what this evidence does demonstrate is that paling-style fencing had been installed along this boundary.

181. Mrs.Bentham raised the quality and reliability of the Objector's photographs both at pp.95 to 101 and at pp.362-368. Mrs.Bentham suggested that they were of little or no evidential value. I do not consider this criticism to be justified. The photographs are clear as to what they show and, without any particular difficulty, I am able to interpret and draw conclusions from them. There is no evidence to suggest that the date shown electronically on the face of the photographs is other than correct and that it represents the date on which the photographs were taken.
182. At the time of my site inspections, the parallel fencing at the western boundary of the land was plain to see. At the site inspection, Miss Roper kindly took photographs of sections of fencing at my instructions and those photographs are produced as document O12. The condition of this fencing demonstrated to me that the wire comprising both of the parallel fences at one time would have extended to close the boundary. The length of wire which had accumulated on one or other side of the gap in my view was consistent with a length of fence which had been cut and folded back (see document O4 pp.4-6).
183. At the time of my site visit, sections of paling fence were apparent along the Birtles Road boundary. Moreover, the accumulation of this fencing on the east side of the Birtles Road point of entry is consistent only with paling fencing having at one time closed that point of entry. I consider that on the balance of probabilities the presence of this accumulation of fencing is as a result of the fence being cut or otherwise disabled and folded back (see document O4 p.9).
184. The photographs and what I observed at the site inspection is consistent with the written and oral evidence of Mr.Belt as to the history of fencing works on the land. I found Mr.Belt to be a credible and persuasive witness and I accept in its entirety his evidence both as to the erection of fencing and subsequent repairs

and as to Council's intention for so doing, namely to exclude trespassers.

185. The Mr.Belt's evidence, the photographs and my observations at the site inspections are consistent too with the records of fencing works within document O13. The documents comprising O13 are clear, legible and readily understandable. The orders comprising the first, third and fourth pages of O13 suggest fencing works were carried out consistently with the photographs and with Mr.Belt's evidence. The documents also suggest the completion of the works described. I therefore consider that document O13 and in particular the pages identified can be relied upon as evidence consistent with the Objector's case. Mrs.Bentham suggests that it was inappropriate to have admitted into evidence document O13 and that at those document should have been put to the Applicant's witnesses. Document O13 was introduced largely following my request for elucidation of the work schedules contained within tab d of the Objector's bundle. O13 was produced after the close of evidence and I am satisfied that this material was only uncovered by the Objector during the adjournment of the inquiry. Had O13 been produced earlier no doubt the Applicant's witnesses may have commented on it. However, the Objector's case in respect of fencing, which document O13 corroborates, was put, appropriately in my view, to the Applicant's witnesses in cross-examination. I do not consider that any material prejudice is caused to the Applicant by my decision to admit document O13 into evidence. This conclusion records the decision I made and announced when this matter was aired on the final day of the public inquiry.
186. I should add that little weight can be attached to the schedule at Objector's bundle tab d as it is incomplete and provides insufficient details to be a reliable indicator of what in fact occurred.
187. The "record of condition" produced by North West Water in October 1997 is also consistent with the Objector's case in particular as to its description of the Drummond Way and Birtles Road boundaries (Objector's bundle pp.92-96).

188. Certain of the Applicant's witnesses gave evidence as to fencing which was more or less consistent with the Objector's case. Mrs.Neilson was an impressive witness. Mrs.Neilson gave evidence confidently and in a manner which leads me to conclude her recollection is wholly reliable. In summary, Mrs.Neilson's recollection was that fencing was erected but soon damaged or removed. Mr.Goodwin gave evidence for the Applicant to similar effect; he recalled the Drummond Way fences and that these fences "did not last long ... [they were] dismantled by kids". Mrs.Spencer-Pickup recalled that at Birtles Road fencing had been erected in the gap in the hedge but that it "may well have been rolled back". Mr.Mottershead recalled the post and rail fence at Drummond Way. Mrs.Broadhurst recalled a fence being erected at Birtles Road but that it was "quickly taken down again". She recalled that it was put back up on two or three occasions. She attributed this action to those whose use of the footpath had been obstructed. Mrs.Amanda Robins recalls fencing being erected at Drummond Way. Mrs.Grindley and Mr.Orme gave broadly similar evidence.
189. There is therefore broad consistency between the Objector's evidence and that of some of the Applicant's witnesses in respect of fencing works.
190. Mr.Hodgkinson's evidence suggests, as have other witnesses, that there is or was a particular problem in the area of a (no doubt small and unrepresentative) small group of children or young people who are prepared to damage the property of others.
191. I acknowledge that some of the Applicant's witnesses who recall the presence of fences were adamant that their access to the land had not been obstructed. Mrs.Hampton is one such witness. Mrs.Cragg is another. One possible explanation is that these witnesses were not giving honest evidence. However, the Objector did not suggest that this was the case and Mrs.Hampton, Mrs.Cragg and indeed all of the witnesses from whom I heard struck me as generally honest and reliable. More likely in my view is that these witnesses benefited from the action of others to remove the fences or sections of fence to allow access.

192. In conclusion therefore, I find that the Objector, as landowner, has, since at least 1997 being the date of the earliest of the photographs on which I rely, erected various fences to prevent access onto the land and has from time to time repaired those fences. However, determined individuals, most likely those who wished to use or were accustomed to using the land as a shortcut, would remove or disable the fences to allow access to continue. It is not possible to reach any firm conclusions as to how long the fences remained intact and complete. That they were noticed by several of the Applicant's witnesses suggests to me that these fences remained complete for a reasonable period. I do not accept Mrs.Robins' recollection that the Drummond Way fence remained complete for a matter of hours only and in fairness to Mrs.Robins, later in her evidence, she acknowledged that she could not be precise as to how long the fence remained in place. Mrs.Robins struck me as a witness who knew that the answers which she gave in cross-examination were unlikely to be helpful to the case which she was supporting but to her credit she gave, in my view, truthful answers all the same. That said, and without in any way giving untruthful responses to questions, I gained the clear impression that in some respects Mrs.Robins sought to downplay her recollections as to duration of the exclusory fencing in particular. On balance, I consider that Mr. and Mrs.Broardhurst were nearer the mark in their recollection that the period between erection and removal was a period of "several weeks".
193. I also accept Mr.Hodgkinson's evidence that during period until 1994 when his licence terminated he maintained the fences around the land. That is what I would expect an experienced farmer to do and I accept that Mr.Hodgkinson, who gave the impression of being a reliable and honest witness, did so.

Temporary Access Road

194. The Objector contends that a temporary access road was constructed across the land. The Objector claims that this access was constructed by those responsible for developing Hamble Way. It was removed following the completion of development and the

- entry point onto Birtles Road was replaced with a hawthorn hedge. Planning permission for the construction of what was to become the western section of Hamble Way was granted on 17 March 1999. The aerial photograph taken on 19 June 2000 (document O5) demonstrates that the development was wholly or largely completed by the date on which that photograph was taken.
195. The only witness from whom I heard who stated that he recalled a temporary access road was Cllr.Goddard. Cllr.Goddard had a clear recollection of circumstances relating to this access road and I found him to be a reliable witness. I was particularly impressed with the clarity of his recollection, which I considered genuine. On the other hand none of the Applicant's witnesses stated that they recalled this temporary access road. Had Cllr.Goddard's recollections been the only evidence relevant to this issue, I would have been disinclined on the balance of probabilities to find that such an access road was constructed.
196. However, there is further evidence which tends to corroborate Cllr.Goddard's recollection.
197. First, there are repeated references to the temporary access road in the planning file concerning the construction of the western side of Hamble Way. It is shown on various plans and drawings. It is referred to in the report to the committee which apparently resolved that planning permission should be granted for the development. Two households in Hamble Way and Drummond Way requested that consideration be given to a temporary access road to avoid construction traffic using existing residential roads.
198. Secondly, there is the aerial photograph of 19 June 2000. This photograph shows openings in the hedge at Birtles Road and at the northern boundary of the application site which Miss Roper considered to be consistent with the alignment of the access road shown on the plans and drawings within the planning file. I agree with Miss Roper in this respect.
199. Thirdly, at my site inspection, I saw and pointed out the remains of a temporary kerb the orientation of which must have formed a junction with Birtles Road. This feature is consistent with a feature

identified on the planning drawings as “temporary kerb to be feathered into existing”.

200. Fourthly, at the site inspection, that a length of single-species hawthorn hedge had been planted adjacent to the kerb was apparent. What I saw is therefore generally consistent with Cllr.Goddard’s recollection.
201. Fifthly, I can readily appreciate that Macclesfield Borough Council, as local planning authority, would have been unlikely to sanction the use of residential roads such as Drummond Way and Hamble Way by what would have been a substantial volume of construction traffic associated with the west of Hamble Way development. That an alternative temporary construction access would have been required can readily be anticipated.
202. These five matters are to my mind are persuasively corroborative of Cllr.Goddard’s evidence.
203. The absence of recollection on the part of the Applicant’s witnesses can be explained by the temporary duration of this access, the passage of time since its removal and also, as I conclude and advise in the following section of this report, since the substantial majority of local inhabitants using the land confined themselves to the path which was to the east of the alignment of the access road.
204. On the balance of probabilities I conclude that a temporary access was constructed across the land in 1999 to 2000 for the purposes of construction traffic accessing the development site which became the west side of Hamble Way. Upon completion of this development the access was removed and the land restored generally in accordance with the recollections of Cllr.Goddard.

Use of the Land

205. The Applicant claims that the land has been used for lawful sports and pastimes. The Objector disagrees.
206. I begin with the use of the path. There is overwhelming evidence of the existence of a path which crosses the eastern part of the land, from Birtles Road to Drummond Way. The route of this path is readily apparent on the ground now. I saw it in use at the time of

both my accompanied and unaccompanied site inspections. It seems well established. The route forms a convenient short cut from Drummond Way to Birtles Road in particular for the students of Whirley Primary School and of Fallibroome Academy.

207. I consider that the use of this shortcut is longstanding but increased substantially following the construction of the western end of Drummond Way and Hamble Way. The evidence suggests that Drummond Way was completed in the early to mid 1990s following the grant of planning permission on appeal on 13 October 1989 (see document O6). The eastern side of Hamble Way was constructed around 1995 following a grant of planning permission on 9 April 1992 (see evidence of Mrs.Carol Jones and document O6). A substantial volume of pedestrian traffic currently using the path derives from Drummond Way and its adjoining roads. Moreover, prior to the construction of Drummond Way and Hamble Way, the area surrounding the land was largely open farmland. There seems to have been available several routes for residents of the Greenside Estate and Birtles Road to access Fallibroome School and/or the Leisure Centre. The available routes included the use of the route to the west of the Shippon, as described by Mr.Craig. I conclude therefore that use of this track increased materially in the early to mid 1990s. That use of the track began to be used in the early 1990s is consistent with the evidence of Mrs.Hampton and with the evidence of Mr.Heath and Mrs.Broadhurst (albeit, with respect to Mr.Heath, I consider on balance that the west side of Drummond Way was completed in the early to mid-1990s rather than in 1989) It is also consistent with Mr.Hodgkinson's evidence that during the currency of his licences (which terminated finally in 1994) he saw no evidence of use of the land for recreation or otherwise and the boundary enclosures remained in tact. Had there been any material trespass onto the land during the term of Mr.Hodgkinson's licence I would have expected that to have been apparent to Mr.Hodgkinson from the condition of his hay crop and the conditions of the boundaries. I accept Mr.Hodgkinson's evidence that there were no such indications.

208. In terms of use of the land I conclude that since around the early to mid-1990s there has been significant use of the land as cut through connecting Birtles Road and Drummond Way and that this has given rise to the path which is now such a noticeable feature on the land.
209. The evidence I have seen and heard suggests to me that users of the footpath my from time to time have strayed off the alignment of the worn path for a range of reasons. First, they may wish to avoid an obstruction in the path. Many witnesses commented that the path was prone to becoming muddy, as indeed was apparent to me from my site inspections. Secondly, they may stray off the path and onto its margins when exercising a dog eg. to throw a ball or to retrieve a ball or dog. Thirdly children and those riding a bicycle may stray off the path slightly. The appearance of the path in photographs demonstrates the existence of margins of trodden grass either side of the worn path (see eg. photograph at Objector's bundle at p.189 (top right and bottom right and left³) and p.363 and Applicant's bundle p.21 (top right corner). However, I consider that this type of use conforms to the general experience of the way in which unenclosed paths are used which involves users from time to time straying off the path to a degree and for a variety of reasons.
210. Beyond use of track and its margins, evidence of use of the remainder of the land so as to support the Applicant's case is distinctly lacking. I conclude that use of the land beyond the path and its margins has not occurred to any material extent during the qualifying period at least until the clearance works of the last year to eighteen months.
211. Had the land during the qualifying period been in the condition and of a similar appearance as at the time of my site inspection I can readily accept that it would have been an inviting location to indulge in recreational activities. However, the evidence demonstrates that the land has undergone somewhat of a

³ These photographs are undated. However, having regard to all the available photographic evidence and the evidence as a whole I consider that the photograph reproduced on the top left corner of p.189 is likely to have been taken after the site was cleared recently.

transformation in the months leading up to the public inquiry. Largely through the industry of Mrs.Grindley and her “bramble blitz”, much of the considerable scrub growth which had accumulated on the land had been removed leaving a largely open area of land. It appears that the last such blitz took place shortly before the opening of the public inquiry. The evidence of many of the Applicant’s witnesses attest to this transformation and that prior to Mrs.Grindley’s endeavours the land was largely overgrown – see evidence of Peter Sadler, Julie Ward, Colin Craig, David Orme, Mr. and Mrs. J.W.Potts. Philip Potts, Mr.and Mrs. Broadhurst, Vivien Hampton, Stewart Heath, Terry Mottershead, Diane McIntyre-Scott, Michael Fairnhurst, Amanda Robins, Grace Nielson. Mrs.Ward’s expressed the matter perhaps most succinctly when she stated that “sometimes the land was very overgrown” and that she “would see very few adults going into the overgrown areas”.

212. The evidence leads me to conclude that the land was substantially overgrown before recent clearances such that I do not consider it remotely likely that the land was used to any material degree for recreational activity beyond the path and its margins, at least until the last year or so. I have no doubt that some hardy souls may have strayed off the path and into the overgrown areas adjoining the path and its margins eg. Mr.Philip Potts, Mrs.Ward. However, such use was in my view the exception. My reasons for reaching this view are as follows.
213. First, the photographs which I have seen show a level of vegetation growth within the land and beyond the path and its margins of such an extent that recreational use of much of the land would either be impossible or in practice a most an unattractive proposition. I refer in particular to photographs at pages 96-101, p.189 (top right and bottom right and left) and 363-368 of the Objector’s bundle and pages 20-21 of the Applicant’s bundle. I attach particular weight to the photographs at pages 363 to 368 of the Objector’s bundle which show the extent of vegetation in the late Spring (of 2008) when I would expect outdoor recreational use to be at or approaching its peak. The condition of the land as

shown in those photographs is neither conducive to nor consistent with recreational use beyond the path and its immediate environs.

214. Secondly, the condition of the land which appears from the photographs is consistent with the description of the land given by Mr.Denis N. Flinn in his letter of 1 July 2003 to the Macclesfield Borough Council in which he states that “[t]he amount of use of this path can be seen from the way a broad, easily walkable pathway has been established *in the midst of an otherwise overgrown field*” (emphasis added) (Objector’s bundle p.207).
215. Thirdly, the Applicant stated in its comments on and objection to the 2008 planning applications that “we don’t find children meet on the field where the development is proposed because it is too wet, marshy, often with little ponds” (Objector’s bundle p.230). This document is a detailed document prepared with conspicuous care and is independent of the village green application. I see no reason to consider that what the Applicant set out in this document is other than correct. I consider that Mrs.Bentham’s attempt, when cross-examined, to distinguish these comment was unpersuasive.
216. Fourthly, the absence of any material use of the land beyond the path and its margins is consistent with the absence of any reference to the loss of recreation space by those residents who responded to the various planning applications which have been made in respect of the land. These responses are not in my view consistent with there being any material degree of recreational use of the land beyond the path (see evidence of Mr.Nick Turpin at Objector’s bundle p.192-193). I should add that I do not accept Mrs.Bentham’s invitation that I should discount the planning history of the land as irrelevant. Mrs.Bentham is of course correct that planning considerations are not relevant to the present application. However, what is of relevance is the extent to which the response by local inhabitants to development proposals is consistent with there being actual recreational use of the land. Had the land in fact been in use for recreational purposes to the extent now alleged, I would have expected these interference with this use to be prominent in objector’s representations.

217. Fifthly, from my site inspections it appears that a large part of the north-west part of the land is distinctly boggy and does not afford conditions that would invite recreational use. That the land became waterlogged and that there is a high "water table" is a point which Mrs.Bentham was at pains to point out during the inquiry (eg. in cross-examination of Mr.Hodgkinson (see also evidence of Mr.Cantrell and Mr.Turpin)). Such conditions are not conducive to recreational use.
218. Sixthly, I attach particular weight to the evidence of Mr.Turpin that during the period of his familiarity with the land there was little use of the land beyond the path. I found Mr.Turpin to be an impressive witnesses and I accept the reliability of his recollections. Mr.Turpin's evidence is consistent with that of Cllr.Goddard as to the use of the land. It is also consistent with the evidence of Mr.Belt and Mrs.Swindells albeit that less weight should be given to their evidence since their familiarity with the use of the land is less than that of Mr.Turpin and, to an extent, is also less than that of Cllr.Goddard.
219. What then of the Applicant's witnesses who suggest that there had been use of the land beyond the path and its margins? First and as I have stated above, I accept that occasionally some residents did venture off the path and its margins and into the overgrown parts of the land (eg. Mr.Philip Potts, Mrs.Ward) but that this was exceptional. I also consider it likely that children play on the path and occasionally stray off the path and onto the margin; that is no more or less than I would expect in respect of any unenclosed path. However, I consider much of the evidence of recreational use given by the Applicant is in fact referable to the use of the path and its margins rather than the remainder of the land. I am reinforced in reaching this conclusion by the fact that none of the Applicant's witnesses recall the temporary access road. If they had in fact strayed off the path to any material extent to the west they would have encountered this access road during 1999 and 2000. That they did not in my view supports a conclusion that use was almost exclusively limited to the use of the path and its margins.

220. With regard to the statement by several witnesses that use of the path as compared to the wider parts of the field divided 50/50, I consider this to be an overstatement and on the balance of probabilities is not correct. The statement became somewhat of a “mantra” during part of the Applicant’s case and I consider that few if any of those who supported this division had genuinely given much thought to the matter of use. Moreover, this evidence is not consistent with the evidence given by other witnesses for the Applicant. Mrs.Ward stated that the “ quite a large” majority of those using the land use the path. Mrs.Spencer-Pickup gave similar evidence. Mr.Goodwin stated that, if children’s use is included, then the “majority” of the use of the land was on the path. Mrs.Hampton stated that “mostly people were walking along the path”. Mrs.Robins gave generally similar evidence. Mr.Fairhurst knew the application as the “cut through”. Moreover, the 50.50 split does not to my mind resonate with the Applicant’s application to modify the definitive map so as to include the path as a public footpath. That application and the evidence in support gives the impression of intensive use of the path. The same cannot to my mind be said of those parts of the land beyond the path and its margins.
221. Some witnesses referred to the playing of football on the land. In my view, on the basis of the evidence I have seen and heard, I do not consider that until recently the condition of the land was such as to make the playing of football realistic at least until the land was cleared in the last year or so. I therefore do not consider on the balance of probabilities that for the majority of the qualifying period this activity occurred other than in the form of very informal kicking of a ball along the path and its margins.
222. The land is not in my view suitable for kite flying given its constrained dimensions and the fact that it is enclosed by substantial hedges. I agree with Mr.Goodwin that kite flying would be “unsuccessful” on the land and with Mr.Sadler who said that kite flying was infrequent.
223. I have little doubt that dog walkers used the land. I equally have little doubt that many will have simply walked the path as part of a

longer route. That dogs ran off the path into the undergrowth equally does not surprise me or that they may have been encouraged to do so their owner or companion throwing a ball. The owner or companion may have been compelled to leave the path and its margins to collect the ball or even to retrieve errant dog. On balance I consider that dog walking in the main conformed to the description given by Mr.J.W Potts who would keep to the path but whose dog would run off into the undergrowth. This, in my view, is part and parcel of normal use of a footpath through unenclosed land.

224. On the evidence I have seen and heard, children's play would also have been confined to the path and its margins and would have rarely extended into the overgrown remainder of the land, at least until recently. I consider that the Applicant's comments in its objection to the 2008 planning application amply support this conclusion.
225. Bonfires occurred only occasionally and the evidence of blackberry picking was inconclusive as to its extent and also seems of have been occasional (see evidence of Mrs.Spencer-Pickup). The evidence suggests that nature observation was opportunistic and largely occurred by those using the path, as described by Mr.Cornford and Mr.J.W.Potts.
226. From the evidence I heard from Mrs.Baskerville, Mr.Goodwin and Mr.Orme which is consistent with the evidence of Miss Roper the placing of chairs and other furniture on the land was a recent development. I do not accept that the balance of the evidence supports Mrs.Bentham's suggestion (in evidence and in document P15) that the presence of furniture on the land was long standing. The dispute between the Applicant and the Objector concerning removal of this furniture which seems to have attracted some press attention is irrelevant to the determination of this application⁴.

⁴ I confirm that I have been provided with a copy of the exchange of correspondence between Mrs.Bentham and Mrs.Gregory which took place during November 2010 and concerned the presence and removal of furniture.

227. In conclusion therefore the balance of the evidence suggests that, the last year to eighteen months apart, use of the land has been largely restricted to the worn path and its immediate margins. Although there has been some limited use of the wider parts of the site beyond the path and its margins for recreation, on the basis of the balance of the evidence I have heard and read, such use was exceptional.

Neighbourhood of Whirley

228. The Applicant advances Whirley as a neighbourhood rather than as a locality, as Mrs.Bentham confirmed in her oral evidence.

229. The Applicant revised the boundaries of its asserted neighbourhood on several occasions during the inquiry. However, the Applicant's final boundaries (Applicant's bundle pp324 and 324A) remain largely unexplained and make little sense. This is particularly so at the eastern end of the alleged neighbourhood where, even following several revisions, the boundary involves the truncation of streets and road in random and unexplained way. By way of example at the eastern end of Drummond Way, some houses seem to be included but others are not.

230. There was divergence among the Applicant's witnesses as to what comprises Whirley. Mrs.Jones considered that Whirley was "the area of open land off Sandy Lane including the allotments". Mrs.Hampton and Mr. and Mrs.Broadhurst similarly held divergent views. Mr.Philip Potts considered that Fir Tree Farm was within Whirley but that property lies outside the boundaries of Whirley shown on the Applicant's map. Mrs.Grindey, a long standing resident, said ultimately that she didn't know where the boundaries of Whirley were. That the Applicant's witnesses are not amongst themselves of one mind as to what Whirley comprises and are not able to support the Applicant's own contention does little to inspire confidence on the case which is advanced.

231. Mr.Turpin, whom I regarded as an entirely sound witness, explained that both as an officer or the Council as well as a former resident of the Greenside Estate, he did not recognise Whirley as a "neighbourhood".

232. Mrs.Bentham explained that she had alighted on Whirley and identified its boundaries by reference to old tithe maps. This explanation reveals a considerable amount.
233. In my view, Whirley, as a cohesive, identifiable and recognisable area as opposed to a general location, seems to have had some currency many years ago (see document RA2 (OS map of 1871-78 revised in 1896). However, the conclusion which, on balance, I have reached is that as a cohesive and recognisable area Whirley, for most people at least, has long since ceased to exist. The Applicant's difficulty in identifying the boundaries of the area attests to this as does the fact that few residents seems to offer Whirley as part of their address. The lack of consistency among the Applicant's witnesses as to what the boundaries of Whirley are has also led me to this conclusion. I do not consider that material weight can be placed on the existence of the reference to Whirley in the name of the local primary School. The name Fallibroome appears in the name of the Academy but it was confirmed to me that Fallibroome is not or is no longer a recognised area of Macclesfield.
234. Moreover, the historic OS map (RA2) in so far as it identifies Whirley, suggests that that area abutted Sandy Lane, included Whirley Barn and Whirley Cottage and extended as far west as Whirley Hall and a property which itself appears to be named "Whirley". The map does not correspond in any meaningful way to the area identified by the Applicant. In this respect the OS map accords at least broadly with the understanding of Mrs.Carol Jones, Mr.Philip Potts and Mrs.Hampton. Therefore, even historically, Whirley seems to have encompassed an area to the west of and excluding the land and the area of Macclesfield now contended by the Applicant to comprise Whirley.
235. I do not consider that the existence of a road named Whirley Lane assists in the determination as to whether a neighbourhood of Whirley exists now largely for the same reason as Fallibroome Academy does not, as is acknowledged, signify the continued existence of a neighbourhood known as by that name. Moreover, directional road signs which refer to Whirley do not to my mind

signify that that location is a cohesive “neighbourhood” as opposed to a general and broad location, perhaps of historic interest only. There is certainly nothing to suggest that those directional signs are related to the area now relied on by the Applicant as opposed to the area around the water tower and other features to the west.

Conclusions

Use “as of right”

236. Use as of right comprises use “without force, stealth or permission”.
237. In his recent judgement in the case of *R (Lewis) v Redcar and Cleveland Borough Council* (2010) UKSC 11 Lord Rodger explained that the concept of use by force does not require physical force. He held that use which was contested by the landowner would amount to forcible use. I consider that Lord Rodger’s observations are binding upon me and upon the Registration Authority, reflecting as they do earlier case law. The Courts have stated repeatedly that the question of whether use as of right should be considered by reference to how the use would be perceived by the landowner rather than the user.
238. I have set out my conclusions of fact concerning the fencing of the land. On the basis of those conclusions, it follows unavoidably that the erection of and repairs to these various types of fencing, which was intended to exclude trespassers, was a clear attempt by the landowner to contest and prevent use. That the fencing was repeatedly damaged and removed and the repairs undone does not to my mind undermine the unavoidable conclusion that the landowner through the fencing works was contesting and seeking to interrupt and prevent use. There was something of a constant battle between landowner and users of the land during the qualifying period.
239. Although it is not possible to be absolutely precise when the various elements of fencing were erected and repaired, to my mind there can be no real doubt that these works took place within the qualifying period. The photographic evidence together with

Mr.Belt's evidence and document O13 make this abundantly clear. I consider therefore that any use of the land for lawful sports and pastimes for that part of the qualifying period following erection of these fences was the subject of contest and objection by the landowner and should therefore be regarded as forcible and not "as of right". I advise the Registration Authority accordingly. My advice in this respect, if accepted, would of itself mean that the application should be rejected.

240. For completeness however, I set out my conclusions in respect of the other parts of the qualifying requirements.

Use for lawful sports and pastimes.

241. I have set out above my conclusions in terms of the extent of use of the land.
242. I am entirely satisfied that for that part of qualifying period between the cessation of Mr.Hodgkinson's licence and the clearance works which took place during the last year or so the land was overgrown and the balance of the evidence suggests, to my mind clearly, that any use of the land beyond the path and its margins was minimal. I also consider that during the currency of Mr.Hodgkinson's licences use of the land was on the balance of probabilities limited if it occurred at all. From 1988 until around 2008 or 2009 the balance of the evidence demonstrates that, beyond the path and its margins, use of the land for sports and pastimes was limited to the occasional hardy trespasser and did not comprise anything approaching use by the general community for recreational purposes. I consider that until the recent clearance took place it was simply not possible or attractive to use the land for recreational purposes beyond the path and its margins. It is not possible therefore to conclude sensibly that the land has been used for lawful sports and pastimes for the qualifying period as would be required for the qualifying definition to be met.
243. I acknowledge that it is not necessary for an applicant to demonstrate use of every part of an application site and that areas may be inaccessible is not inconsistent with a conclusion that land as a whole has been used for sports and pastimes. However, even

where this is the case, the evidence, when considered as a whole, needs to be such as to allow a sensible conclusion that the land has been used for sports and pastimes as opposed to some discrete part of it. I do not consider that this conclusion is possible where, as in the present case, beyond a linear strip comprising a path and its margins which amounts to only a small part of the land claimed as a green, the evidence is that there has been little or no meaningful recreational use of the land during a substantial part of the qualifying period nor indeed was such use in any practical sense possible other than for the most adventurous.

244. So far as use of the path is concerned, its predominant use was to pass and repass across the land largely for the purposes of accessing schools but also other facilities. The path across the land provides a plain and convenient shortcut for such purposes. In **Oxfordshire County Council v Oxford City Council and Robinson** (2004) Ch. 43, Lightman J. provided guidance on how a registration authority should consider evidence of use of land which may be referable to the use of an actual or putative right of way but is claimed to be the indulgence in lawful sports and pastimes. In essence, the Judge advised that the matters should be considered from the point of view of a reasonable landowner. If having regard to all the circumstances the use would be perceived by a landowner as more akin to use of a public footpath then the use ought not to be considered as a lawful sport and pastime but instead should be considered as use which is akin to use of a footpath. The Judge also advised that where the position is ambiguous the use should be attributed to use of a footpath. I am entirely satisfied that the passing and repassing over the path would be viewed by any landowner as use of a footpath rather than a lawful sport and pastimes. The position is clear cut and there is little room for ambiguity.
245. That then leaves the evidence of activities on the path or margins which are of a recreational nature eg. a child riding his or her bike along the path and in doing so, straying of the path and onto its margins or a dog walker standing on or adjacent to the path to throw a ball for his or her dog. When considered from the point of

view of a landowner and in context of the use of the path and the remainder of the land, I am of the view these types of activity would be regarded as incidental to the use of the path as opposed to lawful sports and pastimes in their own right. In this respect I refer to guidance given by Sullivan J. in **R Laing Homes Limited v South Gloucestershire District Council** (2003) 4 PLR 95 and the report and recommendation of Vivian Chapman QC concerning an application to register as a green land at Radley in Oxfordshire to which I drew the parties' attention at and in advance of the public inquiry.

246. In conclusion therefore I consider that use of the land beyond the path and its margins has been limited and is insufficient in extent to justify a conclusion that the land has been used for lawful sports and pastimes during the whole of the qualifying period. The use of the path and its margins has not been for lawful sports and pastimes but instead is referable to the use of a footpath.

Use by a significant number of the inhabitants of a neighbourhood within a locality

247. As a consequence of the conclusions set out above, it follows that there has not been use of the land for lawful sports and pastimes by a "significant number" of the inhabitants of the neighbourhood relied upon for the whole of the qualifying period.
248. I also conclude that the area relied upon and which is said to comprise Whirley is not a "neighbourhood" within the meaning of the relevant qualifying requirements. In **R (Cheltenham Builders Limited) v South Gloucestershire District Council** [2004] JPL 975 Sullivan J. held that to be a neighbourhood, the area advanced must possess a "sufficient degree of cohesiveness" so as to be capable of being recognised as such. This guidance was generally endorsed by Judge Waksman QC in **R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and others) v Oxfordshire County Council** [2010] EWHC 530 (Admin). Although I have not found this an easy aspect of the application to resolve and advised upon, on balance, I conclude and advise that, on the basis of the findings of fact set out above,:

- a. Whirley may historically have been a recognised and cohesive area comprising largely of open land but that it has long since ceased to exist as such. In the present day, it exists at most as a broad and general location probably of historic resonance only; and
 - b. in any event, the area relied upon by the Applicant does not represent what is or was historically Whirley. The balance of the evidence suggests that what historically was Whirley was located to the west of the area relied upon by the Applicant; and
 - c. if the boundaries of the area eventually settled upon by the Applicant are examined for their own sake and not by reference to the question of whether or not they represent Whirley, the boundaries are unexplained and seem to have been randomly drawn. That area does not represent a part of Macclesfield which possesses any cohesiveness so as to be considered a “neighbourhood” within the meaning of the guidance given by Sullivan J. in **Cheltenham Builders** (above) nor does it possess any characteristics or features so as to amount to a recognised or recognisable area in its own right.
249. Having heard the evidence, I acknowledged that that an argument may have been advanced that component parts of the area relied on by the Applicant may themselves amount to a neighbourhood or neighbourhoods. Greenside Estate may be a neighbourhood. I also recognise some basis to suggest that Birtles Road itself may be a neighbourhood and that Drummond Way and the residential roads which link to it may also comprise a separate neighbourhood. However, the Applicant has not advanced these alternatives and therefore neither I nor the Objector has had the opportunity to consider or comment upon them. I do not therefore consider that it would be fair or reasonable to address potential alternatives within this report and to make any conclusions or recommendations in respect of them, particularly in light of my

conclusion and advice that the application should be rejected for additional reasons as set out above.

250. For the avoidance of doubt I do not consider that the area advanced by the Applicant can be considered as a "locality", nor indeed in the end did that Applicant advance it as such. A "locality" is generally required to be an administrative area recognised in law eg. a parish. I heard no evidence to suggest that the area advanced by the Applicant meets this requirement.

Overall Conclusion

251. I consider that the Applicant has not demonstrated that the land was capable of being used or was used as of right during the qualifying period by reason of the fencing works which I conclude as a matter of fact were carried out by the landowner. This conclusion of itself in my view should lead to the application being rejected and I advise accordingly. However, and additionally, I advise that, on the balance of probabilities, it has not been demonstrated that the land was used for lawful sports and pastimes to any material extent during much of the qualifying period. I also consider that the Applicant has not demonstrated a qualifying neighbourhood. I therefore recommend to the Registration Authority that the application should be rejected.

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20 December 2010