AGENDA ITEM NO 5

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

3 OCTOBER 2011

Report of: Strategic Director of Corporate Services

Title: Application to Register Land at Whitchurch as a Town and Village Green under the Commons Act 2006, Section 15(2)

Ward: Hengrove

Officer Presenting Report: Stephen McNamara

Contact Telephone Number: (0117) 922 2839

RECOMMENDATION

To register part of the application land as a Town and Village Green in pursuance of the Commons Act 2006.

Summary

This report concerns an application to register a site in Hengrove Ward as a Town and Village Green.

The significant issues in the report are:

As set out in the report.

Policy

- There are no specific policy implications arising from this report

Consultation

1. Internal

This report has been prepared in consultation with the Registration Authority's responsible delegated officer (Strategic Director, Corporate

Services) and the Head of Legal Services.

2. External

Miss Lana Wood of Counsel was appointed as an independent inspector to advise the City Council as Registration Authority as to how to deal with the application. Ms Wood conducted a non statutory inquiry which opened on 23 April 2009 which took place over a period of days and which included a hearing on the preliminary issue before the final hearing took place on 28 February 2011 to 3 March 2011. It included an accompanied site view. The inspector heard considerable evidence and legal argument and was provided with all available documentation. Both applicant and objector were represented by Counsel.

Context

3. The applicant applied on 11 February 2008 for registration as a Town or Village Green of land at Whitchurch, Bristol.

4. The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land should be registered as a green.

5. The Commons Registration Authority advertised the application on 2 April 2008 and received an objection from the Council as landowner on 18 June 2008.

6. The inspector conducted a non-statutory inquiry which opened on 23 April 2009. The Council (objector) raised the question of whether the land had been enjoyed “as of right” or “by right”.

7. The inspector directed that this should be dealt with as a preliminary issue as it appeared that it might well be determinative of the application. It was clear when the inspector opened the inquiry on 23 April 2009 that there was no prospect of the preliminary issue being dealt with in the time available so the inquiry was adjourned.

8. The Council (objector) contended that the land had been appropriated and that use of the land by local people was not use as of right but lawful use, that is by right. Appropriation is a process whereby land that had been acquired for one statutory purpose, but is no longer required for that purpose, can be appropriated to a new statutory purpose.

9. The hearing of the preliminary issue took place on 29 and 30 June 2009. The inspector submitted her report to the Registration Authority. As

documentary evidence to prove an express appropriation of part of the application land to be held for the purpose of public recreation could not be located the Council (objector) could not prove definitively that the land had been expressly appropriated.

10. Further time was given for the Council (objector) to make further submission on the issue of appropriation. Further documentation was submitted to the Registration Authority in July 2010. The applicant amended the application in August 2010 firstly by amending the application land, and secondly by changing the claimed locality/neighbourhood in respect of which the application was made. The amended application land was outlined in green on the map appended to the amended application, a copy of which is to be found at Appendix 1 to this report. The original application land was an area of 24.05 acres. The amended application land is an area of approximately 27 acres. The Council as objector did not object to either amendment and the amendments were allowed.

11. Following the amendment of the application land an additional plan was produced by the Council (objector), showing the eastern boundary and the south eastern corner of the application land as amended in detail. That plan showed that the area coloured orange (the former site of the prefabs and a thin strip of land to the rear of the rear boundaries of the houses in Fortfield Road) was purchased on 3rd June 1948, the area coloured dark blue (the grassed area to the west of Fortfield Road) was purchased on 15th March 1965, and the purple area (the wooded area in front of the houses on Bracton Drive, and along the eastern edge of the ASDA field) was purchased on 17th May 1965. A copy of this additional plan is to be found at Appendix 2 to this report.

12. The final hearing of the application took place between 28 February 2011 and 3 March 2011.

13. It is for the applicant to define the application land and then to show that the statutory test is satisfied in relation to the whole of it. The inspector was not satisfied, on the available evidence, that all parts of the amended application land had in fact been used for lawful sports and pastimes by a significant number of local inhabitants. The orange land, the former site of some prefabs, formed a discrete area and the inspector was not satisfied that this area had been used for lawful sports and pastimes by a significant number of inhabitants of the locality. The inspector has therefore recommended that the application to register the whole of the amended application land be rejected. However the Registration Authority is entitled to consider whether part only of the application land should be registered.

14. The inspector was satisfied on the available evidence that part of the amended application land (the whole of the amended application land with the exception of the former site of the prefabs) had been used by a significant number of inhabitants of the locality of Whitchurch Ecclesiastical Parish for lawful sports and pastimes as of right throughout the relevant period. The inspector recommends that this part (the whole of the amended application land with the exception of the former site of the prefabs) be registered as a Town or Village Green.

Proposal

11. This Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.

12. The recommendation is that the Committee accept the inspector's recommendations to register part of the application land, that is the whole of the amended application land with the exception of the former site of the prefabs.

Other Options Considered

13. The other options considered are:

    13.1 Register the entire application land.

    13.2 Reject the application.

14. The Council (objector) contended that approximately 185 acres of the application land had been transferred on 31 March 1980 from the Land and Administration Committee to the Open Spaces and Amenities Committee. The Council (objector) contended that the transfer between Committees was consistent with an appropriation of the land so that from and after 31 March 1980 the land was held under the Council's public open space powers. Use of the site was permitted by the Council because the site was open space, held under Section 10 of the Open Spaces Act 1906, and accordingly use by local people was not use as of right, but lawful use, by virtue of the site being held under the Council's open space powers. The Council (objector) submitted detailed written submissions and made oral submissions at the conclusion of the hearing. This is dealt with in some detail in Part 8 of the inspector's report.

15. Based on the comprehensive inspector's report the delegated officer acting in his capacity as the registration officer is recommending the

partial registration of the site, that is to register the part of the amended application land which excludes the orange land (the former site of some prefabs).

16. The Committee may decide to follow option 13.1 or 13.2 but must have sufficient reason for reaching a conclusion different from that of the inspector.

Risk Assessment

17. The options leave the Council open to legal challenge. In spite of the fact that legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision.

18. These risks are mitigated against by the Council's demonstration of a fair and transparent process in its determination of the application and a decision based on detailed consideration by the Registration Authority of the inspector's report.

Public Sector Equality Duties

19. Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following "protected characteristics": age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:

    i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.

    ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --

        - remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;

        - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);

        - encourage persons who share a protected characteristic to

participate in public life or in any other activity in which participation by such persons is disproportionately low.

iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
- promote understanding.

Legal and Resource Implications

Legal

The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land or a part thereof should be registered as a green.

The criteria to be applied for successful registration are provided by the Commons Act 2006. The applicant must establish that the land in question comes entirely within the definition of a town or village green, to be found in Section 15(2) of the Commons Act. The Registration Authority must consider on the balance of probabilities whether or not the applicants have shown that:

- a significant number of inhabitants of the locality or neighbourhood indulged in lawful sports and pastimes as of right on the land for a period of at least twenty years; and they continue to do so at the time of the application.

In its capacity as Registration Authority the City Council has to consider objectively and impartially all applications to register greens on their merits taking account of any objections and of any other relevant considerations. The Committee must leave out of account wholly irrelevant considerations such as the potential use of the land in the future. The inspector has recommended that the application be rejected but that part of the application land be registered as a town green. It is lawful to register part of the application land. The Committee must have sufficient reason for reaching a conclusion different from that of the inspector.

<u>“As of right”</u>

User “as of right” means user without force, secrecy or permission (*nec vi nec clam nec precario*). User as of right is sometimes referred to “as if by right” and must be contrasted with use “by right”.

“By right”

User “by right” means that users already have a statutory or other legal right to use the land for those purposes. Such users are not trespassers. Land is not used “as if right” for lawful sports and pastimes if user is by right. If land is held on trust for the purpose of recreational use and enjoyment by the general public or a section of the public including the users of the land it has been suggested (although not definitively decided) that the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers. It has also been suggested but not yet decided by the courts that a trust may be implied.

“Appropriation”

In 1900 the courts held that a local authority, as a creature of statute, had no power to use land permanently for a purpose inconsistent with that for which it had originally been acquired. Therefore parliament conferred on local authorities a power of appropriation, originally exercisable only with the consent of a minister, whereby land that had been acquired for one statutory purpose, but was no longer required for that purpose, could be appropriated to a new statutory purpose for which the land could have been acquired. The current general statutory power of appropriation is to be found in s. 122 LGA 1972 (formerly LGA 1933 s. 163).

Legal advice provided by Anne Nugent, Senior Solicitor

Financial
(a) Revenue
In the event of any subsequent legal challenge, costs can be met from the central contingency.

(b) Capital
Registering Land as a Town and Village Green prevents development opportunities and therefore potential loss of a Capital Receipt.

(Financial advice provided by Principal Accountants Tony Whitlock, and Jon Clayton)

Land
Use of the council's property holding needs to be flexible if it is to support initiatives such as major regeneration, housing and employment programmes. Registration as a TVG would have a substantial impact on

the ability of land to contribute to these initiatives, both current and future. Registration as a TVG substantially reduces the value of land, including financial value. All alternative use value is wiped out and the land in effect becomes a liability and therefore financially valueless.

Part of the application land (approx 32%) was identified as a potential sale during a strategic review of the city's green spaces. The land sale was deferred by Cabinet in December 2010 and is currently one of a number of land sales being considered by an all-party working group of members. It is expected that the working group will report its findings in the near future. The Whitchurch site has a potentially very high monetary value and the Council has committed to reinvesting 70% of this in improving other green spaces with priority facilities decided on locally by Neighbourhood Partnerships.

(Land advice provided by Richard Fletcher (Parks) and Jeremy Screen (Corporate Property))

Personnel
Not applicable

Appendices:

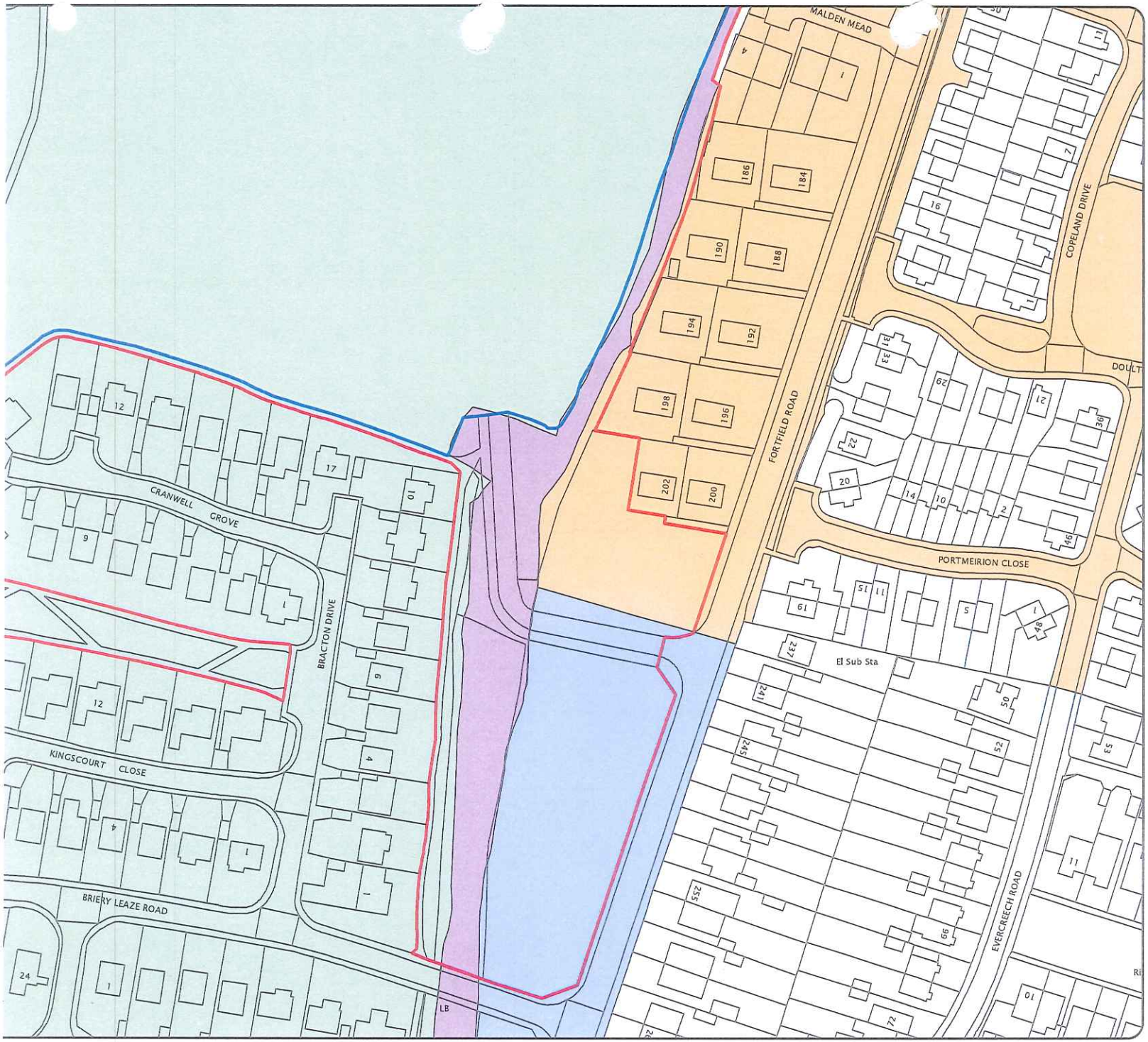
Appendix 1 – The Applicant's Plan (as amended)
Appendix 2 – The Plan produced by the Objectors 24.11.10
Appendix 3 – The Inspector's Report dated 18 May 2011

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985
Background Papers:

Applicant and objector's evidence bundles and written submissions
Inspector's report 17 October 2009
Inspector's supplementary report dated 18 May 2010

WHITCHURCH TVG

APPLICATION LAND (AS AMENDED) SCALE 1:2500



Whitchurch TVG
Additional land

- Extract - original application
- Extract - amended application
- archive 5183 purchased 3/6/1948
- archive 27658 purchased 15/3/1965
- archive 18926 purchased 17/5/1965
- archive 2503 purchased 27/11/1937

N

CORPORATE PROPERTY

Plan No	:	Whitchurch Nov 2(
Prop ID Ref	:	n/a
Polygon Ref	:	n/a
Scale	:	1:1,500
Date	:	24th Nov 2010

BRISTOL CITY COUNCIL

CORPORATE SERVICES

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Will Godfrey, Strategic Director – Corporate Services

APPENDIX 5(2)

In the Matter of

an Application to Register land at

Whitchurch Park, Bristol

as a Town or Village Green

REPORTOF THE INSPECTOR,

MISS LANA WOOD

[redacted]

Bristol City Council

Legal Services

PO Box 2156

The Council House

Bristol

BS99 7PH

Ref: Ms Anne Nugent, Senior Solicitor

CONTENTS OF REPORT OF INSPECTOR MISS LANA WOOD

Executive summary

The Applicant applied to register the whole of the amended application land on the basis that a significant number of the inhabitants of the locality of Whitchurch Ecclesiastical Parish, alternatively a significant number of the inhabitants of the neighbourhoods of the electoral wards of Hengrove and Whitchurch Park within the locality of Bristol, had used the land for lawful sports and pastimes as of right throughout the 20 year period expiring on 14th February 2008.

I was not satisfied that all parts of the amended application land had in fact been used for lawful sports and pastimes by a significant number of local inhabitants. The orange land, the former site of some prefabs, formed a discrete area and I was not satisfied that this area had been used for lawful sports and pastimes by a significant number of the inhabitants of the locality. I therefore recommend that the application to register the whole of the application land should be rejected.

The Registration Authority is required also to consider whether part only of the application land should be registered. I was satisfied that the rest of the amended application land (the whole of the amended application land, with the exception of the former site of the prefabs) had been used by a significant number of inhabitants of the locality of Whitchurch Ecclesiastical Parish for lawful sports and pastimes as of right throughout the relevant period. I therefore recommend that this area should be registered as a town or village green.

In the Matter of an Application to Register

land at Whitchurch Park, Bristol

as a Town or Village Green

REPORT OF THE INSPECTOR, MISS LANA WOOD

09 September 2011

1. The Application

Application

1.1. On 14th February 2008 Bristol City Council, as registration authority ("the Registration Authority"), received an application dated 11th February 2008 from Mr John Button of [redacted] as chair of the Elm Tree Park Residents Association, to register land at Whitchurch, Bristol as a town or village green pursuant to section 15(1) of the Commons Act 2006. The application was in the prescribed form, Form 44, and was verified by a statutory declaration of Mr John Button declared on 11th February 2008.

1.2. The basis of the application and qualifying criteria were specified in section 4 of the form to be those in subsection 15(2) of the Commons Act 2006: that a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, had indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years and continued to do so at the time of the application. Section 5 of the form asks for a description and particulars of the area of land in respect of which the application was made. The applicant stated that the land had no official name. Older people knew it as the Field, Whitchurch Park, Elm Tree Park, the Green, Fortfield Green. Younger people called it "ASDA Field". Its location was described as bounded roughly by Briery Leaze Road, Bamfield, Pinkhams Twist, ASDA, Fortfield Road and Cranwell Grove. The application land was outlined in blue on Maps A and C, exhibited to Mr Button's statutory declaration.

1.3. The locality or neighbourhood within a locality in respect of which the application was made was described in section 6 of the form as being in the Bristol Electoral Ward of Hengrove, and mainly in the polling districts C and D. The neighbourhood was outlined in red on Map B, exhibited to Mr Button's statutory declaration.

In section 7, the justification for the application to register the land as a town or village green, the applicant stated that the land had been and was used by a wide cross section of the residents in the neighbourhood for a range of lawful sports and pastimes for at least the past twenty years. The frequency of these activities can be daily, weekly, monthly and/or seasonal by all age groups. The land supports a wide range of flora and fauna. The justification was continued in appendix 4 in which it was stated that the land is an area of grassland with trees, bushes and hedgerows. There are contours in the form of mounds, as well as flat areas, giving very pleasant and eye-appealing views from all areas.

When the weather is clement, a stroll around lifts the spirit. On the infrequent occasions when the land is covered in snow, it has a very different, but nonetheless enjoyable outlook. The land is frequented by residents of all ages from the neighbourhood, and there is reasonable access for the disabled. The scope of sports and activities includes (although this is not necessarily an exhaustive list): kite flying, football, cricket, picnics, Brownie group activities, children playing, walking, bicycle riding, walking with a dog and blackberry picking. The activities specified had taken place over the last 20 years at varied frequencies (daily, weekly and seasonal) and depending on the weather. The use of the land for the last 20 years had been as of right. Access during that time had never been restricted or denied by fencing, notices or other means and continued, at the time the application was submitted.

1.4. Bristol City Council was specified in section 8 of the form as the person whom the applicant believed to be an owner, lessee, tenant or occupier of any part of the application land.

1.5. The application form was accompanied by 247 user evidence questionnaires in a form based on the Open Spaces Society standard form evidence questionnaire.

Amendment to application

1.6. In August 2010 the Applicant applied to amend his application in two respects: firstly, by amending the application land, and secondly by changing the claimed locality/neighbourhood in respect of which the application was made. The Council did not object to either amendment. I allowed the amendments.

1.7. The amended application land was outlined in green on the map appended to the amended application. I have described both the original application land and the amended application land below. The original application land was an area of 24.05 acres. The amended application land is an area of approximately 27 acres.

1.8. The amended claimed locality was, in the alternative, the Ecclesiastical Parish of Whitchurch (shown on a map at Appendix 6 to the amended application and at page A62) or the electoral wards of Hengrove and Whitchurch Park, (shown on a map at Appendix 7 to the application, as at 1988 and as at 2008, following a boundary change, at pages A65, A67, A63 and A64).

Objection

1.9. The application was advertised by the Registration Authority. A letter of objection dated 18th June 2008 was received from Bristol City Council in its capacity as freeholder of the application land ("the Council"). The following grounds of objection were advanced: firstly, that the application site was not capable of registration as a town green, as the user had not been "as of right", and secondly, that the applicant had failed to fulfil the statutory test in that he had failed to demonstrate use by a significant number of inhabitants of any locality or of any neighbourhood within a locality.

1.10. The Council contended that approximately 185 acres of the application land had been transferred on 31st March 1980 from the Land and Administration Committee to the Open Spaces and Amenities Committee. The Council contended that the transfer between committees was consistent with an appropriation of the land so that from and after 31st March 1980 the land was held under the Council's public open space powers. Use of the site was permitted by the Council because the site was open space, held under section 10 of the Open Spaces Act 1906, and accordingly use by local people was not use as of right, but lawful use, by virtue of the site being held under the Council's open space powers.

1.11. The Council stated that it was unable to see any clear rationale for defining the area chosen by the applicant as the neighbourhood. There did not appear to be any identification of the common factors demonstrating the required cohesive quality binding the area as a neighbourhood, save for the geographical proximity of those completing the questionnaire to the application site. The Council had analysed the claimed neighbourhood and concluded that it contained approximately 2086 households. 194 households had completed a questionnaire, i.e. approximately 10%. The Council submitted that this did not represent a significant number for the purposes of the Act.

1.12. The Council requested that the question of whether the user had been "as of right" or pursuant to an implied statutory licence should be determined as a preliminary issue.

Response to objection

1.13. The Applicant was invited to comment on the Objection and did so by letter dated 31st July 2008. He stated that he considered that there was no conclusive evidence as to whether or not the site had been appropriated under the Open Spaces Act 1906, and therefore that in his view it was equally arguable that the use of the application land had been and continued to be "as of right" rather than by right. He stated that the Council's submissions were based on a series of assumptions, which, in his view, were not fully supported by their documentary evidence. He thought it peculiar that the Council had not been able to trace the critical documents, and observed that the position seemed to warrant further investigation.

1.14. Mr Button stated that local councils had a number of different statutory powers to acquire and administer open spaces. The statutory trust under section 10 of the Open Spaces Act 1906 arose only where land had been acquired or appropriated under the 1906 Act. Where land was described as having been scheduled as public open space for planning purposes, that did not necessarily imply that the land was purchased or appropriated under the 1906 Act.

1.15. Mr Button did not accept that he had failed to show that the land had been used by a significant number of the inhabitants of any locality or neighbourhood within a locality. The Act did not base this concept on any ratio or analysis of households. In his view the 237 questionnaires submitted in support of the application, together with the petition of over 2000 signatures constituted evidence of use by a significant number. He considered that the area from

which the questionnaires were returned did constitute a locality for the purposes of the legislation.

2. The Public Inquiry

2.1. I was appointed by the Registration Authority to act as an independent Inspector, to hold a non-statutory public inquiry into the application and to report in writing to the Registration Authority with my recommendation as to whether the Registration Authority should accede to or reject the application.

2.2. I directed that the question of whether the land has been enjoyed "as of right" or "by right" should be dealt with as a preliminary issue, as it appeared that it might well be determinative of the application. I gave directions on 12th February 2009 for the preparation for and conduct of an oral hearing into the preliminary issue on 23rd and 24th April 2009.

2.3. I opened the inquiry on 23rd April 2009, but it was apparent for various reasons that there was no prospect of being able to deal with the preliminary issue in the time available, and I adjourned the inquiry to 29th and 30th June 2009 and 1st July 2009, and gave further directions for exchange of evidence, which I confirmed in writing on 29th April 2009.

2.4. I held the hearing into the preliminary issue at Bristol City Council House on 29th and 30th June 2009. I produced a Report setting out my findings following that hearing dated 17th October 2009.

2.5. The Objector's primary case at the outset of the hearing of the preliminary issue was that there was an express appropriation of part of the application land to be held for the purpose of public recreation, pursuant to resolutions passed by the Land & Administration Committee and the Open Spaces & Amenities Committee in 1980, and which were later ratified by the full Council. The records of those resolutions had been lost or mislaid.

2.6. In the light of the documentary evidence produced to the inquiry, (and in particular the manuscript note on the Schedule of Appropriations which recorded that the land the subject of the note had been transferred with the agreement of the Chairmen of the relevant committees) the Council conceded that a finding that the appropriation resulted from an express resolution which had subsequently been lost was no longer possible.

2.7. The Objector's primary submission at the conclusion of the hearing into the preliminary issue was that, although there was no evidence of an express appropriation, there was sufficient evidence to show that the Council had intended in 1980 that the land should be appropriated to be held for the purpose of public recreation, and that that purpose engaged the recreational trust under either section 164 of the Public Health Act 1875 or section 10 of the Open Spaces Act 1906. Accordingly, any use of the land by the public was not use as of right, and the application land would not be eligible for registration under section 15(2) of the Commons Act 2006.

2.8. I rejected the Objector's submission that the land had been appropriated to the purpose of public recreation in 1980 in my preliminary report and concluded that the Council had not persuaded me on the balance of probabilities that any part of the application land was used by right because the Council held it under its open space powers and accordingly had not persuaded me that the application should be rejected on the basis of the preliminary issue. I continue to be satisfied that there was no such appropriation in 1980 for the reasons set out in my report on the preliminary issue, my supplemental report on the preliminary issue and in this report.

2.9. I directed that if the Council wished to continue to oppose the application on grounds other than the by right/as of right point, it should notify the Registration Authority of the grounds on which it continued to oppose the application within 4 weeks of receipt of the Report.

2.10. I extended the time of the Council to state its grounds of continuing opposition to 11th January 2010. The Council lodged further evidence and submission in relation to the preliminary issue, which I considered in a Supplemental Report on the preliminary issue dated 18th May 2010. I concluded that there was nothing in the further evidence and submissions that led me to change the conclusion set out in my Report on the preliminary issue.

2.11. I gave directions for preparation for a final substantive hearing of the application on 18th May 2010, and, following a telephone directions hearing attended by Counsel, further directions on 6th October 2010.

2.12. The Objector produced further grounds of objection dated 5th November 2010. The Objector stated that its new case was that the whole of the original application land was expressly appropriated by the resolution of the Council made on 11th February 1964 to the statutory purposes of section 164 of the Public Health Act 1875 or of section 10 of the Open Spaces Act 1906, with the result that recreational use of that land since 1964 had been by right rather than as of right, and therefore not qualifying use for the purposes of section 15 of the Commons Act 2006. The Objector sought clarification in relation to the intended boundaries of the amended application land and asserted that it was inherently unlikely that lawful sports and pastimes had taken place on several individual parts of the amended application land. The Objector contended that that part of the amended application land which was held for housing purposes had also been used by right, as opposed to as of right. The Objector required the Applicant to prove sufficient use by local inhabitants to justify registration and to prove that such user as there had been would have brought the existence of the claimed right to the attention of the Objector. The Objector contended that such recreational user as there had been was substantially for the purposes of passage, rather than for lawful sports and pastimes over the whole of the amended application land. In relation to the areas trees and scrub, the Objector contended that those areas were inaccessible, and, as a result, registration of those areas was precluded. The Objector put the Applicant to proof on his amended neighbourhood/locality.

2.13. I held the final hearing on 28th February 2011-3rd March 2011. The applicant was represented throughout the inquiry process by Mr Daniel Bennett of Counsel. The Objector was represented by Mr William Webster of Counsel, instructed by the Council.

2.14. I would like to express my gratitude to Ms Anne Nugent and to Ms Frances Horner who acted for Bristol City Council as Registration Authority, and who arranged the public inquiry and provided me with efficient administrative assistance.

3. The Application Land

3.1. The amended application land is the area shown outlined in green on A/A22. It is an area of approximately 27 acres on the southern fringes of the City of Bristol, known locally as the ASDA field, by reason of its proximity to the ASDA superstore on the Whitchurch District Centre to the immediate north of the application land. Historically, most of the application land formed part of a substantial area (over 300 acres) acquired by the City in the 1920s and 1930s for use as and in connection with a municipal aerodrome. By the mid 1950s, the aerodrome use had ceased, and parts of the former aerodrome land were developed over time. The amended application land has not been built upon, with the exception of a small area in the south eastern corner which was at one time occupied by three prefabricated houses. In the early 1970s soil excavated in the course of development elsewhere (the District Centre to the immediate north of the site and possibly the M32 motorway) was deposited on the application land, and was used for form large mounds on the northern part of the site.

3.2. At the time of my site visits, the amended application land had the appearance of a large and reasonably well-tended public open space with a pleasant aspect. The aerial photograph at A/A87 gives a good impression of the land. The grass had been recently mown. There were open areas of grass and areas of trees throughout the site. There are several overgrown hedgerows on the site, in the positions shown on the Ordnance Survey base map used to show the amended application land. There are no public rights of way crossing the application site shown on the definitive map. There is a tarmac path running across the site north-south on the western side of the application land.

3.3. There were no play or other facilities on the amended application land, although the evidence showed that in the past a children's play area and a toilet block had been provided. The play area was sited on the wider area of tarmac in the middle of the tarmac path, and was present on the land between about 1975 and about 1995. The toilet block was sited on the Bamfield Road frontage (in the position shown on the Ordnance Survey base map) and was demolished after the application was made. A youth shelter was also sited on the land for a short period.

3.4. An earth bund has been constructed to inhibit vehicular access to the land. The earth bund runs from the point where a line of overgrown hedging comes closest to Briery Leaze Road on the western boundary of the application land,

along the remainder of Briery Leaze Road, and then along Bamfield, to meet a second line of overgrown hedging at the point where the hedging comes closest to Bamfield. The bund then continues from the northern end of the hedging to meet the corner of the hedging to the south of Beech Court, at the northern boundary of the application land. The evidence suggested that the earth bund was constructed in about 2002.

3.5. The amended application land is bounded to the north by the Whitchurch District Centre and by a housing development known as Pinkham's Twist, to the west by the roads known as Bamfield and Briery Leaze Road and to the east by the rear fences of the houses facing onto Fortfield Road and in the southernmost section of the eastern boundary, by Fortfield Road itself. The area historically occupied by a toilet block and its forecourt on Bamfield was originally excluded from the application land, but was included by the amendment. Similarly, an area to the north of the electricity sub-station shown to the rear of 158 Fortfield Road, on the eastern boundary of the application land, was originally excluded but was included by the amendment.

3.6. The southern boundary of the amended application land runs along Briery Leaze Road for part of its length. The middle section of the southern boundary of the application land runs around the Elm Tree Park housing development (Cranwell Grove/Bracton Drive/Kingscourt Close). By amendment the application land was extended to incorporate the grassed tongue of land running between the houses on Cranwell Grove and the houses on Kingscourt Close.

3.7. The most substantial addition by amendment related to the area in the south-eastern corner of the application land: originally the southern boundary of the application land ran from the boundary with the north eastern corner of 10 Bracton Drive to the south western corner of the boundary with 198 Fortfield Road. The amended application land includes the whole of the area between the houses on Bracton Drive and Fortfield Road, bounded by Briery Leaze Road to the south.

3.8. The application land is accessible on foot from a large number of access points. There is open access from the tarmac footpath which runs from Briery Leaze Road and continues at the northern boundary of the land to the east of Beech Court. The earth bund has been designed to incorporate access points (suitable for pedestrian and pushchairs) in several places, and in any event is not so high or steep as to prevent pedestrians or cyclists from passing over it fairly easily. There is open access from the ASDA car park in two places: in the eastern corner, via a metal gate structure designed to impede vehicular access, and just to the west of the point where the northern boundary runs north-south for a short section, before turning again to run east-west. At this point there are white-painted metal hoops to prevent vehicular access, but there is no impediment to pedestrian access.

3.9. There is another metal gate structure opposite the end of the alleyway from Fortfield Road to the north of the electricity sub-station. There is a metal vehicular gate with pedestrian access to the side in the south eastern part of the

application land, between the area added by amendment and the original application land. This gate is at one end of a surfaced roadway, which leads across the additional area to Fortfield Road. The evidence was that this is the access used by the Council's contractors for maintenance purposes. Although it is possible to pass through the hedge between the tarmac pathway along the front of the houses to the north of Cranwell Grove in a couple of places, in other places there is evidence that the hedgerow has been reinforced by fencing to stop up gaps, and it is clear that this access is opportunist, rather than designed.

3.10. Although the whole of the application land, other than the areas where trees and thick hedgerows were growing, was accessible, there were some areas which were or had become somewhat isolated from the main part of the application land. There is a small area to the west of the hedgerow which runs northwest-southeast to the west of the Elm Tree Park development which is cut off from the rest by the hedgerow. Although the hedgerow is penetrable from its eastern side and internally, there was not access through to the grassed area to the west of the hedgerow. The bund begins at the northern end of the hedgerow. The only access to this area from the remainder of the application land was around the southern end of the hedgerow, which appeared to be the route taken by the grass cutting machines.

3.11. The effect of the construction of the bund was to create a strip of land to the road side of the bund along Briery Leaze Road and Bamfield. At the time of my site visit the hedging at both the southern end of this strip on Briery Leaze Road and the northern end of the strip, just to the south of the former position of the toilet block, was growing to the edge of the road, and it was necessary to walk in the road to pass around it. There is a pavement on the opposite side of both Briery Leaze Road and of Bamfield.

3.12. In the north western corner of the site, the bund does not follow the edge of the site, but cuts across to an access point next to the hedgerow to the south of Beech Court. There is a triangular area on the road side of the bund, including the former site of the toilet block. There is a tarmac pavement along the eastern side of Bamfield running from Pinkham's Twist to the forecourt of the toilet block.

3.13. The area in the south-eastern corner of the amended application land is accessible from the remainder of the application land via the gap to the side of the vehicular gate mentioned above, and also from the tarmac pathway along the front of the houses to the north and east of the Elm Tree Park development. Additionally, it is accessible along the whole length of its boundary with Briery Leaze Road, and along the southern part of its boundary with Fortfield Road, from the access road, southwards.

3.14. A feature, which, it was agreed at the site visit, appeared to be the remnants of a drove road, runs from the southern boundary of the application land at Briery Leaze Road in a northerly direction, along the western side of the area in the south-eastern corner of the amended application land, across the roadway, and northwards, along the eastern boundary of the application land, behind the

houses on Fortfield Road. To the south of the site the old drove road appears to extend from the southern side of Briery Leaze Road to Whitchurch Lane.

3.15. The area to the north of the access road and to the east of the drove road is the former site of three prefabricated houses, former numbers 206, 208 and 210 Fortfield Road. The 1977 edition of the Ordnance Survey map shows that the prefabs had been removed from the site by the date of the survey for the map, and the Objector accepted that it had been vacant throughout the relevant period. This area is heavily overgrown, but is accessible in a number of places from the access road. The concrete paths to the prefabs are still visible in this area, together with some remnants of fencing and gate-posts. There is rubble underfoot in this area: there are broken lumps of concrete, and this area has been particularly badly affected by unauthorised dumping of garden and other waste. There has been a lot of rubbish tipped from the Fortfield Road side. There was no sign of any steps in this area.

3.16. The area to the south of the access road and to the east of the drove road is a pleasant grassed area with a line of trees running parallel to Fortfield Road on the eastern edge, and two stands of trees at the northern and southern ends.

The boundaries of the application land

3.17. The question of the precise boundaries of the application land was a matter of contention at the inquiry. It is for the applicant to define the application land, and then to show that the statutory test is satisfied in relation to the whole of it. If the Registration Authority is not satisfied that the statutory test is satisfied in relation to the whole of the application land, it must consider whether the test is satisfied in relation to part of it.

3.18. The application land was defined by reference to a plan drawn on an Ordnance Survey base map. The boundaries of the application land were shown on that plan by a green line.

3.19. The particular areas of contention were the northern boundary between the application land and the ASDA development to the north, and the boundary between the application land and the Elm Tree Park development to the south.

3.20. Mr Button stated in evidence that he intended the boundary between the application land and the ASDA development to the north to run along the kerb of the ASDA car park. There is a hedge along the eastern part of this boundary on the application land side of the kerb. The hedge is not shown on the Ordnance Survey base map used to show the application land. The green line on that map appears to run along the kerb, and therefore to include the land on the ASDA car park side of the hedge. Mr Button agreed in evidence that no recreational activities take place on the car park side of the hedge or in the hedge itself.

3.21. Mr Button stated in evidence that he intended the application land to include the tarmac footpath along the northern and eastern sides of the Elm Tree Park development. The green line on the plan runs between the parallel dashed lines denoting this path.

3.22. The Applicant's rationale for amending the area of land the subject of the application related to land ownership and to the way in which the Council had treated the land: the application land had been amended to include the whole of the area identified as the Briery Leaze Green Space in the Council's Area Green Space Plan.

3.23. Following the accompanied site visit, Mr Bennett and Mr Webster, agreed, on instruction, that the boundary between the application land and the land to the north (ASDA) should be the midline of the hedge, and similarly that the footpaths in front of the houses on Cranwell Grove and Bracton Drive should be excluded from the application land, and the boundary in these areas should be the midline of the hedge between those footpaths and the open part of the application land. These were helpful and sensible agreements, and I treat the application as amended so that the extent of the application land accords with the agreed boundaries.

4. The claimed locality or neighbourhood within a locality

4.1. Two localities or neighbourhoods within a locality were claimed in the alternative by the amended application: firstly the electoral wards of Hengrove and Whitchurch Park, and alternatively the Ecclesiastical Parish of Whitchurch.

4.2. The boundaries of the electoral ward of Hengrove from 1988 to 2008 are shown on A/A65. The boundaries of the electoral ward of Whitchurch Park from 1988 to 2008 are shown on A/A67. In 2008 there was a boundary change. An area including Eastnor Road and Longacre Road previously in the southern corner of Hengrove ward became part of Whitchurch Park ward, and an area which had been part of Whitchurch Park ward, including Whitchurch Road and Maynard Lane in the north western corner of the ward was excluded from the Whitchurch Park ward.

4.3. The boundaries of the Ecclesiastical Parish of Whitchurch have remained the same throughout the relevant period, and are shown on A/A62. The area covered by the ecclesiastical parish overlaps in part with the alternative claimed locality: it includes polling districts B, C and D of Hengrove ward, but not polling district A of that ward, and it includes polling districts C and D of Whitchurch Park ward, but not polling districts A and B of that ward. The ecclesiastical parish also extends in the east to include the village of Whitchurch in the eastern part of the parish. The village of Whitchurch is not part of either Whitchurch Park ward or of Hengrove ward.

4.4. In closing Mr Bennett said that the Applicant's primary case identified the combined electoral wards as the relevant locality/neighbourhood, and the Ecclesiastical Parish as an alternative.

5. The Applicant's Witness Evidence

5.1. The Applicant indicated in his inquiry bundle for the final hearing that he intended to call 16 witnesses to give oral evidence. All 16 witnesses attended the inquiry and gave oral evidence and were cross-examined by Counsel for the Council. The evidence of these witnesses has been tested, and therefore can bear greater weight than the evidence of those witnesses who provided written evidence alone. In addition, a minor, [redacted], attended the inquiry, and requested to be allowed to give evidence. The Applicant called [redacted] as one of his witnesses, but Mr Webster declined to cross-examine him.

5.2. The Applicant also relied on written witness evidence. Individually drafted written statements were provided by 42 user witnesses (some of whom also provided evidence questionnaires). Many of these witnesses also provided pro forma additional statements. 204 evidence questionnaires were provided by witnesses who did not provide written statements. The evidence questionnaires were, with the odd exception, completed in September, October and November 2007, and gave evidence in relation to use up until that time.

5.3. Many of the applicant's witnesses who prepared written statements also signed an additional pro forma statement in the following terms:

> "Further to my statement made on ..... in connection with the application to register land at Whitchurch as a Town or Village Green, it has been drawn to my attention that further land has since been added to the application, in particular the area between Fortfield Road and Bracton Drive, and the corridor of land between Kingscourt Close and Cranwell Grove (as shown on the map overleaf). I wish to make it clear that my evidence in relation to the original application land also relates equally to the areas of additional land, which are continuous with the rest of the site, not physically separated from it, and similar to it in their appearance. These additional areas have always been enjoyed by inhabitants in the same way, for the same purposes, and at the same time as the rest of the application land."

5.4. I have referred to this statement as "the pro forma additional statement".

5.5. A further 378 witnesses completed a witness statement template in the following terms:

> "I, ..., make this statement in connection with the application to register land in Whitchurch, Bristol as a Town or Village Green.
> I have lived at ....., ... since ..... . I know the area of grassland which lies between Fortfield Road, Briery Leaze Road, Bamfield, Pinkham's Twist and Whitchurch District Centre (as shown on the map overleaf) by the name of ....., and I have used this land whenever and however I wished, once/twice/three/four times a day/week/month for the past 30 years, for the purpose(s) of ..... . During this time I have seen many other people also using all parts of the land for
> ..... .

Any other comment(s) ..... .
This statement is true.
Signed ..... Date....."

5.6. The map on the reverse of these statements showed the amended application land. The template statements were completed in October and November 2010 and provided evidence of use up to that date.

5.7. The evidence of those who gave written user evidence in the form of a written statement or an evidence questionnaire is summarised in the table appended to this report. I have read the completed template statements but have not summarised them: they are entirely consistent with and supportive of the remainder of the user evidence. The evidence of those witnesses who provided written evidence only has not been tested by cross-examination, and cannot be afforded as much weight as evidence which has been tested in this way, but it must nevertheless be taken into account.

5.8. The Applicant also relied upon the written statements of two employees of Quadron Services, the entity which has the contract for the ground maintenance services carried out on the application land, [redacted][1] and [redacted][2]. [redacted] employment commenced after the end of the relevant period and his evidence is therefore of limited evidential value. He used the application land as a local resident before he became responsible for its maintenance, and I have summarised his evidence of use in the user evidence table. [redacted] had been responsible for the grass-cutting in Hengrove, Whitchurch and Stockwood since 1976, working for a succession of employers. [redacted] stated that the whole of the amended application land is known as "Whitchurch Phase 2". He said that he had seen thousands of members of the public using the land over that period for a whole range of purposes including dog walking, picnics, ball games, cricket, football, golf, kite flying, tobogganing, cycling, blackberry picking and bonfire parties. He had never been to the land and not seen anyone using it. [redacted] stated that in the early years the maintenance team used to maintain a cleared path through the strip of woodland in front of Bracton Drive and through the strip of woodland at the rear of the houses on Fortfield Road going north towards ASDA, so that walkers could enjoy the wildlife. Those paths had become more overgrown in recent years, but a small number of tracks remain as a result of people using the land.

5.9. The Applicant also provided a written statement of [redacted][3] of [redacted], the Treasurer of the Parochial Church Council for the Church of England parish of Whitchurch, confirming the accuracy of the boundaries of the Ecclesiastical Parish of Whitchurch as shown on the map obtained by Mr Button from the Diocesan Office, and confirming that those boundaries had remained unchanged since at least the 1970s.

[1] A/B398
[2] A/B404
[3] A/B410

5.10. Finally, the Applicant also relied on the results of a survey, carried out by Mr Rowley, Mr Button, Mr Hartles and one other person. Mr Rowley surveyed nearly 500 users of the application land over 29 days in July 2009 and between May-July 2010[4]. (The total number of entries on his survey was 500, but he said that there were a few duplicates). 378 of those users had also provided more detailed statements. Mr Button surveyed 42 users over 12 days between 26th April 2009 and 2nd July 2010[5]. Mr Hartles surveyed 57 users and recorded the presence of two school parties over 32 days between 7th March 2009 and 7th June 2010[6]. The final surveyor surveyed 16 users over 6 days between 18th November 2009 and 27th April 2010[7]. All of these dates fall after the end of the relevant period, but the use recorded in the survey was said to be representative of typical use of the application land during the qualifying period. The survey sheets recorded the name and address including post code of the user, the purpose of their visit, the frequency with which they visited the land, the date and time at which they were surveyed, and their signature. All of the uses recorded were leisure uses and although some may have been right of way type user rather than lawful sports and pastimes, many uses clearly fell into the category of lawful sports and pastimes.

5.11. The addresses of those completing the survey were plotted onto two maps, showing respectively the Ecclesiastical Parish of Whitchurch, and the electoral wards of Hengrove and Whitchurch Park. Mr Bennett told me that 593 people were surveyed. Of the 593, 75.4% came from the Ecclesiastical Parish, and 83.8% came from the combined electoral wards. There was no challenge to these figures and I accept them as accurate. The map at A/A60 shows that the homes of the users surveyed who came from the Ecclesiastical Parish of Whitchurch were spread throughout the Parish. The map at A/A61 shows that the homes of the users surveyed who came from the combined wards of Hengrove and Whitchurch Park, but the users are not spread evenly throughout that area: there were very few users who lived in the west of that area, in Hartcliffe (polling districts A and B of Whitchurch Park ward).

Witnesses on behalf of the Applicant who gave oral evidence

Mr Andrew Lines

[redacted]

5.12. Mr Lines provided a written statement dated 12th November 2010[8]. Mr and Mrs Lines have lived at their present address since 1985. Their two sons, born in [redacted] and [redacted] used the application land to play as they grew up, treating it as an extension to their back garden. They rode bikes and home-made go-karts on the land, played rounders. The family held barbecues and bonfire night parties on the land. Mr and Mrs Lines had a dog from 1985-2009 and walked the dog on the land twice a day. He has observed the land being used regularly by people for a whole range of activities, and every day by dog walkers. He

[4] A/A27-51.
[5] A/A52-54.
[6] A/A55-58.
[7] A/A59.
[8] A/B81

knows many of the people who use the land, and estimated that about 80% of them live locally.

5.13. Mr Lines exhibited various photographs of activities taking place on the application land to his statement. There were photographs of a children's party with a bouncy castle taken in 1989, and a photograph of a group petting a horse which was being ridden on the land, also taken in 1989. There were photographs of two small boys using a go-kart taken in 1990 and 1991. There were two photographs of people sledging in snow taken in 1992, and a photograph of a woman with two dogs taken in 2007. Mr Lines said that the photographs were all taken in the northern part of the application land in the area between the L-shaped hedgerow and the north eastern corner of the application land, with the exception of the bottom photograph on 85. That photograph was taken on the southern part of the application land. The brown dog is Mr and Mrs Lines' dog, and the white one belongs to the photographer, a friend of theirs. The photographer had mounted the photograph as a Christmas card for Mrs Lines.

5.14. Mr and Mrs Lines walk their dog around the outer perimeter of the application land, including the south western corner, congregating with a group of other people "the doggy people" on the southern part of the application land.

5.15. In cross-examination Mr Lines was asked whether his walk takes him on the Fortfield Road side of the earth bund on Bamfield. It does not. He walks on the inside of the bund.

5.16. Mr Lines was asked whether his walk takes him to the copse in the south eastern corner. He said that he walks up there with the dog to the post box. The post box is on Briery Leaze Road. He walks up the drive shown on photograph 30 on O tab 31. He goes into the copse, occasionally, if the dog is in there and will not come out. He did not agree that the copse was impenetrable. He said children go in there and make dens and dig holes in the ground. He does not want to risk breaking his leg to go in there to walk his dog. He has seen children in there, some of whom he recognises, and some he does not. He recognises some children who live on the estate the other side of Fortfield Road from the land, one of whom used to live next door to him. He has seen lots and lots of children in there over the years. There are tracks into the copse and a walk along the back of the copse. The tracks are from the field into the copse.

5.17. Mr Lines was asked whether he uses the open grassy area to the south of the copse. He said that if he needs to post a letter he goes up through there, and he has seen children playing cricket on that area. He agreed that the land was quite tight onto the road. He allows his dog to run off the lead there. His dog is obedient. He has seen people on the land, including the children he referred to who he had seen last summer playing cricket. That was the last time he saw children playing cricket there. He said he could not say whether that part of the land was used occasionally or regularly. He said when he has been there he has seen people using that part of the land. He has, for instance, seen children playing bat and ball there. He would estimate that he had seen people on that

land about 6 or 7 times out of every 10 he had been there. He agreed that that area was used less than the ASDA field.

5.18. O tab 31/22 shows the back of Mr Lines' house, the garage with the black door to the right of the lime coloured garage door is his.

5.19. Mr Lines said that he did not know why land has been added to the application. He had just been asked to come and give evidence about his use of the land.

Mr John Button

[redacted]

5.20. Mr Button was the applicant. Mr Button provided statements dated 27th January 2009[9], 3rd November 2010[10], 13th December 2010[11], 15th December 2010[12] and 26th February 2011[13].

5.21. Mr and Mrs Button moved to their present address in 1981, together with their two sons, then aged [redacted] and [redacted], and their dog. Mr and Mrs Button used the land from 1981-1992 2-4 times a day, to give their dog a run, and for exercise and fresh air. The dog died in 1992. Since Mr Button's retirement in 2000 he has used the land 3-4 times weekly for exercise by walking.

5.22. He has observed children riding bikes, rounders, cricket, picnics, football, people dog walking, kite flying, parents and children playing, berry picking, people reading or eating a sandwich, people lying in the sunshine, and teenagers "chilling out" on the land. He has heard children's voices coming from copses as he has passed by. In snow he has seen the land being used by many children and adults for tobogganing and snowman building. He has seen a balloon from Ashton Court Fiesta landing on the land on more than one occasion.

5.23. Mr Button has observed other people using the application land for leisure when he has been on the application land. He said that it was rare to be on the land and not see anyone else. He appended a number of photographs to his statement, including some photographs of his dog taken on the application land in about 1989 and 1990, a photograph of some young men playing cricket, just to the south of the hedgerow (he did not know who they were), taken in 2006, and a photograph of his wife taken in autumn 2007, picking blackberries in the south western corner of the application land, approximately opposite the tongue of land between Cranwell Grove and Kingscourt Close. He included a number of photographs taken in February 2009 of people playing on the land in snow. Mr Button said that he knew that these photographs were post-application, but they were included as indicative of the type of use which takes place when there is snow.

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[9] A/B35
[10] A/B37
[11] A/B38
[12] A/B40
[13] A/G1

5.24. Mr Button gave evidence about the process by which the evidence in support of the application was collected. Households within the perceived neighbourhood were canvassed on a door-to-door basis, and then contacted with a request that they complete an evidence questionnaire. The questionnaire used was the Open Spaces Society document. The application was submitted with 243 questionnaires. All questionnaires collected were included whether or not they were considered helpful. About 50 witnesses also made written statements, served in readiness for the hearing on 23rd April 2009. Mr Button had obtained the map showing the boundaries of the Ecclesiastical Parish of Whitchurch from the Diocesan Office, and the maps showing the boundaries of Hengrove and Whitchurch Park electoral wards as at 1988 and 2010 from the City Council's Electoral Services Department.

5.25. In response to my question Mr Button said that Elm Tree Park is the development which includes Cranwell Grove, Kingscourt Close, and the area to the south of Briery Leaze Road as far as Whitchurch Lane. The Residents Association took the name Elm Tree Park, as they needed a name. The group was formed in opposition to the proposed development of the application, initially the proposal to move the rugby club to the application land in 2003/2004, and latterly the council's plans. The meetings were public and open to anyone who wished to come. People did not have to come from the Elm Tree Park development in order to join.

5.26. In cross-examination Mr Button was asked to describe his walks with his dog. At the end of Cranwell Grove he lets the dog off the lead. He follows the footpath for a certain way, but the dog runs around. The earth bund was created in about 2002. The dog could have run right to the edge of the road. Mr Button would have been somewhere in the area of the path. He would call the dog back if he thought that it was going too far. The dog never went onto Bamfield. Mr Button walks along the path, and the dog runs either side, sticking reasonably close to him. As he continues northwards, he goes off the path. Once Mr Button goes off the path, the dog does not stay near the path, he follows Mr Button. Sometimes Mr Button goes over the mound towards Bamfield, or he might go to the right. He walks around the field, and does not follow the same path every day.

5.27. After the earth bund was built in 2002, Mr Button usually stayed on the inside of the bund when walking. He agreed that other people also largely keep inside the bund, but said that there are quite often people who park in Briery Leaze Road, who use the Briery Leaze side of the bund. He said that he had observed footprints on the far side of the bund in the snow or frost, which showed that people used that part of the land. He agreed that there was not that much land between the road and the bund. He agreed that there are no paths visible along that piece of land, but said that there are no such paths anywhere on the application land. He has seen people there eating sandwiches or lying in the sun. He did not know the people concerned, but said that he does not know everyone in the area. He saw a couple of people having a sandwich, between two of the lampposts. He saw that more than once, but he could not say how many times. He could not give a date for when he saw it, or

place it accurately on the ground, other than to say it was on the road side of the bund.

5.28. Looking at the Objector's photograph 11, Mr Button agreed that the area on the road side of the bund narrows as the hedgerow comes out, and there is no room for any activity at that point.

5.29. Mr Button was taken to photograph 12. He said that there is from time to time illegal use of the land by motorcyclists: the tracks are created by them riding over the bund. He said that it is possible to cross the bund at any point. At Pinkham's Twist there is a mini-bund in front of the bund which creates a gap through which you could push a pushchair.

5.30. Mr Button was asked what he had observed taking place on the area to the north of the toilet block and to the west of the bund. He said that he has seen dog walkers on that area, possibly people walking from or to their homes on St Giles estate. He was asked to consider whether they were really using that area as an area of transit. He said he did not know. He has not seen people playing cricket or flying kites there, or picnicking there. He agreed that since 2002 that area has been used only occasionally. He did not agree that the use was largely transitory, but agreed that the use had changed between the time before the bund was there, and the time after the bund was there. There was less use after the bund was erected. He does not walk there himself. He had not specifically asked others giving evidence whether they walk there or not.

5.31. The District Centre has a pub, a library, a fish and chip shop, a suntan shop, and in the rank of shops going towards Oatlands Avenue there is an optician and a Halifax as well as the ASDA, which has a cash point. People from the Elm Tree Park estate would use the footpath to obtain access to those facilities. Mr Button said that it is not the case that people are just using the land to access those facilities: the people doing that by and large walk purposely and stay on the path, although some do cross the grass. There is a bus stop on Oatlands Avenue, which serves buses going to town, although there are stops which are closer to Elm Tree Park estate (on Belland Drive or Fortfield Road) and people from there would not walk to Oatlands Avenue.

5.32. Mr Button was asked why the application land extends to the kerb of the ASDA car park, and what lawful sports and pastimes people had enjoyed on the land to the north of the hedgerow. He said that no more than people walking from the car park to the application land. It was put to him that no gaps are visible in the hedgerow on photographs 18-21 and that the area to the north of the hedgerow there was incorporated into the ASDA car park. Mr Button said that he drew the boundary line to the line on the map. He agreed that that land beyond the hedgerow was not used for recreation. He pointed to photograph A/A138 which shows the area to the west of the area shown on photographs 18-21 and said that there is unhindered access to the application land at that point. Mr Button also to photograph 27, which is to the west of A138, and to 28, which is also to the west of A138. He said that before the recycling bins were sited where they are now, people got through gaps in the hedge behind where the bins now are. Mr Button does not remember when the

bins were put there, but said that he thought that it would have been within the last 10 years. He agreed that no lawful sports and pastimes take place in the gaps in the hedgerow or on the ASDA side of the hedge.

5.33. Mr Button was asked about the development of Fortfield Road. He said that there were originally prefabs along Fortfield Road. He agreed that the buildings shown on O tab 25 (c) were the prefabs. When Mr Button moved to the area in 1981, the prefabs were still there, with the exception of the three nearest the driveway towards the application land (numbers 206, 208 and 210). The prefabs were removed and replaced progressively, from the northern end, with housing. Mr Button said that he did not remember a time when all the prefabs had been demolished and not replaced. He agreed that it appeared that 206, 208 and 210 Fortfield Road were where the copse to the north of the driveway now is. He cannot give a date when those prefabs were demolished. The concrete visible in his photograph 70 is the old path to the prefabs. Mr Button was asked if he had any evidence that people use this area, and he pointed to the track shown in his photograph 69, which goes south into the copse. Mr Button had not seen anyone using the path shown on his photograph 69.

5.34. Mr Button was asked about the area to the south of the driveway between Fortfield Road and the main ASDA field. He said that he does not use that area himself. Mr Button was asked why this land was not included in the original application land. He said that at the time the application was made, the main concern was the possibility of the land being developed. This area had been added by amendment to the application land because the Council's area green space plan shows it as part of what they are calling Briery Leaze Green Space.

5.35. It was put to Mr Button that had people been using this area in numbers it would have been included as part of the original application land. He said that at the first hearing the possibility of there being an amendment to the application land was mentioned, because there was information around at that time which suggested that there was a change coming. This change manifested itself as the Area Green Space Plan. He had not used this land, and none of his photographs showed anyone using it.

5.36. Mr Button was asked about the boundary of the application land in the vicinity of Cranwell Grove, Kingscourt Close and Bracton Drive. He intended the application land to include the footpath and referred to the fact that the Area Green Space Plan includes the footpaths in the area called Briery Leaze Green Space. He agreed that there is a hedgerow separating the footpath which runs along the front of 9-17 Cranwell Grove and the application land.

Mrs Patricia Young

[redacted]

5.37. Mrs Young provided a statement dated 12th November 2010[14]. Mrs Young has lived at her present address since 2002. She has kept a dog since moving to her present address, and would not have been able to do so, but for the

[14] A/B128

proximity of the application land. She walks the dog twice a day on the application land. She has open views of the application land from her flat. She has observed all kinds of activities on the application land: youngsters having barbecues and drinks, people flying kites, golfers practising, rugby teams training, children with tents camping out overnight in summer, people exercising their animals, students reading books and making notes, artists sketching and people relaxing over lunch with a sandwich and a novel. In the snow she saw many parents playing with their children, sledging on plastic sheets and building massive snowmen. She has seen people playing tennis and football and joggers doing circuits around the land, a lot of whom start their runs from the corner of the application land on Bamfield by Pinkham's Twist, from where they go either over or through the embankment. People use the land for chilling out, and, for the tenants of the flats in which Mrs Young lives, it is as good as having a garden.

5.38. In evidence in chief Mrs Young pointed out the window of her flat on the ground floor of the block in a photograph. She said that she does not remember the bund being built. She thought that it was not at such a high level when she moved in. They increased the height of the mound to stop children with mud track bikes gaining entry to the land from the road. The activities she described take place throughout the whole field, including on the mound at the back of ASDA. She agreed that the part of the application land on the side of the bund nearer the road is used more for access onto the land than for use of the land itself. Children gather on the mound at the back of ASDA, and access that land across this area.

5.39. In reply to questions in cross-examination Mrs Young confirmed that people do not use the land on the road side of the bund other than to gain access onto the remainder of the land.

Mr Hugh Rowley

[redacted]

5.40. Mr Rowley provided statements dated 15th December 2008[15], 29th October 2010[16] (the pro forma additional statement), 20th December 2010[17] and 21st December 2010[18]. He also completed an evidence questionnaire[19].

5.41. Mr and Mrs Rowley have lived at their present address since June 1977. At that time the grassed area had a hay crop growing on it, which was cut by a combine harvester later that year. After that, the remaining stubble was gradually transformed, by cutting, to the grassland it now is. The ASDA superstore was built in about 1979. Spoil from the site was put into earth mounds on the western side of the application land. These were landscaped and grassed over. Mr Rowley and his family have used the application land without restriction. The land has never been fenced off, and neither have there been any signs restricting use. They have used the land for sports and leisure

[15] A/B103
[16] A/B110
[17] A/B105
[18] A/B108
[19] A/B111

activities, including football, cricket, rounders, kicking a rugby ball, kite flying, tree climbing, wild flower collecting, leaf collecting, blackberry picking, sloe collecting and for 5th November bonfires.

5.42. When Mr and Mrs Rowley's son lived at home, Mr Rowley regularly used his hand mower to cut a cricket square on the land, which was used by upwards of 30-40 children from the area to play cricket on a regular basis. Some years the people employed to cut the grass cut an expanding circle from the square, to make an outfield.

5.43. In August, weather permitting, Mr and Mrs Rowley regularly stand on the raised mounds on the application land to watch the balloons from the balloon festival at Ashton Court rising and flying across the city.

5.44. Between 1991-2003 Mr and Mrs Rowley owned a dog, which they regularly exercised on the application land. Mr Rowley collected rubbish from the land whilst out, as did other local residents.

5.45. Mr Rowley remembered the bund running parallel with Bamfield Road being erected after a problem with cars being driven onto the land and set alight.

5.46. Mr Rowley said that he regards the immediate area within which he lives, Elm Tree Park, as a community. He is an active member of the local Neighbourhood Watch, distributing emails to neighbours. His children attended Perry Court Infant and Junior schools, on the far side of ASDA from his house. He uses the local facilities, including ASDA, its petrol station and cash point, the Halifax, the fish and chip shop, and the Cartwheel public house. He is a member of the Whitchurch and Pensford British Legion, and sells poppies at ASDA in November. He also regularly uses the post office and shops at Belland Drive, and the barber and other shops at East Dundry Road. His local post box is on Briery Leaze Road, about 200 yards from home. He uses the local bus stops at the top of Fortfield Road and the end of Wharncliffe Gardens.

5.47. Mr Rowley stated that he can see the application land from his house. The land is regularly used during snow in winter by youngsters snow balling, sledging, building snowmen and rolling great balls of snow and older people walking about and enjoying the snow. The land is so extensively used that after a couple of days it is almost impossible to find virgin snow anywhere. As the weather gets warmer in spring, more people come out to use the land. In the summer the land is constantly alive with the sound of people playing and enjoying themselves. They have picnics, play sport, chill out, play or walk about and enjoy the land. Some of the trees are used as goal posts. People also shelter under the trees on hot sunny days. Mr Rowley usually finds and collects up to half a dozen golf balls each year which have been lost by people practising golf. In the woods near Bracton Drive there is a large tree onto the branches of which a plank has been nailed: this is the remains of a tree house which local children constructed there several years ago. In the autumn people collect blackberries and sloes from the hedgerows, and also cherries from the trees. After that, stacks of wood and debris appear on the land ready for

bonfire night. One local family had regular yearly access to a large load of wooden pallets, which they burned. Many people use the land for dog walking, which means that they use it daily, many more than once a day, each and every day of the year.

5.48. Mr Rowley stated that the supporters of the application had decided to conduct a survey of users of the land to show that the land was being well used. They devised a survey form, requesting information under nine headings: name, address, post code, purpose, frequency of use, date, time, signature and initials. Mr Rowley began the survey on 20th July 2009, by going out on all parts of the application land with the survey forms and requesting anyone he found using the land to fill them in. He went out for short periods at various times of day, sometimes more than once in a day. He did this for two periods: 20th July – 23rd July 2009 and 22nd May 2010-9th July 2010. He decided to suspend the survey at the end of the first period, pending the outcome of the preliminary issue. In total he went out onto the land at varying times on 29 separate days. He went all over the application land, seeking out people wherever they were and however they were using the land. He only asked people who were using the land for recreation to complete the survey, and discounted anyone who was sticking to a path or just walking across the land to get somewhere. He asked people to fill out the form only once, no matter how many times he saw them on the land. There were only one or two occasions when he could not see anyone using the land. The survey documents collected by Mr Rowley are those at A/A27-51. He did not transpose the addresses onto the map.

5.49. In cross-examination Mr Rowley said that there may be one or two duplications in the survey, although he had asked people not to sign twice. He went anywhere on the application land. He did not go into the copse, but went into the bushes on the main part of the application land, to speak to children in there. He did take some names on the land to the east of Bracton Drive, but mainly concentrated on the main part of the field. He went onto the driveway and spoke to people entering or leaving the land via that track. The bend is a vantage point because it is a point of access and egress, and you can see people coming down through the open piece of land behind you. He could not say how many names were taken whilst he was standing at that point, although he could say that it was not the bulk, 10-15 names, maybe a bit more.

5.50. Mr Rowley agreed that his survey was carried out in the summer months, but said that that was a matter of circumstance, and the timing of the inquiry process, rather than because he thought that use would be greater at that time of year. He agreed that usage would have been at its highest at that time of year. He agreed that the survey does not say how long people have been using the land or for how long they had been living at the address given. He said that 378 of the 500 people he had surveyed had provided more detailed statements which were contained in Bundle F of the Applicant's bundle.

5.51. Mr Rowley was asked about his use of the copse. He said that he had been through the copse, and his children had played in there, as have his grandchildren. He thought he had last been in there last summer, collecting blackberries. He thought that the bushes in there were cultivated from when

the prefabs were there, and the berries are larger than the ones in the hedgerows. The blackberrying season is a matter of a few weeks. Before that, he would probably have been in there the year before for blackberries. He walks through that way sometimes if he can, but does not make a point of going in there regularly. He uses it occasionally.

5.52. He used the grassed area to the south of the copse a lot when he had a dog. Now he walks up and down there sometimes, not that often, 3-6 times a year. He mainly uses the main area of the application land. There are cherry trees there, and he collected cherries there last summer. He uses the main part of the application land 2-3 times a week, more in the summer. Mr and Mrs Rowley are looking after the neighbour's dog at the moment, and he uses the field sometimes to walk that dog. He does not have a particular circuit, but wanders where he can.

5.53. Mr Rowley was asked about the bund. He said that the land between the bund and the road is not used as much as the other area. He goes there sometimes, although not very often. He said that there are blackberries there, and he sometimes collects them. The blackberries are on the Briery Leaze Road side rather than on the Bamfield side. He does not go up to the Pinkham's Twist end very often. He said that when he did the land survey there were a number of children playing up there on bikes. They were using the bund as a ramp for their bikes. He only really noticed that activity when he was doing the survey and could not say whether it had happened in previous years.

Mr Brandon Hewer

[redacted]

5.54. Mr Hewer did not provide a written statement in advance of the inquiry, but attended on the first day of the inquiry and indicated that he wished to give evidence. The Applicant applied to call him. The Objector took no objection, but said that he would not wish to cross-examine a child of his age (Mr Hewer was 14 at the time of the inquiry).

5.55. I asked Mr Hewer to write down what he wished to say, and he provided a written statement, co-signed by his mother, which he read to the inquiry. Mr Hewer stated that he has lived at his present address since 1985. He has used the application land to play, with his parents when young, and, since about 1992, alone, and with a group of about 12 friends from Chew Valley School, all of whom live locally in Whitchurch.

5.56. Mr Hewer and his friends make dens in the woods and copses, and ride their bikes over the mounds and around the houses and over the grass. They go into the hollow hedges. They make rope swings and mini-tree houses out of pieces of wood they find, tied onto the trees with rope to make a platform. There is a hollow tree at the rear of the Health Centre within the hedging which they like to climb. Their favourite area for building things (for instance a zip-wire) is the woods next to the bungalows. Children younger than Mr Hewer's group play in the area nearer to the post box. No part of the land is inaccessible to them: they beat down the stinging nettles with sticks, put down bits of boarding to walk on and make pathways through the bushes.

5.57. Mr Hewer and his friends go to the land at weekends and in the evenings after school sometimes, when the weather is nice or when it snows. They sometimes have picnics on the land, and take chips from the chip shop there to eat.

Mr Ray Andrews

[redacted]

5.58. Mr Andrews provided written statements dated 17th March 2009[20], 14th June 2009[21], 29th October 2010[22] (the pro forma additional statement) and 20th December 2010[23].

5.59. Mr and Mrs Andrews have lived at their present address since 2005. Their house is about a 15 minute walk from the application land. They lived at Pinkham's Twist between 1977-1978. They lived on the Bridge Farm estate between 1980-1999, and their two children grew up there. The Bridge Farm estate is to the south of Whitchurch Lane. The family used the application land regularly for general play and leisure activities during this period. They also walked via the land to reach the Health Centre and the pharmacy, ASDA and the local shops. From 1999-2005 they lived at 16 Cranwell Grove, and continued to use the application land for leisure activities. In 2001 they bought a Labrador, and they exercised it on the application land. They met and made friends with many other people using the land to exercise their own dogs. The dog fraternity gathered during regular morning dog walks. Many people, including Mr and Mrs Andrews, picked up litter whilst dog walking.

5.60. Mr Andrews organised a meeting at his home in 2001 with a council officer and some neighbours to raise concerns in relation to stolen cars being driven onto the application land from Bamfield Road and Briery Leaze Road and Fortfield Road and set alight. In 2002 Mr Andrews saw a car being driven recklessly on the land and made a citizen's arrest on the lads inside. This was one of many incidents. Mr Andrews formed a local residents' group to work with the police and the council to seek to eradicate the problem. It was agreed that a earth mound would be created along the perimeter of the land from Pinkham's Twist, along Bamfield Road, Briery Leaze Road and a mount at the Fortfield Road side outside 10 Bracton Close. There was also a problem with motorcycle riding on the land, which was tackled through a police operation, known as "operation biker".

5.61. Mr Andrews knows of no official name for the land. He has never sought nor been refused permission to use the land.

5.62. Mr Andrews said that the Elm Tree Park Residents Association holds regular meetings at which the TVG application is discussed. They agreed to carry out an on-site survey of people found using the application land, to build up a picture of the purposes for which they used the land, and how frequently they went there. They then obtained pro forma witness statements from as many as

[20] A/B1
[21] A/B4
[22] A/B8
[23] A/B10

possible of those users. The pro formas record the number of years the witness had been an inhabitant of the locality the number of years he had used the application land, and the purpose and frequency of their use. On the reverse of the pro forma was a copy of the amended application plan. They agreed to exclude any evidence which related to the use only of a footpath across the application land, or to use by people travelling across the land as a thoroughfare.

5.63. Mr Andrews said that throughout the period he has lived in Whitchurch, he has on many occasions taken leisurely strolls over all parts of the application land. He said that there was the remnant of a "drove" within the tree line on the eastern boundary behind the Fortfield Road houses. He knew the area well, as he used to take the dog there often and the dog used to wander off there between the bushes. There were planks of wood, bicycle tyres, rope, cushions, evidencing making of dens by children. He heard children playing hide and seek there from his house on Cranwell Grove in the summer when the windows were open.

5.64. When Mr Andrews lived at Cranwell Grove his house faced onto the application land, and there was an access point onto the land opposite their front door. Almost every day he saw early morning dog walkers and people jogging at all times and in all weathers. In the summer there were many more people and groups on the land, often playing team games of football and cricket or rounders. He saw people playing tennis and golf. In dry weather he saw people having picnics and admiring the views. In windy weather he saw kite flying. In the snow he saw and heard people having fun, sledging, building snowmen and having snow ball fights. In rain he saw people sheltering under the trees in the copses. He saw somebody using the land almost invariably at all hours of the day in all weathers. He saw many of these people on a daily basis, and recognised them as being local people. He knew that what the people he surveyed had told him was true from his own experience: there is almost always someone there. There has never been any BCC signage on the land.

5.65. Mr Andrews appended various photographs to his statement. A/B14 is a photograph of a dog on the snow-covered application land. Mr Andrews said that the photograph was taken looking towards Cranwell Grove. The dog is his. The photograph was taken digitally, and that is where he got the date from. The photograph on 15 is a photograph of his wife looking out from a upstairs window in their house on Cranwell Grove over the application land taken in 2003. 16 is a view from his lounge looking towards the snow-covered application land taken in 2004. The photographs at 17-19 are his wife, brother-in-law and nephews on the application land in August 2005, taking advantage of the good weather by erecting play tents. The vehicular gate at the northern end of the driveway from Fortfield Road is visible in the background of photograph 19.

5.66. In cross-examination Mr Andrews was asked about the pro forma additional witness statement at A/B8. He agreed that a number of people who were giving oral evidence had signed a similar document. It was drafted by the committee.

There are 5 or 6 people on the committee. He agreed that the purpose of the document was to give an evidential basis to the land which was being added to the application. He agreed that in the statement he said that he used both the original land and the land added to the application land. He was asked whether he uses the land between Bamfield and the bund. He does use that land when dog walking. The dog grew up on the land. He walks anywhere on the land. They cross Bamfield to go onto Hengrove Park, and the dog sits to cross the road. Mr Andrews was asked whether it was right that the use of that area was occasional and more as a means of access than anything else. He said that he sees people going both ways. He went on the land to the west of the bund and back the weekend before the inquiry. The toilet block has been demolished, and he wanted to see what the land looks like with the toilet block gone. It was in part a reconnaissance before the inquiry, and in part dog walking. Between 2005 and 2008 he would have gone on the western side of the bund when going over to Hengrove. He used the land to exercise his dog and to look at the erection of the hospital, the play park and the skills centre. He had gone over the bund and on to Hengrove Park to look at the progress of the development. He did that occasionally.

5.67. Mr Andrews said that he knows the area called the copse very well. He goes all around the land. The dog sniffs every part of the land. He has seen evidence of children playing there: planks in the trees and litter strewn there. The dog wanders off where there is food. Mr Andrews goes into the copse to retrieve the dog, eventually. He agreed that when this occurs he is headed towards Briery Leaze Road, and sometimes the dog goes off into the copse, and he goes there to retrieve it.

5.68. Mr Andrews was asked about the open grassed area to the south of the roadway onto Fortfield Road. He said that he last used that area on Sunday. It is now his access route onto the application land. He crosses Briery Leaze Road by the post box, and then unleashes his dog. He either walks along the path behind Bracton Grove or across the grass. He has seen football being played there many times during the summer, every year. The children play there, especially in term time, when they can get out and play. In the last year he has seen that probably twice or three times. In previous years it had mainly been football, with the odd cricket game. He would not know the children by name, but he would recognise them. He would know roughly the locality from which they came. He had recognised the children when he went round collecting the pro forma evidence statements. They lived between Fortfield Road, Wharnecliffe Gardens, Eastcote Park and Pennard Court.

Mrs Melanie Perry

[redacted]

5.69. Mrs Perry provided a written statement dated 18th December 2010[24] and an evidence questionnaire dated 7th October 2007[25].

[24] A/B96
[25] A/B98

5.70. Mrs Perry has lived at her present address for 34 years. She and her family have enjoyed using the application land for picnics with the children when young, kite flying, playing ball, when the playground was present in the middle section, using the equipment daily for nearly 2 years, learning to ride scooters, bikes and later, roller skates, the children walking to and from college (1996-1998), walking to and from Midnight Mass, sliding on tea trays in the snow, gathering berries (sloe, blackberry) and oak leaves for wine making, sitting on the hills, some evenings, listening to pop concerts at Ashton Stadium, watching the Red Arrows (on several occasions), dog training (obedience and agility) and dog walking many times a week, for the whole period, walking to Belland Drive shops, and walking to visit friends who live up hill of the land.

5.71. Mrs Perry said that she has used all sections of the area within the amended boundaries of the application land. She said that the use of the land had remained the same as she stated in her questionnaire, although sledging during snow should be included, as the snow brought out up to 50 people per hour, and always had done, due to the hills. She also wished to stress that people come over from Knowle to walk dogs on the application land, and to use the hills during the snow. The land is also a good bicycle ride for those who live at the bottom end of Mile Walk. At Christmas in particular, although also at other times of year, many parents bring children with new trikes and bikes up Mile Walk to learn to ride them.

5.72. Mrs Perry said that the children and grandchildren of the residents of the Pinkham's Twist Co-ownership Housing Society (Pinkham's Twist, Quickthorn close and Hawksmoor Close and the four blocks of 12 flats each) use the land. Her daughters as teenagers used to meet their friends on the land and spend hours up there every evening. They also used regularly to play football with Marcus Browning, who went on to become a professional footballer, and also used to walk and play with his dog up there.

5.73. Mrs Perry produced a photograph of her dog, taken on the application land in 2007.

5.74. In cross-examination Mrs Perry said that her preferred route to the application land is via Pinkham's Twist, but that not her only route. She sometimes comes onto the land between Beech Court and the end of the earth bund, sometimes she goes up and over the bund, sometimes she uses a cut through near the toilet block and sometimes she uses the tarmac path, if it is extremely wet under foot. Her photograph shows the toilet block in the background, before the cut through was created. She walks up both sides of the bund. She uses the land to the west of the bund to get through to the main part of the field. She does not want to take the dog the same way every time. She does not use the area to the west of the bund just in transit. Sometimes she goes up past the toilet block, and crosses the road there. She agreed that when she is on the area to the west she is going towards the rest of the park. She does not spend all her time on that area. She rejected the suggestion that she left that area as soon as she can, and said that she leaves there whenever the dog has finished sniffing around, not as soon as she can. Sometimes she does not use the land to the east of the

bund, but only the land to the west of the bund, walking home, but also exercising the dog. If the dog wishes to tarry, she tarries with him. She does play with the dog on that part of the land, teaching him agility. The dog will be on his flexi-training lead. Over the course of 10 walks, she might spend 20 minutes on that piece of land, exercising the dog, walking home, or walking across to ASDA field. Each walk lasts 40 minutes to an hour.

5.75. Mrs Perry was asked whether she goes to the copse behind Bracton Drive. She did not know which road Bracton Drive is. She was shown the area concerned on a map. She said that she does walk across the application land diagonally to the junction between Fortfield Road and Briery Leaze Road. She goes either straight on beyond the gate, or towards the left. Her dog loves the trees to the left through the gate. She last went in there in the late autumn. She goes there a handful of times a year. There is quite a bit of flooding around that gate sometimes. The dog is after the squirrels in there. He is on the flexi-lead, so he never catches them. She goes right through to the other side occasionally, when the undergrowth has not grown too much. Her use of that area is occasional.

5.76. Mrs Perry was asked about the open grassed area to the south of the track to Fortfield Road. She goes on that area about 8-10 times a year. A lot of elderly people with dogs live up that way, and she has seen them exercising their dogs on there frequently, because it provides easy access for them. She has seen them coming across to use the land. Sometimes she goes around the inner part of that area. They might be there for up to 10 minutes. She goes at different times of day, so does not meet the same people regularly. When she drives along that way, which she does four times a day, she sees people walking dogs on that part of the application land. She recognises them, but does not know where they come from. She does not ask them where they come from. People come to the land from as far afield as Knowle. Knowle is not part of Whitchurch or Hengrove.

5.77. Mrs Perry said that she walks the perimeter of the field, excluding the area just mentioned, many times a week.

Mr David Smith

[redacted]

5.78. Mr Smith provided a written statement dated 2nd March 2009[26] and a pro forma additional statement dated 28th October 2010[27]. He also provided an evidence questionnaire completed in the joint names of Mr and Mrs Smith, but signed by Mr Smith alone, dated 15th October 2007. Mr Smith has lived at his present address for 8 years, but has lived in Whitchurch for his whole life. His present house is about 5 minutes from the application land. He uses the land a lot, as he is a martial arts instructor, and the land is an ideal place for practice. He also takes his children to the land, to sledge in the snow, cycling, for family picnics, blackberry picking and playing ball games, such as rugby and football. The land is used by a variety of different types of people for various activities.

[26] A/B116
[27] A/B117

The availability of the area gives families and friends the chance to get together and use the space for many different reasons. Mr Smith stated that he thought that people respected the area and tidied up their own mess, if they had a picnic, for example.

5.79. Mr Smith said that he had assumed that the City Council owned the land because there is a toilet block on the land and the grass is cut. Some tree pruning had also taken place. Dog bins had been installed. Some years ago an earth bank was erected around part of the area to prevent joy riding and cars being left burned out on the grassland. He had not seen any other evidence of improvements to the land. Mr Smith said that he had never sought permission to use the land, or been told that he cannot use it. There has not been any signage. The land is never shut off.

5.80. Mr Smith stated that he calls the neighbourhood in which he lives Whitchurch. He regularly uses the local amenities, including the shops, pubs, schools, ASDA and the Whitchurch Health Centre. He is concerned that there used to be a lot of open space over the old Whitchurch airport, but that this is gradually being built upon, so that there will be no open space left in the area for people to enjoy.

5.81. Mr Smith provided three photographs of himself practising martial arts which he said were stills taken from film which he takes of himself to assist in his practice. He uses the area to the west of Cranwell Grove and Kingscourt Close, to the west of the path, and between the path and Briery Leaze Road for his practice, as it is reasonably secluded.

5.82. In their evidence questionnaire Mr and Mrs Smith stated that they had known the land since 1971, and had used it from 2004 to date for walking, exercise, fitness and martial arts a couple of times a week.

5.83. In cross-examination Mr Smith said that he also runs, doing circuits around the whole perimeter of the land. He runs within the bund, and does not go through the gate in the south eastern corner: his route follows the perimeter of the main area. He uses the areas off the main patch for martial arts because he wants privacy.

Mr Gary Everett

[redacted]

5.84. Mr Everett provided a written statement dated 23rd March 2009[28] and a pro forma additional statement dated 25th October 2010[29]. Mr Everett stated that he has lived in Whitchurch since 1965, originally in Ridgemeade, and more recently, since 1991, at his present address. He played on the application land as a child, before ASDA and most of the housing in the area were built. He has used the application land with his own sons, and has played football and cricket on the land, held birthday, barbecue and bonfire parties. He taught them to ride their first bikes on the land. His sons still walk the family dogs over the

[28] A/B56
[29] A/B57

field. They went sledging there in the recent snow. Mr Everett's house overlooks the application land. He sees others enjoying the same activities that he and his sons enjoyed. In summer he sees families picnicking and hears youngsters enjoying themselves.

5.85. Mr Everett appended four photographs to his statement taken in 1985, 1993 and 1998. He said that the dates would have been written on the back of the originals. The first three were taken in the middle of the application land. The 1985 and 1998 photographs show people on the land in snow. The first 1993 photograph shows a young boy in football kit on the land. The tarmac path is visible in the background. The bottom photograph, also taken in 1993, was taken on the roadway leading to Fortfield Road. The copse is on the left of the photograph. The gate out of the main field would be behind the photographer.

5.86. Mr Everett said that he has been into the copse. There is a bat colony in there. He has been in there approximately half a dozen times in the last year. Before 2008 he was a regular visitor to the copse, especially in about June when the young bats are there. He goes there in about June each year about half a dozen times. He has been doing that since he moved to Cranwell Grove. At that time the young are brought there from their birthplace, and the females go off foraging, bringing back insects for the young. He stays there to watch for about half an hour.

5.87. Mr Everett has also used the grassed area fronting onto Fortfield Road for dog walking, probably once or twice a week. He crosses across the main field to go to ASDA, and then circumnavigates the field with the dog, and takes the dog different places. He uses the area fronting Fortfield Road as a place of transit to get to ASDA, or for dog walking generally. He uses different areas on different evenings, otherwise the dogs get bored. He takes the dogs around the area, circumnavigating the whole area. Then he would walk down Briery Leaze Road and to the conservation area on the western side of Briery Leaze Road, and around that area. When he walks up the Briery Leaze Road and Bamfield side of the land, he walks on the field side of the bund, not on the road side.

Mrs Joy Ward

[redacted]

5.88. Mrs Ward provided a written statement dated 13th November 2010[30]. She has lived at her present address since 1975 or 1976. When she moved in, the application land was farmland, and Fortfield Road was only partly made-up. ASDA was built in 1977-78, and since then her family has referred to the land as the ASDA field. All the time they have lived at their present address they have walked their dogs three times a day on the application land. They got onto the application land across the private lane at the bottom of their garden, and through a gap in the hedge. Latterly the Council had replaced the hedge with a wooden fence, and a barrier.

[30] A/B127

5.89. Mr and Mrs Ward's two daughters (b.1974 and 1978) played on the ASDA field as children with their friends and playing ball games and riding bicycles, climbing trees, taking planks of wood to build tree houses, burrowing tunnels through the hedgerows and building dens in them.

5.90. Mr and Mrs Ward have picked sloes and blackberries from the L shaped hedge in the north-eastern part of the application land and from the top part of the hedge behind Fortfield Road every year for the past 35 years. On 5th November each year they lit a bonfire on the square-shaped area partially enclosed by the L shaped hedge (the north eastern corner of the application land). Children from the houses on the far side of the ASDA field (from Briery Leaze) would compete with them as to who had the biggest bonfire.

5.91. Mr and Mrs Ward's grandchildren who live nearby now play on the ASDA field when they come to visit, just as Mr and Mrs Ward's daughters used to.

5.92. In the earlier years, and while Mrs Ward's daughters (b.1974 and 1978) were teenagers, the family kept horses which they sometimes exercised on the application land, on the northern part of the application land, enclosed by the L shaped hedge. They never asked permission to use the land for their day-to-day activities on the land, but they had been unsure about taking the horses onto the land. They telephoned the Council and also spoke to the park warden, and asked whether it was alright. The Council said that as long as the ground was solid, and they were not cutting the ground up with their hooves it was alright. The area in which they took the horses, the square in the north eastern part of the land, was scrubland. It was not grassed out initially, because there was a plan to put an adventure playground there. They kept to that area with the horses. They had not sought permission for any other activities.

5.93. Mrs Ward said that they had thought of the land as belonging to them, and had tried to look after it. They had always reported any problems to the police. Anyone is able to use the land. They can see a large part of ASDA field from the back windows of their house, and have seen many people using it over the years for all kinds of activities. They have recognised many of them as local residents. Mrs Ward said that she did not think that there was any part of the land which people had not gone to at various times.

5.94. In cross-examination Mrs Ward agreed that she took it that she had been given permission to use the land with horses, as long as the going was firm. The use with the horses would have been from about 1985 for about 5 years. She also uses the land with her dogs, up to three times a day. Her daughter also uses the field with her dogs. Mrs Ward's daughter lives in Gilda Crescent, about 5 minutes walk away. Mrs Ward does not take any particular route with the dogs, she uses the whole field.

5.95. Mrs Ward is aware of the bund which was erected to prevent driving on the land. She said that she does not always keep to the east of the bund: she has gone across the bund, and over to the fields opposite the application land. She goes over the bund with the dogs if they go over there. She also likes to look at the hedgerows. She uses the triangular shaped area to the south-west of Briery

Leaze Road as well as the application land, and goes over the mound to get there. She does not go on the area to the west of the bund in the northern corner, near Pinkham's Twist.

5.96. Mrs Ward has been into the copse. There are spring flowers there. She goes there a couple of times a year, mainly in the spring. She has also been onto the grassed area which fronts onto Fortfield Road. She has a friend who lives up that way, so she walks that way with the dogs. She goes that way maybe 5 or 6 times a year. She walks across the grass to get to her friend's house. She agreed that in so doing she was using the grassed area as a place of transit.

Mrs Eileen Steer

[redacted]

5.97. Mrs Steer provided a written statement dated 4th November 2010[31]. She has lived at her present address since 1984, and before that lived at Wharnecliffe Close. Coulsons Road is in Whitchurch Park ward. She has known the application land for 30 years, and calls it ASDA Field. She has used the land since 2000 to dog walk on a daily basis, at about 9 a.m. each day. From 1993-2000 her husband used to walk their dog there. They acquired their first dog in 1993. The present dog is the third dog.

5.98. Mrs Steer has got to know other dog walkers who use the application land, and if she meets people she knows, she stops to talk. There is usually someone there she knows. If there is no-one she knows she walks a few times around the perimeter and then home. Sometimes there have been up to 8 people and 10 dogs. There are 6-8 people who meet regularly every morning at about 9 a.m. On one occasion there were 14 dogs, but that was a record. She stays longer then, up to a couple of hours. That has been the case all the time she has been going there. The other people come from all over: Whitchurch and Hengrove. She has not sought permission to use the land, and neither has she been prevented from using it.

5.99. Mrs Steer provided three photographs of some of the dogs and people she meets on the land, taken in the summer and autumn of 2007.

5.100. In cross-examination Mrs Steer said that she does not go as far across the field as Bamfield. She stays on the field side of the bund. She does not go into the copse area. She does not use the open grassed area which fronts onto Fortfield Road either.

Mr Alan Mann

[redacted]

5.101. Mr Mann provided a written statement dated 24th November 2010[32]. Mr and Mrs Mann have lived at their present address since July 1977. He has used the land by himself for exercise, for recreation and relaxation and as a thoroughfare to get to Belland Drive and Dundry.

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[31] A/B124
[32] A/B86

5.102. Mr and Mrs Mann have two children (b. 1979 and 1981). Mr Mann has used the application with the family as a play area for the children when they were growing up, for exercising the dog, to teach the children to ride bikes, cross the road and for sports, to take or meet family and friends in nice weather, for picnics, to use the play equipment, sledging in the snow, and to collect nature study bits and pieces for school.

5.103. Mr Mann was the Scout Leader of 21st Bristol in the 1990s. As a Scout Leader he has used the land for wide games, badge work, as a football practice area, for camping, foraging for materials and for first aid, for orienteering, map reading and map making, for nature observation.

5.104. Mr Mann said it was difficult to give times or regularity for his use, except for the dog walking, which took place almost twice a day, except during holidays over 12 years. He currently has a medical condition which prevents him using the land. He confirmed in examination in chief that he used the whole area outlined in green on the amended application map.

5.105. In cross-examination Mr Mann said that he does not use the grassed area in the south eastern corner of the application land. He has not been into the copse for years either. Mr Mann is familiar with the earth bund. He uses the land on both sides of the bund and on top. He said that the bund is a good place to stand and survey what children are doing. He uses the land to the west of the bund for walking across and sitting on, although has not done so recently because of his back. He walks up through the garage area at Pinkham's Twist with friends who live there, and has sat on the area to the west of the bund with them.

5.106. To get to the ASDA field he either goes up Bamfield, up Quickthorn or along Mile Walk (the tarmac path). He has both stood and sat on the area to the north of the toilet block and to the west of the bund. He has sat there and had a picnic with friends who used to live in Quickthorn Close, when they were waiting for their children to come home from school, because they could see the back of their house from there. He might have done that 10 times in the last 30 years. He has also held Scout meetings during the 1990s on the area to the west of the bund, because it is flat and easy to build things on. They carried things there from the Scout hut. The Scouts used the area he thought on a monthly basis. He has also walked down and along the edge of the road, on the road side of the bund, occasionally.

5.107. In re-examination Mr Mann said that the copse he was referring to was the area behind the toilet block. He did not use the new area added in the south eastern corner of the application land at all.

Mr Robert Nevett

5.108. Mr Nevett provided two written statements dated 16th February 2009[33] and 4th November 2010[34]. He also provided an evidence questionnaire dated 27th

[33] A/B88

November 2007[35]. Mr Nevett has lived at his present address since 1972. He said that he is one of the few original residents of the Elm Tree Park estate. Mr Nevett said that he made inquiries of the City Council as to who owned the application land before buying his house. They wrote him a letter stating that the land was controlled by the council and could not be built on because it was green belt.

5.109. The application land used (in the 1970s) to be known by most people and by the city council as Whitchurch Park, and it used to have a children's play area on it. The name fell out of use quite quickly. He thought it had been used as a marketing strategy to increase the saleability of the houses on the Elm Tree Park estate. The name had never appeared on any local maps, name plates or signposts. After ASDA was built in the early 1970s, his children and others on the estate began to refer to it as ASDA Field. Lately, since the proposal to dispose of the land for development, the Council had referred to the land by other names such as "Bamfield Green Space" and "Briery Leaze Open Space".

5.110. When Mr Nevett first knew the land it was maintained by a local farmer who kept the grass cut short. The trees were cut by the council. Latterly contractors have cut the grass.

5.111. When Mr and Mrs Nevett moved to their present address, their children were 2 and 3. The children rode bicycles up and down the footpath in front of the houses and played ball games on the application land with friends until they married and moved away. In their teenage years they played cricket, rounders and football on warm summer evenings, and especially at weekends. The parents of some of the boys cut a cricket square. When Mr and Mrs Nevettt's children had children of their own, their grandchildren visited or stayed and played on the grass and play equipment, before it was removed.

5.112. Mr Nevett has never sought permission to use the land. The play equipment reinforced his understanding that it was available to use for recreation. The land has never been shut, fenced, or signed with restrictive notices.

5.113. There were some problems with dumping and setting cars alight, but the problem ceased when the higher banks were created.

5.114. Mr Nevett said that the inhabited area is known as Elm Tree Park, which was the name given to it by the builder: from Briery Leaze Road, Bracton Drive and Bamfield Road. He uses ASDA, the health centre and the opticians. He uses the post office and stores in Belland Drive, and the newpaper shop in Dundry Road.

5.115. In Mr Nevett's further statement he stated that he knows the area added to the south eastern corner of the application land and the tongue between Cranwell Grove and Kingscourt Close extremely well as his house overlooks one to the front and one to the rear. These areas have been used by the residents and their

[34] A/B90
[35] A/B91

families in the same way as the larger part of the application land. He has seen children from the Elm Tree Park estate, Fortfield Road and the surrounding area playing football regularly on the green in front of his house (the south-eastern corner of the application land), playing in the trees making dens, playing hide and seek and making a rope swing from the branch in front of his house. In the summer he has seen children playing in and out of the trees/copse.

5.116. When his own children and grandchildren were young, they played with their friends on the strip of land between the houses on Kingscourt Road and Cranwell Grove.

5.117. In his evidence questionnaire Mr Nevett stated that he had known and used the land from 1972 to date most days for walking. His immediate family had used the land for playing ball games and general play. The land was in use by the community for cricket, rounders, footballs, cycling and nature, and by the Scouts and Brownies.

5.118. In cross-examination Mr Nevett was asked about the copse between 200 and 202 Fortfield Road and the driveway to Fortfield Road. He said that there were prefabs there, and they were taken away, and the area has been allowed to become overgrown. The footings for the prefabs are still there. He said that it is an overgrown area, not a copse. The trees along Bracton Drive were originally a hedge, and the trees on the grassed area were planted on it. Mr Nevett uses that area. He walks across it around it through it. He goes out for exercise every day, and probably uses that area twice a week. He does not go into the overgrown area: he said that you cannot walk in there, it is too overgrown.

5.119. Mr Nevett was asked about the bund erected in 2002. He said that he normally sticks to the field side of the bund. The bund is irregular and not a sensible place for him to walk.

5.120. The children's play area was about half way along the footpath: the remains of the footings are still visible in the tarmac. There was a climbing frame, swings, a roundabout, and a see-saw. His grandchildren were born in 1990, 1992 and 2000. It was the older grandchildren who played on the equipment. He had photographs of them playing, but had been unable to find them. He thought the equipment was removed some time around 1995 –1997. When he moved in the equipment was not there. The footpath was not there either. The footpath and the equipment were put in at the same time, in around 1975, between 1975 and 1980. The equipment was removed because the area was overrun by older children setting fire to the equipment and vandalising it at night time. The council could not keep it safe. The equipment was not enclosed in any way.

5.121. Mr Nevett said that when he referred to the trees/copse in his statement he meant the trees in front of his house, between his house and the grassed area fronting Fortfield Road, and not the trees to the north of the drive from Fortfield Road. The children play football on the grassed area in the summer,

he estimated two or three times a week. He does not know who the children are, or where they come from.

Mr Steven Gardiner

[redacted]

5.122. Mr Gardiner provided a written statement dated 25th February 2009[36] and a pro forma additional statement dated 28th October 2010[37]. He also provided an evidence questionnaire dated 21st October 2007[38].

5.123. Mr Gardiner stated that he has lived at his present address since 1980, but has known the land since at least 1962, having always lived in the area. He previously lived in Allerton Crescent. Heart Meers is just off Wharnecliffe Gardens. He remembers the application land being farmland, with cows on it. He remembers the houses in Briery Leaze being built in about 1973, and the farmland becoming open grassland, which people could use for recreation.

5.124. Mr Gardiner stated that he assumed that the land belonged to the City Council because it is an open piece of land. When it was farmland it had fences, hedges and stiles around it. It is now open to access from many directions. He had never seen any signs on the land, and had never been refused access to the land.

5.125. He and his family, including his two daughters (b. 1980 and 1982), and friends had used the application land regularly over the years to play games, walk and carry out other outdoor activities.

5.126. Mr Gardiner has seen the land used regularly by children playing both on the open grass and amongst the surrounding trees and shrubs. He has also seen people dog walking, blackberry picking, playing football, playing cricket, playing rounders, bird watching, picnicking, kite flying and riding bicycles. The land is a very well used amenity for many local inhabitants of Whitchurch.

5.127. Mr Gardiner said that there are at present no facilities on the land, other than dog bins. There used to be some swings, but they were removed a long times ago. There was a metal structure for youths to meet under, but that was damaged and removed. There was also a toilet block, but that was closed some years ago, although it remained on the land as at the date of his statement. At one time there was a problem with stolen cars being dumped on the land, and earth banks were erected to prevent cars being driven onto the site. Grass has grown over the banks.

5.128. Mr Gardiner stated that he calls the area around where he lives "Whitchurch" and regards the area as a community. He and his family use many of the local facilities, including the post box at ASDA, ASDA itself, the Whitchurch Health Centre, the hairdresser's, the fish and chip shop, the pharmacy, the opticians, the Halifax Building Society, the cash points and the petrol filling station, all on the ASDA complex. They also use the post office and other

[36] A/B59
[37] A/B61
[38] A/B62

shops at Belland Drive. They catch local buses from Wharnecliffe Gardens or Fortfield Road to Broad Walk, or into Bristol. They use the Whitchurch Sports Centre in Bamfield Road regularly, and the local churches on Whitchurch Lane and in Whitchurch village. Mr and Mrs Gardiner are both members of the "Whitchurch Tenants and Residents Association", an organisation set up to help local people with problems in the area.

5.129. In cross-examination Mr Gardiner said that his children would have been going to the application land by themselves from when they were 12 onwards, in the 1990s. His own use in the last 10 years has been mostly walking and riding mountain bikes, and a bit of bird watching. He uses the land almost every day. He and his wife walk 3-4 miles every evening around the local area. They walk over the bund and on, to Hengrove Park. They have also walked along the bund, up to the area to the south of Briery Leaze, the triangular area. They walk on that land as well. Mr Gardiner said that he also uses the bund to tail-slide on his mountain bike. He tends to go there when there are not so many dog walkers, as he does not like dogs chasing him. He used to have a BMX bike, and his daughters had BMX bikes too. They rode over the bund, through the trees and hedges, and along the slope of the bund, normally on the western side. He rode there with his children in the 1990s, but he still does it himself. He now has a mountain bike. He plays around on the land, including on the grass on the other side of the bund. This would be once or twice a week. He has like-minded friends who do the same thing. He has friends who live on the St Giles estate, and they tend to meet on the north western corner. Before 2002 there was an earth mound there: it was enlarged in 2002. A lot of activity which used to take place on the airfield now takes place on the ASDA field, now the airfield has been developed.

5.130. Mr Gardiner was asked whether he uses the bund further down to Briery Leaze: he said that there is no flat area where you can turn down there, so it is less useful. He thinks there are tracks up towards the Pinkham's Twist end of the bund where cyclists ride, although they vary according to the season.

5.131. Mr Gardiner was asked about the area in the south eastern corner of the amended application land. He said that he does go into the wooded area to the north of the driveway. He rides out of Portmerian Close, and crosses the road, and occasionally goes into the wooded area: there are concrete footings and steps there. They used to put planks on the steps to make obstacles to ride the BMX bikes. He did that with his daughters, and children still do it. His daughters built dens in there, and local children still do that too, in that area, as well as in the trees in front of Bracton Drive. When he first saw the application, he was surprised that that area was not included, because that was where he played when the area was all farmland, in the early 1970s. He has not played there in recent years, but local children do. The younger children play football in that area. The residents on Fortfield Road complained that children were playing there too much, and the trees were planted to reduce the noise and the nuisance. By then the field had been opened, and a lot of the activity moved there. The children who play there come from the two estates to the east of Fortfield Road: Fortfield Green estate and Ridgeway Park estate (the estates between Fortfield and the Wells Road). The Ridgeway Park estate

was one of the earliest developments in the area. The ASDA field is a big area, and there are lots of people with dogs there. There are not so many dogs on this area, and is visible from the houses that some of the children come from. He knows that the land is used because he walks every day, and also drives by. Unless the weather is really bad, he usually sees someone on the bit of land fronting Fortfield Road.

5.132. A while ago, when his daughters were children, there was an issue with dog faeces on the main field, so the area fronting Fortfield Road was used by children in preference to the big area. This has improved recently. The use he has seen has been children playing football, riding bikes and building dens. He said that maybe he sees the land from a different perspective, because the vast majority of witnesses have been dog walkers.

5.133. He knows quite a few of the people who use the land fronting Fortfield Road: he knows the first names of a lot of the children but not the surnames. He has seen Mr and Mrs Hartles on the land, and other people who were at the inquiry, who he recognises but does not know by name. He sees people who live on Fortfield Road, because he has also seen them in their front gardens. He does not know a lot of second names, even of his neighbours. He has seen people who he recognises as local people, who he has seen in the locality. In terms of the number of people on the land, the grassed area is not used as much as the main grassed area, but it is used regularly, and he sees people that he recognises using it regularly. He is mostly around there in the evenings, early evenings, and on the weekends.

Evaluation of Mr Gardiner's evidence

5.134. Although I looked carefully on the accompanied site visit for any sign of steps on the former prefab site, there were none. I am therefore driven to conclude that Mr Gardiner's account of riding mountain bikes with his daughters in that area over ramps created by putting planks over steps cannot be correct. Mr Gardiner's memory must be false in this respect. I have therefore approached the rest of his evidence with caution, and only accept it where it is corroborated by other evidence.

Mr Nigel Bayly

[redacted]

5.135. Mr Bayly provided written statements dated 23rd January 2009[39] and 1st November 2010[40]. He also completed an evidence questionnaire. He has lived at his present address for 25 years, and previously lived at 20 Widcombe on the St Giles estate. Mr and Mrs Bayly have two sons, who have now left home. He and his family have used the application land many times for recreation, playing football, badminton, cricket, snowballing, cycling, dog walking and blackberry picking. Mr and Mrs Bayly's sons still use the application land to meet up together with their dogs and to exercise the dogs and enjoy the open space. They still meet up with their old school friends on

[39] A/B20
[40] A/B22

the application land. He has seen many local residents and strangers using the land with their friends and families.

5.136. Mr Bayly said that he assumed the land was owned by the City Council, because the grass had been cut in response to his telephone call to the parks department complaining about the length of the grass. He had not sought permission to use the land and has not been told that he cannot use it. It has never been fenced or gated. A mud mound was erected on the western side of the land after residents and users complained about motorbike riding and cars being driven and burned out on it. The mound does not restrict pedestrian access. Dog bins have been provided and the grass has been cut, but no other services are provided. There are no signs. He could not remember any tree pruning or general maintenance or other improvements to the land within the last 24 years.

5.137. Mr Bayly said that there is a strong community spirit within the Whitchurch neighbourhood. The Baylys use all the local amenities including the Whitchurch District Centre (ASDA, the Health Centre, the fish and chip shop), the shops on Belland Drive, the post box, the local pubs, and the Sports Centre. Mr and Mrs Bayly are co-ordinators in the local Neighbourhood Watch Scheme. The scheme helps bond the community.

5.138. In his evidence questionnaire Mr Bayly stated that he had known and used the application land from 1969 to date for leisure, to walk to the superstore and health centre and to play with his children, four or five times a week, and more recently two-three times a week. He used to take part in football, cricket, dog walking, biking, kite flying, blackberrying, snowballing and sledging, and, at the time of filling in his questionnaire, took part in walking, biking and blackberrying. His immediate family used the land for the same activities. The Scouts and the Rugby Club also use the land.

5.139. In cross-examination Mr Bayly was asked about his use of the grassed area in the south eastern corner of the application land. He uses that part of the application land perhaps 8-10 times in a month. About a third of that time would be general walking, enjoying the hedgerows, flora and birds, and the other two-thirds would be walking his son's dog. He wanders around the grassed area sometimes, and sometimes uses it to gain access to the main field, or comes back that way. He is not using it to get somewhere: he is just out for a walk: he can turn any way, or just stop and look. He does not avoid that area because it is near the road. He guesses that he might be on that part of the application land for as little as 2 minutes, or as much as 20 minutes. The row of trees is almost dead in line, and he finds that amazing. If you line them up with the trees going up Briery Leaze they almost all line up.

5.140. Mr Bayly was asked about the overgrown area to the north of the driveway off Fortfield Road. He said he could vaguely remember the prefabs there, but there were a lot of prefabs along there. There are the remnants of footings there. The remnants of the gates were there, but he does not know whether they are still there. He went in there once when his children were young, but has no reason to be in there and does not go in there because he does not want his clothes

snagged by brambles. He has heard children playing in there, not every time, but quite often, when he goes by. He would estimate that he had heard children more between spring and autumn, but maybe 6 of the 10 times that he would be there.

5.141. Mr Bayly goes on both sides of the bund along Fortfield Road. He walks on the other side of the bund to enjoy the area, and along the bund. There are some nice vantage points, and views. He goes on the road side of the bund, round from Kingscourt Close all the way to Pinkham's Twist. He might use that area 8-10 times a month. He comes that way back from the old airport, via Widcombe, where he used to live, and sometimes goes along there all the way to Kingscourt Close. He only uses the tarmac footpath if he is going to the doctor's, because then he does not want muddy shoes. Otherwise he walks anywhere on the grass. Mr Webster suggested that Mr Bayly did not in fact walk along the western side of the bund. Mr Bayly said that there is grass, then a pavement, then the road along the road side of the bund, and he knows where it is safe to walk. He was taken to the Objector's photographs 6- 13. Mr Bayly agreed that there is no footpath on the application land side of the road. He walks on the road around the area where the hedgerow covers the verge, and said that it is only 3-4 metres. Sometimes he has his son's dog with him when he does this. He might cross the bund at any point: he goes wherever he wants to go. He travels along the whole area to the west of the bund only occasionally, but uses parts of it 8-10 times a month. He thought that the last time he used the whole length of it might have been in the autumn.

Mr Andrew Hartles

[redacted]

5.142. Mr Hartles provided three written statements, dated 21st December 2010[41], 27th January 2011[42] and 24th February 2011[43].

5.143. Mr and Mrs Hartles have lived at their present address since October 1987. They lived elsewhere in Whitchurch for 6 years prior to that. Mr Hartles knew the land before moving to Whitchurch, as he had worked in the area since 1978. Mr and Mrs Hartles have two children (b. 1985 and 1988). Their house overlooks the application land.

5.144. Mr Hartles' children grew up using the land for play from an early age, and later for games of cricket with Mr and Mrs Hartles and the neighbours' children, rugby practice with friends, kite flying, picnics, learning to ride bikes, throwing Frisbees, and playing in the snow. As teenagers and young adults they used the land for relaxation, either with friends or in solitude to read, or enjoy the space and air, until 2009 when their daughter moved away for employment.

5.145. Mr Hartles himself has used the land to walk, several times a week, enjoying the views.

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[41] A/B67
[42] A/B80a
[43] A/G8

5.146. Mr Hartles has seen people using the application land, and described a steady trickle of people entering and leaving the land for recreational purposes via the access points to the north and south of Cranwell Grove, or over the embankment near the junction of Briery Leaze Road and Bamfield. He said that he is able to distinguish recreational users from those who are passing through by their absence of baggage, their dress, and by the casual pace at which they move. People continue to use the site into the evening in darkness. He has seen the whole of the amended application land being used for many kinds of information recreation, and has heard people on the land. The wooded and hedgerow areas are used by people enjoying the flora and fauna, picking nuts and berries, and building dens and climbing trees. Very few areas of hedgerow are impenetrable. Mr Hartles has gone into what appear to be thickets and found rubbish inside, which he said in his opinion provides evidence of use. It is easily possible for a grown man to pass through. The wooded areas near the corner of Bracton Drive are riddled with paths. The hedgerows adjoining ASDA and the health centre used to be perforated with gaps, although these have reduced in size over time. There are stanchions along the section of the car park edge where there is no hedgerow, which prevent vehicular but not pedestrian access. The hedgerow at the rear of the health centre is hollow and teenagers gather inside it.

5.147. There are a number of crossing points over the bund: two which appear to have been purposely constructed, and at least a further 10 created by people walking across. There is unrestricted access from one side to the other: any agile person can cross it wherever they wish. Since the bund was built Mr Hartles has seen joggers, dog walkers and cyclists on both sides of the bund, and passing from one side to the other, during the course of their recreation. For a large section of its length the bund is only three paces from the edge of the road. At the northern end the bund diverges away from the application land: at this point the land to the west of the bund is higher, and affords views to and from that part of the application land.

5.148. Between 1987 and 2008 Mr Hartles travelled past the application land on his way to work. On most mornings he was habitually greeted by the same walkers and joggers setting out on their regular exercise routes over the application land, with or without dogs, in all weather. On his way home, he often saw an after-school game of football in progress on the area fronting Fortfield Road.

5.149. Mr Hartles has seen succeeding generations of children enjoying the land in the same way as his children did. He knows of many people who use the land every day, rain or shine. For many years at certain times of day he has seen up to a dozen people gathering on the land and socialising in twos and threes and small groups. At other times, depending on the weather and the time of day and day of the week, there might only be a handful of people there. It is seldom possible to look out over the land between dawn and dusk, without seeing someone there. He hears the dog bins being used in the dark. There is evidence on the ground of people using the land.

5.150. Mr Hartles has seen parties of children from nearby schools using the land for class outings. The local rugby teams (junior and senior) have used it for

training and pre-match warm-ups. He frequently sees and hears younger members of the local community congregating in the evenings and towards nightfall on the mounds or under the trees, on the land.

5.151. Mr Hartles has collected more than 100 photographs from local residents showing them using the land for recreation between 1988 and 2008. He appended his own photographs to his statement. The three July 1990 photographs show his son on the application land, learning to ride his bicycle. The top photograph shows that there was no bund along Briery Leaze Road at that time. There were two photographs of Mr Hartles' children playing in the snow in December 1990 on the application land. The snow photograph dated December 1990, Mr Hartles said, shows that the hedge at that time in front of the houses was thin, so there was an almost unobstructed view across the land. There were two photographs dated June 1991 and two further photographs dated 18th April 1992 showing Mr Hartles' children flying a kite on the application land, and a photograph of them on bicycles on the application land on 12th April 1992. The 1992 photographs again show that no bund along Bamfield, outside the rugby club. Finally there were three photographs of Mr Hartles' children playing on the application land in snow, the first taken in December 1996, and the latter two taken in December 1997. The 1996 and 1997 photographs show sledging on the mounded areas.

5.152. Mr Hartles was one of the individuals who assisted Mr Rowley in carrying out the user survey. His pages are at A/A55-58. On the last page he recorded two school parties on the land.

5.153. Mr Hartles put the dots on the sheets at A/A60 and 61. He said that the dots are purely derived from the survey sheets. Each dot represents the address of a respondent to the survey. On the Ecclesiastical Parish map there are 447 dots within the Parish, and 146 outside the Parish. On the electoral wards map there are 497 dots within the two wards, and 96 outside the two wards.

5.154. Mr Hartles obtained the documents at A/A65-68 from the Electoral Services department of the City Council.

5.155. The photograph at A/A74 was provided by a local resident, and was dated by reference to the date on which Portmerion Close was completed.

5.156. The aerial photograph at A/A87 was provided as a handout on the site walkabout with the area green space officer advertised on the previous page, which took place on 27th July 2008. Mr Hartles did not receive a flyer. His understanding is that only about 6 flyers were put into letter boxes. He was told about the event, and attended. About 30 people attended. The document at A/A88 was produced by the officer, and copied to Mr Hartles.

5.157. Following the publication of the City Council's Green Space Plan there were a series of consultation meetings. The local one was in July 2010. The marked-up aerial photograph, an extract of which is at A/A110, was on the wall at that meeting. The boundaries of the amended application land are the same as the

boundaries of the area identified by the Council in the documents generated for the purposes of the Green Space Plan.

5.158. The photographs at A/A119-137 are photographs provided by local residents who have not made statements. Mr Hartles wrote the names and addresses of the persons supplying the photographs on each.

5.159. The photographs at A/A138-139 are photographs taken by Mr Hartles at about the time the application was submitted. They were taken to show the dog bins, but provide a record of the condition of the land at the time. The photographs at A/A140-142 were taken at about midday on the morning after snow fell overnight.

5.160. Mr Hartles pointed out that the value assessment carried out by the Council at A/A150-151 records that visits to the site have always seen use, and mentions in particular that the area adjacent to Fortfield Road is used as a kick-about area.

5.161. Mr Hartles' statement dated 24th February 2011 dealt with the further documentation provided by the Objector in relation to its latest submission on appropriation. Mr Hartles, Mr Button and Mr Andrews carried out further research at the Records Office. He said that the impression given by the written statement indicates that the Council intended that the plan was deliberately drafted without any great precision. The general introduction says that the plan will be reviewed in the light of progress made, and any changes in circumstances. Under programme, the Council states that there is no assurance that all development proposed will in fact take place. Mr Hartles said that in his opinion the development plan was an unlikely basis for the appropriation of publicly owned land to a particular statutory purpose. The plans were created in accordance with the Council's obligation under the Town and Country Planning Acts. The allocation, designation or reservation of land for a particular purpose carries no statutory weight until an appropriation takes place. Mr Hartles produced the minutes of the meeting held on 14th October 1958, the date on which the Amendment to the Development Plan was adopted. The report showed that formulating the amendments had not been an easy task. He drew my attention in particular to paragraph 6:

> "In due course, when the amendments to the development Plan have been approved by the Minister and have become operative, the Committees concerned will report to the Council with recommendations for the appropriation of those portions of the lands already owned by the Council for the purposes for which they are zoned, and upon any other necessary arrangements."

5.162. Mr Hartles said that this wording makes it clear that he Council was aware of the need to appropriate the land owned by the Council and zoned on the plan for particular uses to the appropriate purposes for the uses shown on the zoning of the development plan, but chose not to appropriate at that time.

5.163. Mr Hartles said that he and his colleagues did not find any report from any of the Committees to the council with recommendations for appropriations between 1958-1964. He set out extracts from the minutes of the Airport Committee and the Planning and Public Works Committee's meetings of 1958, in which the Planning and Public Works Committee agreed to act as agent for the Airport Committee.

5.164. Mr Hartles said that his interpretation of the minutes of the meeting of the Planning and Public Works Committee which took place on 20th February 1963 was that the Committee did not recommend appropriation of the 200 acres approximately reserved for open spaces purposes to that purpose at its meeting, when it approved the officer's recommendations and recommended the other appropriations considered. Instead it put off consideration of this matter and instructed its officers to submit a report on the proposal.

5.165. By the time the matter was considered again in November 1963, the land had become absorbed into a larger appropriation of 341 acres, to be made under planning powers. The report received at the 27th November 1963 meeting was the report commissioned at the 20th February 1963 meeting, but matters had moved on since that time. Whereas the Airport Committee had requested the Planning and Public Works Committee to appropriate the "200 acres approximately" reserved as public open space, and the Planning and Public Works Committee had in turn considered an appropriation of "land zoned for public open space purposes", in the intervening period, that area had become absorbed into a larger area of 341 acres, which was being considered for appropriation under "planning powers". The report's recommendation is that the whole should be appropriated for redevelopment, in the first instance, and subsequently re-appropriated or sold. The recommended appropriation was approved by resolution of the full Council made on 11th February 1964. The appropriations schedule records this appropriation as "P&P Works (Re-Development)" by contrast with other entries on the sheet relating to open spaces which show those appropriations as to "P&P Works (Parks & OS).

5.166. In the circumstances, Mr Hartles said that it was clear that the application land had been used temporarily as open space, but was held for the statutory purposes of development. There have from time to time been various proposals for the redevelopment of the land. The current proposals include up to 262 dwellings and/or offices.

5.167. Mr Hartles said that it could not be right that the 1964 appropriation was somehow made with reference to the zonings on the 1959 Development Plan. It was clear from the Council and committee minutes that much had changed between 1959 and 1964. Although it was anticipated that about half the 341 acres being appropriated would subsequently be available for use as public open space, it was not clear that that stage for certain which parts of the land those would be.

5.168. Mr Hartles asked me to note that not all of the application land in any event falls within the area zoned as public open space on the 1959 Development Plan: a significant part of it lies outside that zone. Additionally, the Council's

records show that various parts of the 341 acres appropriated to planning purposes in 1964 were subsequently re-appropriated to other purposes. For instance, in 1966 the St Giles estate area was appropriated for housing purposes, although roughly two thirds of that area was zoned for residential use in the 1959 Development Plan. Similarly, both the Pinkham's Twist development and the Health Centre development straddle two areas on the Development Plan: the areas they occupy were in part zoned for housing and in part zoned for open space. Had the effect of the 1964 resolution been to appropriate the parts of the 341 acres which were zoned in the 1959 Development Plan for open space to public open space purposes, and areas zoned for housing to housing purposes it would have been necessary to re-appropriate parts of this land before these developments were carried out. In fact there were no such re-appropriations. This was consistent with the whole area being held for planning purposes.

5.169. In cross-examination Mr Hartles agreed that his description of the land as land freely used by local people for all sorts of reasons in all seasons could equally apply to a park or other public open space. He agreed that the land is publicly owned and maintained by the Council, although he said that it was not maintained to a good standard and work is done only reluctantly and to avoid a liability risk. He considers that the work carried out represents the bare minimum. He agreed that the play equipment was provided. He agreed that if there is an issue with dog bins or with the grass, people call the Council. The earth bund and the gate onto the field from the driveway from Fortfield were installed by the Council after requests by local people.

5.170. Mr Hartles was asked whether in his opinion the land is managed as a public open space. He said all that the Council does is cut the grass, and empty the dog bins, and that not very regularly. He agreed that the horseshoe gates were installed by the Council: he thought that those were installed as part of the bund works. It was done at the insistence of the local residents, and, he agreed, paid for by the Council. He agreed that the Council does carry out work to the land, although he refers to it as the bare minimum. The work is funded by rates. The public have unhindered access to the land. Mr Hartles did not accept that the Council have encouraged use of the land in any way: there is no signage inviting people on, and although there is no fencing, in his view that is because erecting fencing costs money.

5.171. The boundary for the amended application is the Council's boundary: it is the area which the Council has described as publicly accessible open space on the Green Spaces plan. Mr Hartles said a line has to be drawn somewhere on the map, and where the council draws it is good enough. Where someone steps off tarmac and onto green, to him that is them entering onto the land. Mr Hartles has not observed any lawful sports and pastimes on the area between the edge of the car park and the hedge in the Objector's photograph 18. He said that he does know that people pull up in the car park and let their dogs out for a walk on the application land.

5.172. Mr Hartles was asked to compare the kinked line on the northern edge of the application adjacent to ASDA, and the straight line in the same area on

A/A105 and A/A110. He said that he has followed the line on the Ordnance Survey plan which he understands to be the kerb line of the car park.

5.173. Mr Hartles was asked about the flyer at A/A86: he had asked Ms Barham how many had been delivered and she had said six. She was overwhelmed by the response she got. He said that although the residents produced a wish-list of improvements, no-one expected those items to be provided, on the basis of past experience.

5.174. Mr Hartles said that he has used the land to the west of the bund during the relevant period. The embankment was not created until 2002. For the first 14 years of the relevant period there was no barrier, and the Hartles family used the full extent of the land. After 2002 Mr Hartles has made recreational use of the area beyond the bund, passing over it quite freely. It is no impediment to his walking. In his view if one were walking to Hengrove, one would walk on the footpath on the other side of the road. Mr Hartles does walk along the land on the road side of the bund, if he is going that way. The road is quiet. He walks on that part of the land, as on any other part.

5.175. The period during which Mr Hartles did the first journey via Briery Leaze and Bamfield by bicycle was 1987-2004. He did not ride on the application land, but saw others on the land as he rode past. The people were on the verge land and elsewhere. He knew the people he saw by sight, but does not know their names. From 2002 he would only have seen people on the verge, because by then the embankment was built, and he would not have been able to see over it onto the rest of the application land. He did see joggers and walkers with and without dogs after 2002. He knew them by sight. He did not know where they lived, but assumed that they had not come very far. It was a regular occurrence. In his view, if they were not recreating they would be on the pavement side of Bamfield.

5.176. Mr Hartles was asked about the land between 200 and 202 Fortfield Road and the driveway (the former prefab site). He said that he has been into that area, but not regularly: only occasionally. He has used the area to the south of the driveway, but because of where he lives, he tends mostly to go west rather than east. He used to go past that area from 2004-2008 on his way to work. His own use of that area was occasional. He had seen dog walkers there, and youngsters playing there.

Mrs Norma Bullock

[redacted]

5.177. Mrs Bullock provided a written statement dated 27th January 2009[44], an additional statement dated 4th November 2010[45] in relation to the land in the south eastern corner of the amended application land and an undated evidence questionnaire[46].

[44] A/B28
[45] A/B29
[46] A/B30

5.178. Mrs Bullock lived in Whitchurch with her family from 1968-1974, and returned to the area in 1979 with her husband and two children (b. 1975 and 1983).

5.179. Mrs Bullock uses the application land to walk her two dogs. She dog-walks three times a day. Her son attended the Scouts (at the Scout hut on Bamfield Road), and used the application land in the spring and summer months with them for playing rounders, cricket and camp fires, bird watching, nature studies and conker collecting. Mrs Bullock's daughter used the application land with her friends to roller skate along the path, to play tennis, and, with the local Brownies, for nature walks and games. Mrs Bullock took her daughter to the land to teach her to play tennis. Mrs Bullock had also played golf on the land, when the grass was cut to a suitable length. Mrs Bullock used to stop on her way back from ASDA, with her daughter, at the play park. Every year when Mrs Bullock's children were growing up, they had an annual 5th November bonfire with fireworks on the application land, overseen by the parents.

5.180. Mrs Bullock said that she did not know who owned the application land. She knew it as ASDA field. She had never seen any signs on the land. She had never sought permission to use it, nor been told that she could not use it.

5.181. Mrs Bullock made an additional statement in relation to the land added to the application land by amendment, in the south eastern corner. This area is in front of her house. Her children played in the wooded area immediately in front of the house from when they were small until they were grown up, her daughter from ages 5-14 (1983-1997) and her son from ages 8-15 (1983-1990), and made dens and climbed trees. They used the grassed area to play cricket and to meet up with friends. The whole family had used the grassed area for games of badminton and tennis. Mrs Bullock's neighbour's children and their friends now use this area in the same way.

5.182. Mrs Bullock added that the tongue of land between the houses on Kingscourt Close and Cranwell Road at the back of her house had also been used, and, at the time of writing her statement (November 2010) was being used by her grandchildren and by the local children every day. Mrs Bullock's two grandchildren were born in 2001 and 2008. The older child is a step-granddaughter, and came into the family when she was about 4 or 5. The children play on scooters, ride bikes and skate up and down. The area is overlooked by the houses, so that parents can keep an eye on them.

5.183. In her evidence questionnaire Mrs Bullock stated that she had known and used the land since 1978 for dog walking and berry picking daily. Her immediate family used the land for tennis, rounders and dog walking. The Scouts, Brownies and rugby club also used the land. The land was owned by Bristol Council.

5.184. In cross-examination Mrs Bullock was asked about her evidence in relation to the land fronting Fortfield Road. She said that the children spent most time on the main part of the application land, but they also played football, cricket and

badminton on the grassy area along Fortfield Road, and she walked her dogs along there. They met their friends on that area when they came home from school, and built dens in that area, in the trees in front of her house. Sometimes they moved on elsewhere after meeting up, but sometimes they played football there, maybe once or twice a week. It just depended on how they felt. Her daughter played there, so she could keep an eye on her, and Mrs Bullock would go and play badminton or tennis with her there, rather than on the main part of the application land. They gathered in the middle of the field waiting for their friends, and then decided what they would do that evening.

5.185. Mrs Bullock was asked about the use of that area now. Her grandchildren now use that area: they live in Hartcliffe, and come to visit every weekend. There are other children who play there: the children from 3 Bracton Drive play football there every night. She said that she hears children playing there all the time. She walks there every night with the dogs every evening for her last walk, every day, for about 20 minutes.

5.186. Mrs Bullock was asked whether the use of that area was just by people from adjoining streets. She said she did not know whether people came from far and wide to use that area, but people she knows from the area who walk their dogs, use that area as well as the main area. She agreed that the use of that area is concentrated in those who live by the adjoining streets.

5.187. Mrs Bullock was asked about the area between 200 and 202 Fortfield Road and the driveway from Fortfield Road to the main field. She said that her dogs go into that area. It is possible to get in. She has been in there, but does not go in very often. She walks past and the dogs go in, and there are children who play in that area. Her own use is occasional. She does not know how often the children play in there. She hears voices from in there, having fun and laughing when she walks by, although she does not know what they are doing. She does not think they are doing anything illegal. The children build dens in that area. Quite often when she is dog walking, she can hear children in there, not just in the summer, they have been there recently in the winter time.

5.188. Mrs Bullock was asked about land to the west of the bund. She acknowledged that the effect of the erection of the bund has been to create a grass verge on the road side. She walks along there to get to the airport (Hengrove Park) area. She walks across the field to where the toilets used to be and crosses the bund there, onto the area near Pinkham's Twist, the wider area. She uses that land as a place of transit to go further afield to the west.

6. The Objector's witness evidence

Witnesses who gave oral evidence

6.1. The following three witnesses gave oral evidence on behalf of the Council at the final hearing.

Mrs Susan Comer
Bristol City Council

6.2. Mrs Comer provided a written statement dated 19th January 2011. Mrs Comer is employed as an Estates Information Officer within the Corporate Property Department of the Council, a post which she has held since July 2000.

6.3. Mrs Comer's role is to provide officers and members of the Council and the public with information in relation to land and assets held by the Council. She is part of a team which maintains a database including location plans, of all the Council's land interests, including brief details in relation to freeholds, leaseholds, easements, way-leaves and the like. The records also note current land usage, along with records of any change of use or appropriation.

6.4. In 2001 the system of Terrier cards and files was replaced with an electronic Property Database. The data from them was transferred onto the Database. In 2005 the Council introduced the Uniform Estates Management Application which replaced the electronic Property Database. However, the Terrier records are not obsolete, and are still used daily in connection with the provision of property information.

6.5. Mrs Comer investigated the Council's title to the areas added to the original application land. She viewed the original conveyances and the City and County of Bristol (Wells Road, Whitchurch) CPO 1946. Where necessary she downloaded official copy entries of titles registered at the Land Registry. She also viewed officers' reports and minutes of meetings held by the Housing, Planning and Public Works and the Public Works Committees. From those documents she produced the working plans at tabs 14, 15 and 16 of the Objector's bundle.

6.6. Mrs Comer also investigated the history of the Development Plans produced by the Council from the 1950s to February 1964. She carried out a trawl of the Record Office database and viewed all the documents which appeared to her to be connected to the Council's Development Plans of the 1950s and 1960s. The first development plan dates from 1952, prior to the closure of Whitchurch Airport, which she understands occurred in 1957. The next plan is dated 1956. She produced copies of the 1956 Development Plan and of the amendments made to it in 1959. No further amendments were made to the 1956 plan between 1959-1963. The Council's Estates' GIS team provided a copy of the 1959 amendment map super-imposed onto the application land.

6.7. In cross-examination Mrs Comer was asked where she got the information from for the plan at 14. She does not draw the maps herself, but draws them up from the database and decides on colours and shading. One of the cartographers in the GIS team drew the plan. The layers which she added to the base map were already on the system and she chose to have them shown on the plan at tab 14.

6.8. Mrs Comer is not familiar with the lease plans to the ASDA head-lease or sublease, and does not know whether or not the green hatched area on the database is an accurate refection of those plans. She thinks it was Rachel Johnson in the legal department who asked her to include the lease area on this plan.

6.9. Similarly in relation to plans 15 and 16, the outlines come from the database. The plan at tab 15 shows the Land Registry titles, whereas the plan at tab 16 shows how the Council derived title to the land shown. Compulsory registration came in in this area in December 1967. There are some pieces of land in the Whitchurch area which were registered voluntarily in the 1930s. There has been a project in the recent years to register unregistered land voluntarily. Mrs Comer has no explanation for why a white strip appeared on the plan at tab15, but said that often when titles are registered, they do not quite match up.

6.10. Mrs Comer said that she thought she had read Counsel's submissions as part of her preparation for the inquiry, but was not very familiar with them, and she had really just been asked to provide information.

6.11. Mrs Comer was asked about paragraph 6 of Mr Reichel's statement: she looked on the database and found that the land was sold to the Pinkham's Trust. It was her who was asked to look for evidence of any appropriation away from public open space in relation to the land which fell within the area zoned for open space in the 1959 Amendment to the Development Plan. She did not find evidence of any other appropriation either during the course of her researches. To provide this information she just looked at the record card, and did not look at any of the minutes of the Council.

6.12. In relation to the St Giles Estate, it was Mrs Comer who looked at the record cards or the database and informed Mr Reichel that those records showed that the land was appropriated to housing purposes in 1966. She did not look at the Council minutes.

6.13. She was not asked to look at the appropriations in relation to the Court Meadow estate area to the south west of Briery Leaze Road, which straddles pink, green and purple areas on the Town Map.

6.14. The Definitive Map is also on the mapping system, and Mrs Comer added that layer to provide the information in paragraph 9 about footpath 508.

6.15. Mrs Comer was asked about the information Mr Reichel says that she provided that the land coloured blue on tab 16 is held for highway purposes. She provided that information from the record card. She found the conveyance and the minutes which referred to the Fortfield Road extension. The record card[47] says Fortfield Road extension, and that is why she told Mr Reichel that it was acquired for highway purposes. She agreed that she does not know the actual purpose for which the land was purchased, except from the statement on the record card that the proposed use was for the Fortfield Road extension. She cannot remember whether she was asked to look for evidence of any appropriation in relation to that area.

[47] A/A23

6.16. Mrs Comer was asked about the information provided in relation to the ownership and development of the Elm Tree Park Estate by Carlton Homes in the early 1970s. The record cards and paper plans which go with the record cards are the source of the information. She also looked at the title plan to BL12970, and provided the copies of the transfers at O/tab27/6. She did not read the documents, she just downloaded them and provided them.

6.17. In re-examination Mrs Comer said that the documents relevant to the Fortfield Road extension are those behind tab 21. She found the minutes.

Mr Nicholas Jenkins
Bristol City Council

6.18. Mr Jenkins provided two written statements dated 7th April 2009 and 18th January 2011. Mr Jenkins is employed by the Council in its Drawing Office, within the Property Department, and has held that post since 1991. He is a GIS/CAD Specialist in the Business Information Section of the Council's Property Division.

6.19. Part of Mr Jenkins' responsibilities are to draw up plans for use by officers and members and in connection with the maintenance of property records, and to provide information derived from those plans and records.

6.20. The procedures in place in 1991 had been in place for a number of years. Plans were produced by hand, and areas were calculated using a polar planimeter. The results were not very accurate because of the difficulty in tracing the shape of pieces of land and because of irregularities in the surface of the paper. Measuring was carried out three times, and the mean of those results used.

6.21. The move to digital technology has resulted in great increases in accuracy in plotting boundaries and in making area calculations. It is now possible to copy plans from source documents with a degree of accuracy which was unattainable in 1991. The information on historic maps and plans can be reproduced using ESRI ArcMap Geographical Information System (GIS). The orginal is scanned in and saved. The Council's Terrier maps were scanned between 1996-1998 by an external contractor (Terraquest), converting the Council's property records into a seamless digital format. Other maps and plans have been scanned in house.

6.22. Using the Ordnance Survey's MasterMap as a base, the scanned images can be positioned, by matching up known points, such as buildings, to produce the best possible fit.

6.23. Mr Jenkins matched the Town Map extract onto the current Ordnance Survey basemap using the intersections of the OS gridline.

6.24. As the OS mapping was updated, and the Terrier maps had to be periodically updated and redrawn, boundaries were copied by hand from one edition to the next (leading to slight discrepancies between versions at the end of W20/3), and new boundaries were added as the records were refined to reflect changing

land uses, new acquisitions and disposals. Through this process the area identified as W20/3 had modified from the 324 acres appropriated in 1964 by the Planning and Public Works Committee to the parcel of 183.99 acres noted as the area of W20/3 on the Terrier reference card of 1980. These areas had been translated into digital form by tracing the original boundaries in ArcMap and transposed onto the latest Ordnance Survey maps for the area to produce the plan series N5097.

6.25. Mr Jenkins explained that before digital mapping was introduced, the Ordnance Survey re-published its mapping only when a certain number of changes had occurred in a particular area, and as a result the 500 meters square maps might be updated at different times, so that a development which spread over two or more squares appeared piecemeal over a number of years, according to which square was updated first. Mr Jenkins gave as an example plan N5097h, which he had drawn up.

6.26. Mr Jenkins also drew up plans N5828a, N5829a and N5097k. Mr Jenkins produced the following plans: Tab 6, page 29, 30, 32 and Tab 31, page 2.

6.27. Mr Jenkins was asked about the plans at tab 6. The Development Plan was at a scale of 6 inches to a mile. Mr Jenkins did not use the original application plan, but was provided with an A4 photocopy of the original, such as that at tab 13, to work from. However the application plan is on the current Ordnance Survey base map, so matching it up and drawing it on the base map was a relatively easy job. The areas shown on the Development Plan map are proposed areas on a simplified map base (for instance there are blocks of houses rather than individual houses, and the road widths are increased so that they show up better), so there are almost bound to be differences between the simplified map base and the large scale map base now used. The Development Plan map is a descriptive map, rather than a survey map, as the Ordnance Survey map is. It is not in any way intended to be used, say, for measurement purposes. Mr Jenkins said that you could not use it for that.

6.28. In relation to the plan at tab 31, Mr Jenkins has been responsible for just about all the layers on the base map. The last Terrier plans, those in use in 1996, were scanned in by Terrafirma. There are earlier sets which have not been digitised. The layers showing W20/3 as at 1st April 1964 and as at 1st April 1980 had to be recreated from older Terrier maps.

Mr Jan Reichel
Bristol City Council

6.29. Mr Reichel provided written statements dated 21st May 2009, 10th February 2010 and 18th January 2011. Mr Reichel is a chartered surveyor, employed by the Council as a Principal Project Officer in its Corporate Property Team.

6.30. Mr Reichel confirmed that Mrs Comer had carried out the investigations necessary to enable him to deal with a number of the matters which he addressed in his statement. Mr Reichel said that Counsel had asked him to investigate the instances in which built development appeared to have taken place on an area of the land coloured green i.e. zoned as public open space on

the 1959 amended development plan. Mrs Comer carried out the research, and Mr Reichel summarised the content of the documents she found in his statement and provided his interpretation of those documents. Mr Reichel stated that there appeared to have been no appropriation away from public open space of the land zoned for open space on the 1959 Amended Development Plan which was subsequently sold to Pinkhams Twist Co-ownership Housing Society and developed as Pinkhams Twist. The land required for the St Giles Estate was appropriated for housing purposes. There was no relevant appropriation for the Elm Tree Park housing estate.

6.31. Mr Reichel made various comments in relation to the likelihood of particular parts of the application land having been used for lawful sports and pastimes, and in relation to what he perceived to be the lack of logic behind the selection of the boundaries of the application land in parts. In particular he said that he could not understand the boundary in the vicinity of the ASDA car park, and he questioned whether the footpaths and hedgerows to the north and northwest of Cranwell Grove were intended to form part of the application land.

6.32. Mr Reichel said that following an inspection of the blue land, he considered that it was unlikely that that land was used other than on an occasional basis, perhaps by children, for recreational purposes. Similarly, the orange land was heavily wooded and he thought was probably only rarely used by the public. He thought that the tongue of land between Cranwell Grove and Kingscourt Close was probably used mainly as a place of transit rather than as a general play area.

6.33. Mr Reichel said that the toilet block fronting Bamfield Road had been built in around 1978 and was closed on 1st June 2008. He questioned why it had been added by amendment to the application land. He also questioned the inclusion of the "plug" of land on the eastern boundary, just to the north of the electricity sub-station. He stated that this area in fact formed an access point, leading between the buildings into Fortfield Road. There is a substantial raised manhole cover and inspection chamber within this area. Mr Reichel said that it was unlikely that recreational activity had taken place there.

6.34. In cross-examination Mr Reichel was asked about the Pinkham's Twist development: he agreed that there is no evidence of appropriation of the land on which that development is built after 1964. Mr Reichel agreed that he had previously believed that there was evidence that this land was appropriated in 1980, but he now believed that it was appropriated in 1964. The land coloured green and the land coloured pink on the Amended Development Plan were sold in one transaction.

6.35. The St Giles estate appropriation referred to an appropriation of 32 acres of land. He did not measure the area of the St Giles Estate, and did not know whether the whole area of the estate was 32 acres. He said that he had assumed that the appropriation related only to the area shown green on the development plan. He agreed to provide a measurement later in the day. He agreed that the information on the Terrier card did not suggest that only part of the St Giles Estate was being appropriated. He could not think of any other document

which suggested it was only part of the estate which was being appropriated, but said he would have to re-read the minutes to be sure. He said that it may be that his understanding came from the reference to the land coloured pink on the plan on tab 6, page 36, but accepted that the land shown on the development plan coloured pink was zoned for housing, so that could not be it. He agreed he was starting from the assumption that only the land zoned for open space would have had to be appropriated. He agreed that all the land was held by P & PW committee, and that there was nothing in the minute which suggested that the appropriation related only to part of the land.

6.36. Mr Reichel was asked about the fact that, on the map showing the Amended Development Plan superimposed onto the present-day Ordnance Survey base map, it appears that part of the car park for ASDA is on land zoned for public open space. He said that he would expect the boundary to have run along the hedgerow, and that maybe the discrepancy arose from the superimposition of the maps. The green line on tab 14 page 1, is intended to run along hedgerow. He agreed that the plan to the sub underlease could only show what ASDA believed its boundaries to be, at best.

6.37. The pink land on Tab15 was not appropriated to highway purposes: Mr Reichel understands that it was acquired for those purposes. He was taken to the minutes and agreed that it appeared possible that part of the land might be used for housing. There are pieces left over from the area used for highway, which he considered were available for highway purposes. He infers that the land was acquired for highway purposes from the records: in particular the Terrier record referring to the Fortfield Road extension, and the references in the minutes to the Fortfield Road extension. He agreed that the area was more extensive than was required for the road extension. He was not sure that the reference to housing being developed on both sides of the new road referred to the Fortfield Road extension part of the road. He was referred to the 1959 development plan, and agreed that the road apart from the extension existed and had been developed. He thought that the minutes might refer to the part of the road which had already been developed. He thought they were referring to the building of the road to facilitate transport to the estate. He did not know why the minutes referred to development on both sides of the new road, rather than the existing road.

6.38. Since the application was submitted Mr Reichel has visited the land a dozen times. Before that he had visited the land once, to have a look at ASDA. The comment is based on his experience on the occasions when he visited. He took the photographs at tab 31. He went into the copse area about 3 times. He went to the grassed area fronting Fortfield Road only 3 or 4 times, as that was added later. He has walked down the tongue of land between Cranwell Grove and Kingscourt Close once.

<u>Witnesses on behalf of the Objector who did not give oral evidence at the final hearing</u>

6.39. The following witnesses provided written statements and some of them gave oral evidence at the hearing into the preliminary issue. I have re-read the statements when preparing this report and have incorporated references to

particular pieces of evidence where relevant, but have not summarised these statements here.

Name	Date of statement(s)
Mr David Cheesley	08.04.2009 21.05.2009
Mr Philip Hodges	20.05.2009 11.02.2010
Mr David Miles	10.02.2010
Mr Gary Ratcliffe	07.04.2009

7. The documentary evidence

7.1. I have re-read all the documents submitted by both parties, and here set out details of those which I consider to be the most relevant and the inferences and conclusions I have drawn from those documents. I have set out the documents in chronological order, and have divided this section into specific periods, for ease of reference. Before turning to that task, I set out some general comments in relation to various categories of documents

The minutes of the Council

7.2. The Minutes of the Council are kept securely and are in good order. The Minutes are bound in books, and any report to a meeting is bound in the book with the minutes of the meeting at which the report was received. However, plans referred to in minutes and reports which would have been on display at the meeting have not survived.

The Development Plan

7.3. The Council produced copies of its 1956 Development Plan and of the 1959 Amendment to that Development Plan. Those documents were in good order, and I was satisfied that they were accurate.

The Terrier records

7.4. The Terrier cards provide useful corroborative evidence, but do not appear to be completely reliable. The entries on the cards are not dated and neither area they signed. Mr Cheesley's evidence was that the Terrier record cards ceased to be updated in 2001. Mr Cheesley stated that the data held on 5468 Terrier cards has yet to be entered on the current electronic database. Mrs Comer confirmed that the Terrier records are not obsolete and stated that they are still used on a daily basis in connection with the provision of property information.

7.5. Mr Cheesley described the numbering system used for the Terrier records as follows: the City was divided into grids, with each square being a 1/1250 ordnance survey plan square (500 metres square). The grid is numbered A-Z vertically and 1-34 horizontally. Following a land purchase, a Terrier card would have been completed and given a reference number. The first purchase on square W20 would have been W20/1, and the next W20/2, and so on. The land parcel concerned was plotted on the Terrier plan and coloured in pink.

7.6. There are some inaccuracies in the Terrier records: for instance X21/3 records the area as 0.187, but gives the purchase price as the whole of the purchase price for the 0.187 acres plus the 1.42 acres acquired by the Council in May 1965. One of the W20/3 cards states that the land appropriated in 1963 for £570,000 included the land formerly within Terrier record X21/1, but that land was not acquired by the Council until March 1965. That card does not list X21/2 within the former Terrier references of the land now comprising W20/3, whereas the later card recording the 1980 transfer does. The record for X21/2 records that that land was appropriated by the Planning and Public Works Committee and refers to Terrier record W20/3. It therefore seems that this was an omission.

7.7. Historic Terrier plans for grid square X21, which includes most of the application land (although not the most southerly part) were produced by the Council. As with the Terrier record cards, the Terrier maps provided by the Council are helpful, but cannot be regarded as wholly reliable: the annotations on those maps are undated and unsigned. On the map provided for the approximate period 1948-1950, the location of Terrier reference W20/3 has been marked, but, from the entries on Terrier card W20/3, it seems that that record was a composite record created at about the time of the appropriation in 1963 and therefore would not have existed in 1948-1950: the annotation must therefore post-date the period to which the map relates.

Official copy entries of title and ownership of the application land

7.8. The Council is the freehold owner of the whole of the amended application land. The Council's title is registered at HM Land Registry under five different title numbers: 70565, BL70565, BL60840, BL12970 and BL1536. Part of the area added by amendment to the application land in the south-eastern corner is unregistered. The Council produced a helpful plan[48] showing the areas held under each title number and the unregistered land.

7.9. The Council also produced two plans showing when the application land had been acquired by the Council, according to its records. The first plan was produced before the application land was amended.[49]. It was stated to be for identification only The land the subject of the original application was shown as having been acquired, as to the part coloured light blue (a small part in the north-western corner) in 1929, as to the part coloured green (the bulk of the application land) in 1937, as to the part coloured yellow (a small area in the south-western corner, opposite the end of Cranwell Grove) in 1938, as to the part coloured pink (the north eastern corner, partially enclosed by the L-shaped hedge) in 1939. Following the amendment of the application land an additional plan was produced[50], showing the eastern boundary and the south eastern corner of the application land as amended in detail. That plan showed that the area coloured orange (the former site of the prefabs and a thin strip of land to the rear of the rear boundaries of the houses in Fortfield Road) was purchased on 3rd June 1948, the area coloured dark blue (the grassed area to the west of Fortfield Road) was purchased on 15th March 1965, and the purple

[48] Plan No Whitchurch 7, 29th October 2010
[49] Plan No N5028c, 1st April 2009
[50] Plan No Whitchurch Nov 2010, 24th November 2010

area (the wooded area in front of the houses on Bracton Drive, and along the eastern edge of the ASDA field) was purchased on 17th May 1965. For clarity, I will refer to the parts of the land by reference to their colours on these plans.

1929-1939 documents

7.10. The 1929 conveyance of the light blue land was not produced by the Council. Extracts from the Council's records[51] confirm that the Council did in about 1929 acquire land for the purposes of a Municipal Aerodrome. It seems likely from the Minutes that the vendors of the land acquired were Mr Wise, Mr Adams and Mr Broad. It is not possible from the Minutes to identify the land in question, other than its general location at Whitchurch. However, it seems likely that the land acquired in 1929 included the blue land and that the blue land, therefore, was acquired under the powers contained in the Air Navigation Act 1920. A Terrier card, X21/2, was produced by the Council for an area of 33.972 acres giving the date of purchase as 3rd August 1929, the vendor as T Adams, the purchase price as £2,378 and the proposed use as airport.

7.11. The 1937 conveyance of the green land was produced by the Council[52]. The recitals to the Deed record that the land was acquired by the Council under the powers contained in the Air Navigation Acts 1920 and 1936. The land acquired was 104.202 acres of land owned by Mr Adams and known as Court Farm. The acquisition of this land was referred to in the Minutes of the Airport Committee Meeting held on 20th April 1937, the Minutes of the Airport Committee Meeting held on 15th June 1937 and the Report by the Airport Committee to the Council Meeting held on 27th July 1937. A Terrier card, W21/2, for this land was produced by the Council, which accurately records the details of the acquisition.

7.12. The 1938 conveyance of the yellow land was produced by the Council[53]. The recitals to the Deed record that the 5.928 acres of land conveyed were acquired by the Council in pursuance of the powers conferred on them by the Bristol (Airport Extension) Compulsory Purchase (No.2) Order 1937 and the Air Navigation Acts 1920 and 1936. The land acquired was 5.928 acres forming part of Rookery Farm. The vendor was two Misses Wise and Mr Greenham, as Personal Representatives of Mr Allen George Wise. The acquistion of this land was referred to in the Minutes of the Airport Committee Meeting held on 15th June 1937, the Minutes of the Airport Committee Meeting held on 20th July 1937 and the Report by the Airport Committee to the Council Meeting held on 27th July 1937. A Terrier card, Y21/1, for this land was produced by the Council[54], which accurately records the details of the acquisition and states that the proposed use of the land was for the airport extension.

7.13. The 1939 conveyance of the pink land was not produced by the Council. The official copy entries of title number BL60840 which includes the pink land,

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[51] Minutes of Town Planning Committee Meeting, 23rd April 1929 and Minutes of Town Planning Committee Meeting, 17th June 1929

[52] Bundle tab 11.

[53] Bundle tab 12.

[54] Reference Y21/1

record at entry number 1 on the Charges Register that the land in the title was the subject of a Transfer dated 12th January 1939 and made between (1) the Gilda Investment Company Limited and (2) The Lord Mayor Aldermen and Burgesses of the City of Bristol. It therefore appears likely that the pink land is the 12.725 acres of land on the east side of the airport referred to in the Minutes of the Airport Committee Meeting held on 15th June 1937 and in the Minutes of the Airport Committee Meeting held on 20th July 1937 as belonging to Chessington Land Company, and referred to in the Report by the Airport Committee to the Council Meeting held on 27th July 1937 as belonging to Gilda Investment Co Ltd. The Minutes of the Airport Committee Meeting held on 16th November 1937 record that the Town Clerk reported to the Committee that the Air Ministry had confirmed the Compulsory Purchase (No. 2) Order for the acquisition of lands from the Gilda Investment Company, the Misses Wise and Mr White. A Terrier card, W22/1, for this land was produced by the Council which records the purchase of the land on 12th January 1939 by the Airport Committee. A note on the Terrier states that the original purchase was number 3 in the Bristol (Airport Extension) Compulsory Purchase (No. 2) Order 1937, confirmed on 9th ?November 1937. It therefore seems likely that this land was acquired, in the same way as the land acquired in 1938, pursuant to the powers conferred on the Council by that Order and by the Air Navigation Acts 1920 and 1936.

1940-1950 documents

7.14. The Minutes of the Meeting of the Airport Committee held on 9th March 1948 record that Committee's agreement to the appropriate of 12.75 acres of land at Fortfield Road at a fair value of £2500 by the Smallholdings and Allotments Committee. The Minutes of the Meetings of the Small Holdings and Allotments Committee held on 11th March 1948, 13th May 1948 and 5th May 1948 record that an appropriation was provisionally agreed (subject to approval by the Council and the consent of the Ministers of Health and Agriculture and Fisheries) between the Airport Committee and the Allotments Committee of 12.13 acres of land west of Fortfield Road. The land is described as being land which was purchased by the Council in 1939 for possible future extensions of the Airport. The plan referred to in the Minutes of the Meeting of 5th May 1948 does not survive.

7.15. The Minutes of the Smallholdings and Allotments Committee meeting held on 13th May 1948 record that the Town Clerk reported that the Council had approved the appropriation at its meeting on 11th May 1948. A Terrier card, reference W22/1, was produced, relating to 12.131 acres of allotment land to the west of Fortfield Road, Whitchurch. The card states that the land was purchased on 12th January 1939 from Gilda Investment Company and was appropriated on 11th May 1948 by the Smallholdings and Allotments Committee from the Airport Committee for £2500. I am satisfied therefore that the pink land was appropriated to be held for the purposes of allotments on 11th May 1948.

7.16. The 3rd June 1948 conveyance of the orange land was not produced by the Council. A Terrier card, X22/1, was produced by the Council giving the date of purchase as 3rd June 1948, the vendor as Gilda Investment Co., the area of

land acquired as 52.46 acres and the purchase price as £35,000. The proposed use is given as housing. No minutes were produced which were relevant to this acquisition.

1951-1959 documents

7.17. The Minutes of the meeting of the Airport Committee held on 9th August 1955 refer to the proposed purchase of Lulsgate Airfield, and to the suggestion that the Ministry of Transport and Civil Aviation's terms for the purchase of Lulsgate would be contingent on the derequisition of Whitchurch by 31st December of that year. The Council approved the Airport's Committee's report with regard to the purchase of Lulsgate, and the removal of its operations from Whitchurch to Lulsgate as soon as practicable at its meeting on 13th September 1955. The subsequent minutes of the Airport Committee's meetings, and in particular those of its meeting on 9th March 1956 and its report to the Council's meeting of 10th July 1956, show that Whitchurch Airport was derequisitioned on 30th June 1956. The report records that the Minister had agreed to made ex gratia payments towards the such costs of restoration of the land as he approved. He had indicated that he would be prepared to consider a claim for ex gratia payment in respect of the land zoned for housing, but would not be prepared at that time to consider proposals for the development of the land zoned as open space, although he would consider a claim at a later date. The Committee reminded the Council that the Royal Show was to be held on the land in 1958, and that therefore the land could not in any event be developed for open space before late 1958.

7.18. The Council's first Development Plan under the Town and Country Planning Act 1947 was approved by the Minister in September 1956.

7.19. The minutes of the meeting of the Airport Committee held on 16th September 1958 note that the City Engineer and Planning Officer reported that it was proposed to amend the Development Plan for the former airport area, and that provision was being made for the appropriation of various areas of the site by the Housing, Education and Planning and Public Works Committees. The Airport Committee's requirements for reinstatement after its use by the Royal Agricultural Show were heavily influenced by the proposals for redevelopment of the land. The area where the main disturbance had taken place was within the part of the site to be appropriated eventually by the Planning and Public Works Committee for open space purposes. The Planning and Public Works Sub-Committee approved and adopted the Chief Engineer's recommendations in relation to the reinstatement works at its meeting on 15th October 1958.

7.20. The Airport Committee considered a suggestion that the Planning and Public Works Committee should be asked to act as its agents in relation to the Whitchurch airport site at its meeting on 21st October 1958, and resolved to request its officers to consider the matter and report to its next meeting. The Planning and Public Works Committee resolved to agree to act as the Airport Committee's agent at its meeting on 5th November 1958, pending appropriation of the lands and buildings for their ultimate purposes. The Airport Committee resolved to approve the Planning and Public Works

Committee taking over the management of the site at its meeting on 18th November 1958.

7.21. The Planning and Public Works Sub-committee approved and adopted the recommendations of the City Engineer and Planning Officer in relation to Whitchurch Airport and contained in his report to its meeting of 12th November 1958. The Engineer recommended that as a temporary measure, until a decision had been reached with regard to the amendment to the Development Plan for the re-zoning of the land in the airport area, parts of the land should be used temporarily for playing pitches and a club house and dressing room. His report to the meeting of the Planning and Public Works Sub-Committee held on 23rd December 1959 shows that these proposals were carried into effect.

7.22. The Council sealed its proposed amendments to the Development Plan on 14th October 1958[55], and the Minister approved Development Plan Amendment No 1 (1959) on 18th December 1959. The amendments concerned the development of the Whitchurch Airfield Area, including the amended application land. The proposals in relation to the Whitchurch land resulted in an increase in the area of land proposed to be developed for residential purposes from 1393 acres, accommodating approximately 47,500 persons to an area of 1619.4 acres, accommodating approximately 58,820 persons. The Planning and Public Works Committee's report to the Council states that 226.4 acres of the Whitchurch lands were proposed to be developed for residential purposes. The total areas provided for public open space were revised upwards by the amendment from 925.51 acres for playing fields and 1662.32 acres for amenity areas (i.e. all areas other than those suitable for use as playing fields and children's playgrounds) to 1096.11 acres for playing fields and 1710.87 acres for amenity areas (respectively an increase of 170.6 acres for playing fields and 48.55 acres for amenity areas, total 219.15 acres). The Planning and Public Works Committee's report to the Council shows that this additional area was part of the Whitchurch lands. The area of land proposed for allotments was reduced by the amendment. The Council did not provide a copy of the map to the 1955 Development Plan, and the copy of the 1959 amendment plan was poor. However, as the amendments only affected the area within the black line shown on the map, it seems likely that the reduction in allotment provision must have resulted from land within the area affected by the amendment which had previously been zoned for allotments having been zoned for some other purpose. Further parts of the Whitchurch lands were zoned for educational purposes, for a hospital, for a health clinic, for a public library, for a fire station and for public baths.

7.23. The Applicant asked me to note the words of the general introduction to the Development Plan:

> "The City of Bristol Development Plan comprising the 6 inch scale Town Map and accompanying documents indicates the broad

[55] The report of the Planning and Public Works Committee to that meeting was provided by the Applicant at G/31.

intentions of future development proposals which in the opinion of the City Council can be undertaken within the period ending 20 years after the approval of the Plan, and certain proposals which are expected to be undertaken within the subsequent ten years. Owing to the limitations of scale the maps do not show precise zoning in detail and many of the proposals are shown diagrammatically. The Development Plan will be reviewed in the light of progress made and any change in circumstances which may arise from time to time."

and the following words under the heading "Programme":

> "In view of the many factors influencing the rate of development which are outside the control of the City Council, there is no assurance that all the development proposed will in fact take place, or take place in the order indicated."

These provisions were unchanged by the 1959 Amendment.

7.24. I found Mr Jenkins' maps showing the amended Town Map superimposed onto a current Ordnance Survey base map helpful, as a general guide to the approximate positions of the various zonings in the amended Town Map. The bulk of the application land (the whole of the area from a line running east-west immediately to the north of the Elm Tree Park estate) was zoned as public open space. The remainder of the application land was zoned as an area primarily for residential use.

7.25. The Applicant also invited me to consider the zoning of other nearby areas: the St Giles estate, to the north east of the application land, has been built on land zoned in part for housing and in part public open space (approximately 60% on housing and 40% on public open space); Pinkhams Twist, to the north of the application land, has been built on land zoned in part for housing and in part public open space (approximately 50% on housing and 50% on public open space); the Court Meadow estate, to the south west of the application land, has been built on land zoned in part for housing, in part for public open space and in part for industrial purposes.

7.26. Mr Webster sought to persuade me that the effect of the zoning in the Development Plan, insofar as it related to land owned by the Council, was to effect an appropriation of that land to the purpose for which it was zoned on the Development Plan. I cannot accept this submission. Zoning for planning purposes and appropriation of land to be held under particular statutory powers enjoyed by the Council are two different concepts. The Development Plan, as it specifically states, sets out the Council's broad intentions for future development of the land within its area. An appropriation of land from one statutory purpose to another involves a decision by the Council to change the statutory purpose for which the land is held. My conclusion in this regard is supported by the fact that the Council in 1964 resolved to appropriate 341 acres of land at Whitchurch zoned for various purposes in the Amended Development Plan for planning purposes. The minutes relating to that decision show clearly that the Council's own view at that time was that the land being

appropriated was, immediately prior to the appropriation, held for various statutory purposes, which did not necessarily coincide with the proposed future use of the areas concerned as set out in the Development Plan.

1960-1962 documents

7.27. There is mention in the Engineer's Report to the Sub-Committee's meeting held on 17th February 1960 of unauthorised use of the Whitchurch site for car and motorbike racing, and by a Model Aircraft Club. The Committee instructed its chair and the Engineer to consider the various applications for permission to use part of the site, to hold discussions with the applicants if necessary and to report back to the Committee.

7.28. The meeting of the Airport Committee held on 31st October 1961 was attended by the Chairman of the Planning and Public Works Committee and the City Engineer and Planning Officer. A report submitted to the Planning and Public Works Committee was read to the Airport Committee. The minutes record that the Committee was told that the airport land comprised approximately 450 acres, of which at that time 130 acres was available for housing re-development. Before development could take place on the site, and in fact before planning permission could be granted, it would be necessary for the brook which ran along the eastern side to be re-aligned and regraded, and in conjunction with this, it would be necessary to re-align and regrade the remainder of the brook from the edge of the Whitchurch Airport land to the River Avon. The cost of those works within the airport lands was £50,000, and the cost of the works beyond the airport land was £130,000. The landowner of the adjacent land would be asked to make a small contribution. When this work was completed, the land could be appropriated if necessary, or sold for private housing development. The income would be credited to the Airport Committee. It was anticipated that the income would exceed the required £180,000 expenditure. The City Treasurer stated that, if the land was to be sold for private housing development in small plots, it would be necessary for the roads and drains to be included, and this might cost another £250,000. The Town Clerk told the Committee that if they proposed to sell the land for housing development [as one large area] they should inform the Housing Committee, because that Committee's present policy was that land for housing development in the City should be sold in small plots. There was some discussion as to whether the Planning and Public Works Committee might pay for the improvement works to the brook beyond the boundary of the Airport land. The Chairman of the Planning and Public Works Committee indicated that the Committee's view was that the Airport Committee should do all the works, but if they did not wish to, the Planning and Public Works Committee might be prepared to appropriate the land, although the appropriation figure would be lower than that which would be obtained on a sale if the land were ripe for development, i.e. with the improvements to the brook completed. The Chairman of the Airport Committee stated that the Committee's wish was to use the profits from the sale of the land for the development of Bristol Airport and that if no profit were to be obtained because of the drainage works, that would severely handicap the Committee's work. The Airport Committee approved the improvement works in the sum of £180,000 in principle, subject to the probable sale price of the land being in excess of the cost of the works,

and requested a report from the City Valuer as to the price obtainable for the land on sale.

1962-1964 documents

7.29. At its meeting of 20th November 1962, the Airport Committee resolved to request the Planning and Public Works Committee to consider the appropriation of the land at Whitchurch Airport which was set aside as a public open space and to let the Airport Committee have its views on that.

7.30. At the Airport Committee meeting held on 19th February 1963, the Chairman referred back to the discussions at the 31st October 1961 meeting and stated that the Housing Committee had objected to the proposal to sell the land to one developer. The City Valuer stated that the total acreage of the airport land was approximately 379 acres, all of which was still in the ownership of the Airport Committee. 200 acres was reserved as a public open space, and 133 acres for housing development. Other land was reserved for other corporation purposes. The Housing Committee had agreed to appropriate 26 acres of land, subject to City Council approval. The balance was to be sold for private development. The City Valuer advised that the possible sale price of the balance of the 133 acres, once the 26 acres had been appropriated by the Housing Committee was approximately £185,000, which would only just cover the cost of the drainage works once legal costs had been taken into account. The City Treasurer stated that he understood that the Planning and Public Works Committee would apply for loan sanction to undertake the drainage works, and that the Airport Committee would undertake to reimburse the Planning and Public Works Committee once the land had been sold and the purchase money received. The amount to a reimbursed would be a matter of negotiation. If loan sanction was forthcoming, the works could in this way be put in hand immediately, and the money repaid by the Airport Committee when the land was sold. The Committee resolved to request the Planning and Public Works Committee to undertake the drainage works on the understanding that a payment of an amount to be agreed would be made by the Airport Committee towards the costs of those works after the land was sold, and subject to the Planning and Public Works Committee agreeing to that, to recommend to the City Council the sale by auction of approximately 107 acres of land at Whitchurch for private housing development. The Committee also agreed the Housing Committee's request to appropriate the 26 acres, and resolved to request the Planning and Public Works Committee to appropriate immediately the 200 acres approximately reserved and already used as a public open space and the Education Committee to appropriate immediately the land reserved for school sites.

7.31. The Minutes of the Meeting of the Planning and Public Works Committee held on 20th February 1963 record that that committee acceded to the Airport Committee's request that it should undertake the drainage works, and resolved to recommend to the Council that it should apply for consent to borrow £180,000 in connection with those works. In relation to the request of the Airport Committee that the Planning and Public Works Committee should appropriate the land zoned for open space purposes, the Planning and Public Works Committee resolved to instruct its officers to submit a report to the

meeting to be held on 6th March 1963, giving details of the financial implications of the outstanding appropriations between the Planning and Public Works Committee and other Committees. The Planning and Public Works Committee also resolved to grant, subject to a variation in the density from between 13 and 6 houses to the acre to between 13 to 8 houses to the acre, outline planning approval in principle to a layout prepared by the Engineer and Planning Officer for the whole of the areas north and south of the Whitchurch Land zoned for residential purposes, including not only the 132 acres of land in the ownership of the Airport Committee, but also 120 acres of privately owned land, 17.35 acres of land in the ownership of the Housing Committee required for public buildings and shops, and 8.4 acres of land in the ownership of the Allotments Committee. The layout plan referred to does not survive.

7.32. The Minutes of the Meeting of the Council held on 12th March 1963 show that the Council received a report from the Airport Committee concerning the land at Whitchurch, and resolved to authorise the Committee to sell by auction approximately 102 acres of land at the former airport at Whitchurch for private housing development. The land was described as being in two distinct plots, divided by land reserved for open space. The Council also received a report from the Planning and Public Works Committee in relation to the improvement of Brislington Brook (the drainage works), approved the scheme and resolved to apply for consent to borrow £180,000 for the works.

7.33. The Airport Committee made various resolutions at its meeting of 19th March 1963 in relation to the arrangements for the sale of the land at Whitchurch. The matter was further considered at a Special Meeting of the Airport Committee held on 1st April 1963 at which the City Engineer and Planning Officer outlined the difficulties which had arisen in relation to the proposed sale. The Committee resolved to recommend that the Council rescind its decision taken at the 12th March 1963 meeting to sell the land at Whitchurch. The Council approved and adopted this recommendation at its meeting held on 9th April 1963.

7.34. At the meeting of the Planning and Public Works Committee held on 5th June 1963, the City Engineer and Planning Officer produced a revised layout (in accordance with the variation required by the Committee by its resolution passed on 20th February 1963) for the land zoned for residential purposes at Whitchurch. Again, the layout plan does not survive. The Engineer's comments on the layout refer to the revised layout incorporating flats, sited overlooking the proposed open space, and to the fact that the layout amended certain areas indicated in the Whitchurch Airfield Amendment Development Plan (a re-siting of the Secondary School and a small alteration to a tongue of Public Open Space and industrial land to the east of the former airport main buildings. The Engineer stated that should the Committee consider those variations to be major departures from the Development Plan, they would require the approval of the Minister as amendments to the Plan. The Engineer also stated that the ownership of a small tree belt to the west of the indicated extension of Fortfield Road was undetermined and was being investigated. The Committee approved the revised layout plan as a basis for the ultimate

development of the area. The Committee did not instruct the Engineer to seek the Minister's consent to an amendment of the approved Development Plan, from which it can be inferred that they did not consider the layout to be a major departure from that Plan.

7.35. The Planning and Public Works Committee at its meeting held on 9th October 1963 approved the City Valuer's report and approved and adopted his recommendations in relation to a proposed extension of Fortfield Road to Whitchurch Lane. The City Valuer reported that it had provisionally be agreed that New Ideal Homesteads would sell the land necessary for the extension to the Council (approximately 3 acres), free of cost. At the Planning and Public Works Committee's meeting held on 6th November 1963, the Committee approved the City Engineer and Planning Officer's report and approved and adopted his recommendations in relation to a scheme for the Fortfield Road extension at an estimated cost of £16,000, and a minor improvement to Whitchurch Lane at an estimated cost of £3150 and authorised the Engineer to advertise for tenders for the scheme.

7.36. At the meeting of the Planning and Public Works (Works and General Purposes Sub) Committee held on 27th November 1963, the Committee considered a joint report of the City Value and the City Treasurer relating to the appropriation of land at Whitchurch and of land required for open space purposes in other areas. The introduction to the report makes it clear that this report was the report requested by the Committee at its meeting on 20th February 1963. The report reminded the Committee that the City Engineer had reported on 26th July 1961 that before development of the Whitchurch area could take place, adequate surface water would have to be provided and recommended that this could be achieved by improvement of Brislington Brook. The Council had approved the Committee's reports in March and June 1963 authorising expenditure of £230,000. The officers recommended that in view of this expenditure and in order to deal equitably with land transactions between interested Committees, that the Planning and Public Works Committee should appropriate the whole of the land at Whitchurch, with various specified exceptions[56], with the intention that when the drainage works financed by the Committee had been completed, any land required for housing, education and other purposes would then be re-appropriated by those committees at the enhanced value (i.e. with the benefit of drainage). The initial appropriation would be under Planning Powers. The total area to be appropriated, at a value of £600,000 was 341 acres, comprising 324 acres held by the Airport Committee, 15 acres held by the Allotments Committee, 1 acre held by the Housing Committee and 1 acre held by the Highways Committee. The exact areas concerned were shown edged in various colours on a plan which accompanied the report, but which does not survive. The officers stated that it was not possible to forecast accurately the value of 156 acres of land which would be re-appropriated to other services or otherwise disposed of once the drainage works had been completed, but it would be substantial. The officers stated that the total charge [which I take to be the annual cost of the

[56] 3.7 acres forming part of an area of land leased to the Minister of Civil Aviation and zoned for open space; 40 acres in the north west, required for education, 8 acres in the south, occupied for industrial purposes, and 3.25 acres in the east, required by the Allotments Committee.

loan repayment in connection with the scheme] for the drainage works when completed and initial appropriation of land was likely to be approximately £46,000 p.a., but after redevelopment and re-appropriation or sale, might be reduced to approximately £20,000 p.a. in respect of the 185 acres remaining for public open space. The 3.25 acres excluded from the area to be appropriated by the Planning and Public Works Committee was recommended for appropriation by the Allotments Committee. The Minutes record that the City Value advised the Committee that in view of the potential value of land for residential development there was no risk involved in appropriating the land on the terms described in the report and re-appropriating it or disposing of it when the drainage work had been completed. The Committee resolved to recommend, subject to the approval of the City Council, and to Ministerial approval where necessary, the recommendations contained in the joint report relating to land at Whitchurch be approved and adopted.

7.37. The recommendations of the Sub-Committee were adopted by the Planning and Public Works Committee at its meeting on 4th December 1963.

7.38. The Airport Committee considered the appropriation of the 324 acres at Whitchurch by the Planning and Public Works Committee and the appropriation of an area of 3.25 acres by the Allotments Committee at its meeting of 17th December 1963, and approved both appropriations. The City Valuer reminded the Committee that the land was allocated for various purposes in the revised Development Plan at was at the time managed by the Planning and Public Works Committee. That Committee had recently decided to appropriate land in various parts of the City reserved for open space held by other committees. The land at Whitchurch was unusual in that in addition to the open space requirement, there were various committees interested in the future use of the land. The Planning and Public Works Committee had approved an outline plan of development covering a large area, and including land in private ownership. The position was further complicated by the necessity of improving Brislington Brook before the adjoining land could be satisfactorily developed. In the circumstances the Planning and Public Works Committee had decided, subject to the Airport Committee's approval, to appropriate most of the land within the Airport Committee's ownership, (approximately 324 acres), at a valuation of £570,000. The exceptions from appropriation were set out and were identical to those set out in the Joint Report to the meeting of the Planning and Public Works Sub-Committee of 27th November 1963. The Airport Committee resolved to approve the appropriation of 324 acres by the Planning and Public Works Committee and the appropriation of approximately 3.25 acres by the Allotments Committee.

7.39. The Engineer reported to the Planning and Public Works Committee's meeting held on 18th December 1963 with details of the tenders received for the Fortfield Road extension scheme and recommended acceptance of one of the tenders. He also reported in relation to the copse to the west of Fortfield Road and recommended that the Committee should recommend the City Council to make a compulsory purchase order in respect of that land. The Engineer reported that "in order that an integrated development may proceed in conjunction with the adjoining lands, it would seem desirable that the copse

should be acquired by the Corporation." Both reports were approved and the recommendations adopted and approved.

7.40. An extract from a report to the Meeting of the Allotments Committee held on 9th January 1964 sets out the background to a proposal to adjust the allotment provision at Whitchurch. The report states that the Planning and Public Works Committee had been considering the future development of the Whitchurch Airport area and had prepared an outline plan incorporating land at the time held by several committees, and including land in private ownership. In addition the Planning and Public Works Committee had had to deal with a large open space reservation and was committed to a major improvement of the surface water draining in the area. With those points in mind, the Planning and Public Works Committee had decided to appropriate the greater part of the Whitchurch Airport Area and to hold the land until the drainage works had been carried out, when the land allocated for residential and ancillary purposes would then be released for development. The proposals afforded an opportunity for the Allotments Committee to adjust its holding in the area. The Planning and Public Works Committee wished to include in the appropriation two areas of land including approximately 8 acres of land comprising the Fortfield Road smallholdings. The remaining Fortfield Road smallholdings and the existing allotments were to be retained by the Allotments Committee, and an adjoining area of approximately 3.25 acres would be appropriated by the Allotments Committee from the Airport Committee. Together those areas would provide a permanent reservation of 7 acres for allotments, as provided for in the development plan. The author recommended that the Committee should agree to the appropriation of 15 acres of land by the Planning and Public Works Committee, and to appropriate an area of approximately 3.25 acres from the Airport Committee. I was not supplied with a copy of the Minutes of this meeting.

7.41. The Council received a report of the Planning and Public Works Committee at its meeting of 11th February 1964. The report states that approval had already been given by the Council for the improvement of Brislington Brook to provide adequate surface water draining for the Whitchurch Airport Area, works that were necessary before any development could take place in the area. The Committee considered, having regard to the expenditure being incurred in carrying out the drainage works and the Committee's interest in ensuring that the whole area was comprehensively developed, that in order to deal equitably with land transactions between interested committees, most of the land in the Whitchurch Airport area, held principally by the Airport Committee, should initially be appropriated by the Planning and Public Works Committee and, when the necessary works had been completed, the land not required for public open space purposes should be disposed of or re-appropriated to other Committees concerned at the value then prevailing. The proposal entailed approximately 341 acres of land being appropriated by the Planning and Public Works Committee, 324 acres from the Airport Committee, 15 acres from the Allotments Committee, 1 acre from the Housing Committee and 1 acre from the Highways Committee. The areas referred to were identified on a plan exhibited outside the Council Chamber which does not survive. The Planning and Public Works committee stated that of the 341

acres, approximately 156 acres would be surplus to that committee's requirements when the drainage works had been completed. Details of the loan charges which would be incurred by the Committee were given: about £46,000 for the loan charges for the drainage works and for the land whilst it was vested in the Planning and Public Works Committee, but after disposal of surplus land on completion of the works, a reduced figure of approximately £20,000 per annum in respect of "the 185 acres remaining for public open space purposes". The Planning and Public Works Committee recommended that, subject to Ministerial approvals where necessary, (a) in the first instance 341 acres of land in the Whitchurch area be appropriated for planning purposes with effect from 1st April 1963 on the following basis: 324 acres from the Airport Committee at an appropriation value of £570,000; 15 acres from the Allotments Committee at an appropriation value of £26,000; 1 acre from the Housing Committee at an appropriation value of £2000 and 1 acre from the Planning and Public Works Committee (Highways), at an appropriation value of £2000 and that when the land had been provided with adequate surface water drainage the land surplus to the Planning and Public Works Committee's requirements be re-appropriated or sold at values then prevailing; (b) approximately 3.25 acres of land in the Whitchurch area be appropriated from the Airport Committee by the Allotments Committee at a transfer value of £5000 (the plan on which this area was shown does not survive); (c) the accounts of the Corporation be adjusted accordingly. The Council resolved to approve and adopt the report of the Planning and Public Works Committee.

7.42. A Schedule headed "Appropriation of Land 1963/64 At 1st April 1963" was produced to the inquiry by the Council. The Schedule was divided into 7 columns headed: Fol.; Consent C; Loan Sanction G; Situation of Land; Appropriated (subdivided into By and From); and Amount £. There were three subheadings in the column headed "Situation of Land": 1. 60 year Annuity Payments; 2. Transfer of Asset and Loan; and 3. Adjustment in Revenue Accounts. References to the land at Whitchurch appeared under both subheading 1 and subheading 2. The entry under subheading 1 read "Whitchurch (part of) 324 ac." In the appropriated by column "Planning and Public Works (Redevelopment)" was specified and in the appropriated from column, "Airport". The amount given was £545,960. A second entry under subheading 1 related to 15 acres from the Allotments Committee, with a value of £26,000. Under subheading 2, the first entry read "Whitchurch (part of) 324 ac. Again, in the "appropriated by" column Planning and Public Works (Redevelopment) was specified and, in the "appropriated from" column, Airport. The amount given was £24,040. These two amounts add up to £570,000. It appears therefore that these entries correspond to the appropriations to planning purposes recommended by the Planning and Public Works Committee in its report to the meeting of the Council held on 11th February 1964. The second and third entries under the second sub-heading also correspond to the recommended appropriations from Housing and Planning and Public Works Committees (Highways).

7.43. Mr Webster sought to persuade me that the 11th February 1964 resolution of the Council comprised two appropriations: firstly an initial appropriation of the whole 341 acres to planning purposes, and secondly, a further appropriation of

(as relevant) 185 acres of that 341 acres for public open space purposes. I do not accept this submission. In my judgment it is clear that the resolution effects one appropriation only: the appropriation to planning purposes of the whole 341 acres. Although the report contemplates a subsequent re-appropriation following the drainage works, the proposal for which the Committee sought the Council's approval was the initial appropriation only: the appropriation values for the subsequent re-appropriations contemplated were not determined (and therefore could not have been approved) but were left to be determined by reference to the values prevailing following the completion of the drainage works.

7.44. I have considered also whether this resolution could be interpreted as a resolution to appropriate the 185 acres zoned within the layout plan for public open space to open space purposes, with the remainder being appropriated to planning purposes. Mr Webster asked me to take into account in this regard the fact that, at the time this resolution was made, the Planning and Public Works Committee was the committee of the council with responsibility for both land held for planning purposes and land held under the Council's public open space powers. The information on Mr Cheesley's chart, showing the Council's departments' function history, shows that between 1953 and 1968 the Planning and Public Works Committee had responsibility for land held for development, for highway purposes and for parks and open spaces purposes. Mr Webster suggested therefore that the view might have been taken by the Council that it would not be necessary to re-appropriate the area to be used for public open space purposes, because the Planning and Public Works Committee would have had responsibility for it in any event. The difficulty with this interpretation is that the report refers to one appropriation of the whole 341 acres for planning purposes: there is no distinction in treatment between the land which would ultimately be redeveloped for housing and land which would ultimately be used as public open space. It is possible that the fact that the Planning and Public Works Committee would have had responsibility for land held for either planning or public open space purposes might have resulted in the need to re-appropriate the public open space land being overlooked, but this does not affect the statutory purpose for which the land was held, in my judgment. Further, I note that the Council considered it necessary to appropriate 1 acre of the 341 acres which was held by the Planning and Public Works Committee for highways purposes to planning purposes. Had it been the practice of the Council only to appropriate where the change of statutory purpose for which land was held would result in a change in the owning committee, this appropriation would not have been necessary. Taking all these matters into account, it is clear in my judgment that the resolution of the Council effected one appropriation only of the whole 341 acres to planning purposes.

Identifying the 341 acres the subject of the 1964 appropriation

7.45. Terrier card W20/3 is a composite record. There are two cards relating to this record. The first relates to 324 acres of land at Whitchurch, described as part of the former airport, formerly W20/1, W21/3, X19/1, X21/1, Y21/1 [the yellow land] and parts of W20/2, W21/2 [the green land], X20/1 and X20/2. Under "Extraordinary covenants and remarks" it is noted that the land was

appropriated by the Planning and Public Works Committee from the Airport Committee for £570,000. The date given for the approval of the appropriation by the Council is 11th February 1964. The note says that the appropriation was to take effect from 1st April 1963. Given the coincidence of the area, value and dates, it seems that the card relates to the 324 acres appropriated from airport purposes to planning purposes. The green land and the yellow land are included within the area annotated as being W20/3 on all of the Terrier maps. I am satisfied on the balance of probabilities that the green land and the yellow land formed part of the land appropriated to planning purposes in 1964.

7.46. There Terrier record card X21/2, which relates to the light blue land, has a note on it recording that the land concerned was appropriated by the Planning and Public Works Committee, and referring to record W20/3. Although the first Terrier record card does not list X21/2 as one of the former record numbers of part of the land within that record, the later Terrier record card W20/3 (which gives the area as 183.99 acres) includes X21/2, by manuscript insertion amongst the former record numbers. The light blue land is also included within the area annotated as being W20/3 on all of the Terrier maps. I accept, on the balance of probabilities, that it is likely the area the subject of the 1964 appropriation included the light blue land.

7.47. A note on Terrier card W22/1 (the pink land) states that 8 acres of the land within that record was appropriated by the Planning and Public Works Committee, and refers to Terrier record W21/7. Terrier card W21/7 is a composite card relating to land which formerly was recorded under Terrier reference V20/5 and parts of W22/1 and V21/1. It records the appropriation of 15 acres of land for re-planning purposes from the Allotments Committee to the Planning and Public Works Committee, approved by the Council on 11th February 1964, again to take effect from 1st April 1963. The card is annotated "(7 acres at [*illegible*] 8 acres at Fortfield Rd)". The dates recorded on the card as the dates of the meetings of the Allotments Committee and of the Council at which the appropriation was approved accord with the Minutes provided. It seems therefore that this record relates to the 15 acres of land which were appropriated from allotments to planning purposes. This suggests that the 8 acres at Fortfield Road which originally formed part of the pink land was part of the 15 acres appropriated by the Planning and Public Works Committee in 1964. All of the annotations on the Terrier maps (with the exception of map (b) which is ambiguous) clearly mark W21/7 as including the land in the north eastern corner of the application land. I conclude on the balance of probabilities that the pink land was part of the land appropriated from allotment purposes to planning purposes in 1964.

7.48. I am therefore satisfied that the land the subject of the 1964 appropriation to planning purposes included those parts of the application land coloured light blue, green, pink and yellow on Plan No N5028c. There is no evidence to show that any part of the orange land on Plan No Whitchurch Nov 2010 was included within the land appropriated to planning purposes in 1964. The dark blue land and the purple land on that plan had not been acquired by the Council by this time.

March 1964-1978 documents

7.49. The minutes of the Planning and Public Works Committee meeting held on 8th April 1964 record that the Committee approved and adopted the recommendations in the Report of the Town Clerk (items 1-3). The report recommended that the City Valuer be authorised to enter into negotiations with Mrs Carpenter for the acquisition of such interest as she might have in the land, and noted that a major part of the land in question, described as "a small copse of approximately 1.6 acres in area", "was formerly a highway known as Court Perry Lane, and, as the Council own the land immediately to the west and are in the process of acquiring the land immediately to the east, the land can be closed and the soil will then revert to the Council … As regards the remaining land comprising in area approximately 0.187 acres, a Mrs Carpenter claims title to this, and in the opinion of the Town Clerk if the Council acquire whatever interest Mrs Carpenter may have in this piece of land, they will then be able to develop the whole of the land".

7.50. The 15th March 1965 conveyance of the dark blue land was not produced by the Council. The official copy entries of title number BL1536 which includes the blue land, record at entry number 1 on the Charges Register that the land is subject to rights reserved by a Transfer dated 15th March 1965 and made between (1) New Ideal Homesteads Limited and (2) The Lord Mayor Aldermen and Burgesses of the City of Bristol. The Council's title was registered on 18th March 1965. I infer that the transfer referred to was a transfer of the whole of the land within the title. A Terrier card, X21/1, was produced by the Council giving the date of purchase as 15th March 1965, the vendor as New Ideal Homesteads, the area of land acquired as 3.022 acres and the purchase price as 1/-. The proposed use is given as Fortfield Road extension. The Council's case was that this land was acquired for highway purposes, and this seems likely to me.

7.51. The 17th May 1965 conveyance of the purple land was produced by the Council. The recitals to the Conveyance record that the Council acquired the land in pursuance of the powers conferred on it by the Local Government Act 1933. That Act and in particular section 158 conferred on the Council a wide general power to acquire land for any purpose for which the Council was empowered by that Act or by any other public general Act to acquire land, notwithstanding that the land was not immediately required for that purpose. Two parcels of land were acquired, an area of 0.187 acres and an area of 1.42 acres, for £500. A Terrier card, X21/3, was produced by the Council. The Terrier card gives the area as 0.187 acres, but records the purchase price as £500. The vendor and date of purchase are accurate. The proposed use of the land is stated to be redevelopment. Having regard to the mention of this area in the 5th June 1963 minutes, the 18th December 1963 Engineer's report and the 8th April 1964 Town Clerk's report, and having regard to its position, as a missing strip of land from the area under consideration for redevelopment, in my judgment it can be inferred on the balance of probabilities that this land was acquired for planning purposes. I am satisfied that the land conveyed included the unregistered strip shown between the purple and orange areas on Plan No Whitchurch 7.

7.52. The Applicant produced an extract from the Council's minutes which show that the Quinquennial Review of the Development Plan was submitted to the City Council for its approval at the meeting which took place on 8th March 1966. The report explained that the review had been delayed, and set out the following information and guidance in relation to the development plan, which is instructive (as relevant):

> "Form and Scope: a development plan consists of a basic town map and written statement together with other maps as required by the Regulations. The plan may define the sites of proposed roads, public and other buildings and works, airfields, parks, nature reserves, pleasure grounds and other open spaces, and may allocate areas of land for use as agricultural, residential, industrial or other purposes of any class specified in the plan....
> Effect of the Review of the Development Plan on future development: The Review of the Development Plan, when approved by the Minister, will, until it is formally amended or revised, govern the general manner in which development within the City may be carried out. The Council, as local planning authority, will have to have regard to the provisions of the plan, when considering any application for permission to carry out development, and will be able to grant permission which does not accord with the provisions of the Plan only where the Minister agrees and directs. The Review has been so prepared as to give the Council a considerable measure of discretion as to the type of development which they can permit in various areas without the necessity of obtaining the specific approval of the Minister in individual cases."

7.53. The report of the Planning and Public Works Committee to the Council's meeting held on 13th September 1966 related to the proposed development of the St Giles Estate on part of the former airport site at Whitchurch. The scheme involved the appropriation of approximately 32 acres of land, then under the control of the Planning and Public Works Committee, for housing purposes. Approximately 7 acres of that land was allocated for public open space and was to be taken over and maintained by the Planning and Public Works Committee on the satisfactory completion of the development. The Council approved, subject to the consent of the Minster, the appropriation from the Planning and Public Works Committee for housing purposes of the land necessary for the development, and authorised the adjustment of the accounts of the Corporation in the sum of £90,300 in respect of the net area of 25 acres.

7.54. The Applicant produced an extract from the appropriations schedule for the relevant year, which records an appropriation of 25 acres at Whitchurch from Planning and Public Works (Redevelopment) to Housing. Other entries on the same sheet relate to Planning and Public Works (Highways) and Planning and Public Works (Parks). There are appropriations of land from the Planning and Public Works Committee by the Planning and Public Works Committee where different purposes are stated in brackets after the words "P & P Works".

7.55. From 1968-1973 the property/development, highways and open space functions previously exercised by the Planning and Public Works Committee were split between two committees: the Planning and Traffic Committee took over the property/development and highways functions and the Public Works Committee took over the open space functions.

7.56. The Meeting of the Planning and Traffic Committee on 23rd August 1972 received a report from the Acting City Planning Officer concerning the former Whitchurch Airport and surrounding area, zoned for public open space, playing fields, schools, hospital and industry. The report appended plans showing the area together with ownerships and Development Plan Review zonings. The mention of ownership suggests that the area under consideration was not exclusively owned by the Council. The main public open space area, Hengrove Park, was the largest remaining undeveloped open space in South Bristol, with an area of 256 acres. The author of the report stated that various factors were combining to make the preparation of a plan for the area a necessity. He put forward various proposals to form the basis for more detailed study and discussions with interested parties, and meanwhile to form the framework for any immediate development proposals. The report noted that the majority of the area was zoned for public open space and as such was administered by the Public Works Committee. The land was owned by the former Planning and Public Works Committee and although only part of it had since been specifically appropriated, it was all taken to be under the Planning and Traffic Committee's control. Mention was made in the report of provision having been made by the Committee in its Capital Estimates programme for instructing architects to design and provide estimates for carrying out landscaping proposals for an area to the east of Bamfield. The report notes that the architects had submitted proposals in August 1970, but at that time the surrounding housing developments had not been sufficiently advanced for the proposals to be carried out, and accordingly the proposals had not been put before the Committee. Since that time details of the surrounding developments, such as the proposed Whitchurch Neighbourhood Centre had changed to the extent that modifications to the proposals were necessary. The architects had provided a quotation for their fee for updating the proposals. The report recommended that the payment of that fee should be approved. The Committee noted and approved the report and specifically mentioned one of the other recommendations but did not approve the payment of the architect's fee.

7.57. The Meeting of the Public Works Committee on 26th September 1972 received a report from the Acting City Engineer and Surveyor concerning Hengrove Park: former Whitchurch Airport and surrounding area. The report again noted that the majority of the area (shown on a plan which is no longer available) was zoned for public open space, and as such administered by the Public Works Committee, but that since the land had been owned by the former Planning and Public Works Committee and only part of it had been specifically appropriated (shown on a plan which is no longer available), it was all taken to be under the control of the Planning and Traffic Committee. The report stated that the architect's plans in relation to the area to the east of Bamfield were to be updated. No proposals were made which affected the application land.

7.58. The Applicant produced an extract from the minutes of the meeting of the Public Works Committee held on 28th November 1972, at which a petition by the residents of Cranwell Grove and Kingscourt Close was considered by the Committee. The residents complained about the state of the "green belt" area separating the two roads, as it was profusely littered with broken glass contained in the top soil delivered to the site and spread over it by the contractors. The Committee was informed that the area was part of the Elm Tree Park development and had not been adopted by the Council. The Engineer had written to the developers and informed them that the area was unacceptable for adoption in its present condition and should be reconstructed to adoption standard in accordance with the section 40 agreement between the developer and the Council.

7.59. The report of the Public Works Committee to the Council's meeting held on 10th July 1973 set out various proposals in relation to Hengrove Park and the Whitchurch Sports Complex, none of which appear to affect the application land.

7.60. From 1973-1974 the property/development functions of the Planning and Traffic Committee were taken over by the Finance and Land Committee. From 1973-1986 the open spaces functions of the Public Works Committee were taken over by the Open Spaces and Amenities Committee. From 1974-1986 the property/development functions of the Finance and Land Committee were taken over by the Land and Administration Committee.

7.61. The Minutes of the meeting of the Finance and Land Committee held on 25th July 1974, together with what I assume to be an extract from the Report of the City Engineer to that meeting were produced. The Report of the City Engineer is referred to in minute 41 as having been considered and noted, and the recommendations therein approved and adopted. The report set out proposals prepared by a consultant for an outline layout for land between Bamfield Road and Fortfield Road in three stages. Stage 1 concerned an area to the south of Whitchurch Lane, stage 2 an area to the north of Whitchurch Lane, excluding the specialist sports facilities, and stage 3 the specialist sports facilities sited near the Neighbourhood Centre planned for Oatlands Avenue. The proposals which appear to relate to the application land are stage 2 and possibly stage 3. The report recommended (1) that the consultant's landscaping proposals be adopted in principle, (2) that the committee agree to the implementation of stage 1, (3) that the proposals for stages 2 and 3 be discussed with the Local Community Council, (4) that, following those discussions the consultant be asked to prepare a final scheme for the committee's approval, (5) that the Open Space and Amenities Committee be informed and asked to take over and maintain the open space once it has been laid out and (6) that the Resources and Co-ordination Committee be asked to authorise the expenditure in relation to the implementation of stage 1.

7.62. The Minutes of the meeting of the Open Spaces and Amenities Committee held on 3rd December 1974, together with an extract from one of the two reports of the City Engineer to that meeting were produced. Minute 68 states that the reports of the City Engineer were read. The report sets out the

proposals prepared by consultants in three phases. Phase 2 is identical to stages 2 of the proposals as described in the report to the meeting of the Finance and Land Committee held on 25th July 1974. The wording of Phase 3 differs slightly from the wording of stage 3, "This is intended to include specialist sports facilities which are sited near the Neighbourhood Centre. The type of facility to be provided can only be specified tentatively at present and final decision must await the result of local consultations and future Council policy in respect of Recreation and Amenity." It is clear reading this report and the earlier report together that, at the time these reports were written, the specialist sports facilities did not exist, but were the subject of proposals. The report recommended (1) that the Open Spaces and Amenities Committee agree to take over and maintain the open space when developed and (2) that the City Engineer be authorised to arrange a public meeting in conjunction with ward councillors and local Community Association. Minute 68 records under Parks & Open Spaces, item number 6, that the recommendations set out in the report were adopted and approved by the Committee. The Minutes were adopted and approved at the meeting of the Open Spaces and Amenities Committee held on 7th January 1975.

7.63. The Minutes of the meeting of the Land and Administration Committee held on 21st October 1976 were produced. Minute 79 records that the Committee considered the report of the City Engineer and resolved that the report be accepted and the recommendation therein set out be approved and adopted. The report was headed "Whitchurch Landscaping Phase II and III", and stated:

> "Your Committee will be aware of the proposal to build a District Centre between Oatlands Avenue and the area of land designated as Public Open Space to the north of Briery Leaze Road, which is currently being developed as part of your Committee's capital programme.
> At present the landscaping of the Open Space to form the basis of a future park has reached the stage whereby most of the land formation and grading is complete with the exception of an area adjacent to the proposed District Centre.
> During negotiations with the Holder Mathias Partnership, acting Consultant Designers for C.H.Pearce Ltd., the likely developer of the District Centre, landscaping details of both the Park and the District Centre have been considered, including the possibility of a joint approach to the treatment of the site boundary.
> The developers estimate that surplus topsoil and fill material will become available as the building works on the Centre commence and are prepared to offer this excess material to the City in order to create an additional landscape mound similar to those already formed as part of Phase II of the Whitchurch Landscaping Scheme. The position of the proposed mount is indicated on the plan displayed, together with the siting of a topsoil heap which will be required temporarily whilst the work is being carried out.
> In addition, the developer wishes to carry out some off site tree planting in the rear of the bungalows in Fortfield Road and on the

proposed mound. All the works undertaken by the developer on City land will be subject to a twelve months' maintenance period.
The disposal of surplus filling material on an adjacent site is clearly advantageous to the developers, but in accepting these proposals an effective amenity screen between the District Centre and its car park will be provided which will also improve the sense of enclosure within the park and generally improve the local environment. No costs will be borne by your Committee for the works indicated and further maintenance costs are not thought to be significantly increased by the additional landscaping. There is also a possibility that topsoil surpluses will accrue and any material surplus to the requirements of Whitchurch Landscaping could be used on similar works taking place in Hengrove Park.
RECOMMENDED – that your Committee agree to the proposals as outline and that subject to the receipt of the necessary planning permission your Engineer be authorised to conclude an agreement with the developer to provide additional landscaping at Whitchurch in the vicinity of the new District Centre."

7.64. The Applicant produced two Terrier cards which related to the District Centre: Terrier card X21/4 for 8.6 acres of land at Oatlands Avenue, Whitchurch, and Terrier card X21/5 for an unspecified area of land, also at Oatlands Avenue, Whitchurch. The description given of the land on X21/4 was "Whitchurch Neighbourhood Shopping Centre". The card records that the land was parts of W20/3 and W21/7. There is no entry relating to the appropriation of this land on the card. The description given of the land on X21/5 was "Site for proposed Health Centre and Library". The card records that the land was part of W20/3. Again, there is no entry relating to the appropriation of this land. The card records that the land was sold, as to part on 27th June 1985 to the Bristol and Western Health Authority, and as to the remainder, by way of exchange with Avon County Council for the "Greenway Centre" on Doncaster Road, Southmead on 24th November 1995.

7.65. The meeting of the Public Works Committee held on 24th January 1978 received a report of the City Engineer. The report stated that the Committee had approved the construction of new public conveniences at various sites including Bamfield at its meeting on 25th October 1977. The report set out the resolutions of the Planning and Traffic Committee on the detailed plans. The Committee resolved to proceed with the development of the public conveniences at Bamfield. I consider that it is likely on the balance of probabilities that these minutes relate to the toilet block until recently present on the western side of the application site, fronting onto Bamfield.

1979-1980 documents

7.66. The second Terrier record card for W20/3 reads (as relevant):

"WHITCHURCH AIRPORT
Land forming part of former Airport

Area 183.99 acres formerly W20/1, W21/3. X19/1, X21/1, 2, Y21/1 and parts of W20/2, W21/2, X20/1 and S20/2. Part now X20/5 and X20/6
Proposed use: public open space
Outgoings, covenants and remarks: All land remaining within this reference on 31.3.80 transferred to OS&A C'tee. Accounts adjusted by City Treasury with approval of chairmen of L&A & OS&A C'ttees. The only parts of W20/3 to remain with L&A were Hengrove Way Industrial Area (see V19/6 & 7) & Secondary School reservation at Bamfield (see X21/6)."

7.67. In the box in the top right hand corner of the card, next to the printed word "Committee", "OS&A" and L&A have both been written and both crossed through. "L.S." has also been written. Beneath the line "(POS)" appears. Mr Cheesley's evidence, which I accept, was that the handwriting on this card was that of Mr Colin Clark, the Senior Property Records Officer of the Council at that time.

7.68. The Minutes of the Meeting of the Open Spaces and Amenities Committee held on 4th December 1979 record that the report of the City Treasurer, annexed to those Minutes was read to the Committee. The Committee resolved to approve the draft estimate for 1980/81 were approved, subject to an adjustment to the Capital Programme. The notes to the Revenue Budget contained in the City Treasurer's report included the following:

"Additional information which the Committee may find helpful is:-

(i) Transfer from Land and Administration Committee
This item represents the annual debt charges on debt relating to Castle Park and other areas, now under the control of this Committee, hitherto borne by the Land and Administration Committee.

7.69. The Open Spaces and Amenities Revenue Budget 1980/81 contains an entry in respect of the Parks and Open Spaces Service/Department Administration Net Expenditure under the column headed "Detail":

"Commitments:
Debt charges Transferred from Land and Admin. Committee"

and in the column headed "Commitments", relating to that entry, the figure of £705,170.

7.70. The Council produced an extract from its Capital Account (Completed Projects) and Work in Progress (Live Projects) ledger. The entries dated 31 March 1980 in the Capital Account of the Land and Administration Committee, account reference PT/500, included an entry in red, "Finance Tab'n" The folio reference was TK99. The total given was £5,977,874.00, which, as Mr Hodges said, is the total of the figures in the typewritten schedule in the column headed "£" in typescript, and immediately above the entries

"Actual debts" in manuscript, relating to Castle Park (£4,217,979), Whitchurch Lands (£1,453,845), Land fronting Frenchay Park Road (£1,072) and Works at Whitchurch, Crox Bottom, St Andrew's Churchyard, Parkway Open Space etc (£304,978). There were two further entries on the same line, which were not explained: an entry under the heading Redevelopment: Land Acquisition and Clearance in the sum of £4,892,189 and an entry under the heading Redevelopment: Site Development in the sum of £1,097,300. Those two amounts total £5,989,489, i.e., £11,615 more than the sum given in the Total column. I am not sure to what those figures relate.

7.71. The entries in the Capital Account of the Open Spaces and Amenities Committee, account reference OS/500, included an entry in blue, marked "Acquisition of Land (T/er from P&T [*illegible ? RE'UE?*])" The total given was £5,977,874.00, and the same amount was entered again in a column headed "Parks". Mr Hodges' evidence was that an entry in blue in these accounts denoted a credit and an entry in red a debt.

7.72. The Council produced a handwritten schedule from the Terrier Department's file. It was in the handwriting of Mr Clark, who was the Referencer within the Council's Terrier section. The schedule was divided into 11 columns headed: "Land Appropriated"; "File"; "Price"; "Area"; "To Cttee"; "Ctee date"; "From Cttee"; "Ctee date"; "Council"; "Min. Cons."; and "Terrier". There were 25 entries in the schedule which all had the columns File; Area; To Cttee; Ctee date; From Cttee; and Ctee date completed, with the following exceptions: a dash or no entry was put in the "Area" column for entries 7, 9, 11, 13, 15 and 22; and a dash was put in the price column for entry 25. The 24th and 25th entries recorded committee dates of 17th July 1980. Entries 1-25 were in date order. The 26th and 27th entries recorded committee dates of 20th March 1980 and 24th April 1980 respectively (i.e. dates which predated the previous entries). The last 4 entries on the schedule were in different form: a dash was inserted in the "File" column. Across the four columns, To Cttee; Ctee date; From Cttee; and Ctee date, was written "Accounts adjusted by City Treasury with approval of chairmen of OS&A and L&A C'tees – 31/3/80." Following the description of the land appropriated in the column headed "Land Appropriated", (Castle Park, Whitchurch Lands, Riverside Drive, Frenchay and 14/15 Trenchard Street), each of these entries had the word "Transfer" in brackets, and in the case of Whitchurch Lands "4 transfers". No other entry on the schedule had similar entries. The amounts entered in the price column were bracketed together, and in the "Area" column the bracketing was labelled "Actual debts".

7.73. The Council also produced a Memorandum from the Council's City Treasurer (reference D A Miles) to the City Valuer (reference Terrier's Section) enclosing a schedule, stamped as received by the City Valuer on 24th April 1980. The memorandum is headed "Appropriation of Land 1979/1980" and reads "Please find enclosed a copy of the above schedule. I would advise you that the City Council's accounts have been amended accordingly." The memorandum was signed by R Crook, Chief Accountant. The enclosed Schedule was typewritten. Mr Miles stated that he was the author of this Schedule and of the memorandum, but did not remember any individual item

or appropriation. The Schedule was headed "Appropriation of Land 1979/1980 as at 31.3.80". The Schedule is divided into 6 columns headed: Ref.; Situation, Area, Appropriated (subdivided into By and From) and £. The first five entries are under a sub-heading "Transfer of Asset and Loan". Each of the 6 columns is completed for each of the entries, with the exception of area for 1, 2 & 3 Oakenhill Cottages, Brislington, where a dash is put in the area column. A further five entries, including the entry relied upon by the Council in respect of the application land come under a sub-heading "Memo item Transfers (Not Appropriations) As at 1.4.79". The second item is described as "Whitchurch Lands". No area is given. In the column headed "appropriated by" is entered "Open Spaces & Amenities" and in the column headed "appropriated from" is entered "Land and Admin. (Redevelopment)". There is a further sub-heading in manuscript at the same level as the sub-heading "Memo item Transfers (Not Appropriations) As at 1.4.79" above the five entries in the column headed "£", which reads "Actual debts". The amount given for the Whitchurch lands is £1,453,845. The other amounts in this column beneath the sub-heading are similarly exact amounts, whereas the amounts in the £ column for the first five entries in the schedule are all whole hundreds of pounds.

Post 1980 dealings with the land within W20/3

7.74. The minutes of the meetings of the Open Spaces and Amenities Committee held on 3rd February 1981, of the Land and Administration Committee held on 19th February 1981 and of the Council held on 20th April 1982[57] show that the Council proposed to demise part of the land within W20/3 to St Bernadette's Old Boys' Rugby Football Club for the construction of a pavilion and car park. The report of the Parks Manager to the Open Spaces and Amenities Committee's meeting on 3rd February 1981 refers by way of comparison to a leasing arrangement with Barton Hill Old Boys' Rugby Football Club at Argyle Road Playing Fields and the report of the Open Spaces and Amenities Committee to the meeting of the Land and Administration Committee held on 19th February 1981 states that approval had already been given in respect of the provision of pavilions on open space land for the Barton Hill Old Boys' Rugby Football Club, Whitehall Rugby Football Club and Stapleton Association Football Club. The proposal was clearly being given consideration on the basis that the land was open space, but it does not appear from the minutes that the Council had given clear consideration to the statutory purpose for which the land the subject of the proposed lease was held. Other than the Argyle Road Playing Fields, which I would assume from their name were held under section 19 of the Local Government (Miscellaneous Provisions) Act 1976, there is no information as to the statutory purposes for which the land on which approval had been given for pavilions was held.

7.75. The Minute of a joint meeting of the Land and Buildings (Special Purposes) Sub-Committee and the Leisure Services (Special Purposes) Sub-Committee held on 1st April 1993 reports the content of an exempt joint report of the City Valuer and Director of Property Services. The report sought the Leisure Services (Special Purposes) Sub-Committee's approval to declare

[57] Applicant's additional bundle pages 26-35

approximately 40 acres of land surplus to operational requirements (rather than the previously estimated area of 35 acres), and sought the Land and Buildings (Special Purposes) Sub-Committee's approval for the necessary action to appropriate the land from public open space to be used for the benefit, improvement and development of the area[58]. The way in which the approval sought from the Land and Buildings (Special Purposes) Sub-Committee was framed shows that as at the date of the report the City Valuer and Director of Property Services understood or assumed that the 40 acres of land under consideration was held for open space purposes. The Leisure Services (Special Purposes) Sub-Committee resolved to amend its earlier resolution so that its resolution declared approximately 40 acres of land, edged black on the plan attached to the minutes, to be surplus to the Leisure Services Committee's operational requirements and the Land and Buildings (Special Purposes) Sub-Committee resolved (1) that the appropriate officers be authorised to advertise the intention to appropriate the land for the purposes specified in section 122 of the Local Government Act 1972 from public open space to be used for the benefit, improvement and development of the area, and subject to no objections being received, (2) to appropriate the land from public open space to be used for the benefit, improvement and development of the area, and to ask the appropriate officers to adjust the accounts of the Committees accordingly and (3) that the appropriate officers be authorised to advertise the intention to dispose of the land in accordance with section 123 of the Local Government Act 1972 and to consider any objections received.

7.76. The report of the content of the joint report of the City Valuer and Director of Property Services to the Joint meeting of the Land and Buildings (Special Purposes) Sub-Committee and the Leisure Services (Special Purposes) Sub-Committee held on 1st April 1993 shows that as at that date the City Valuer and Director of Property Services understood or assumed that the 40 acres of land under consideration was held for open space purposes. However as the basis for that understanding or assumption is not specified, it does not assist me in determining whether in fact the land was held for open space purposes. I must reach my own conclusions on the basis of the evidence put before the inquiry, which, in any event, it seems to me, must be fuller than that which would have been available to the City Valuer and the Director of Property Services when the report was written.

More recent documents

7.77. The Council adopted a Parks and Green Space Strategy in February 2008, under which area green space plans have been developed and put out for consultation. The application land is part of the land covered by the Council's Hengrove and Stockwood Area Green Space Plan[59], in which the amended application land as a whole is identified as Briery Leaze Road Open Space. The Council's aim as stated in that document is for Briery Leaze Road Open Space to be recognised as the neighbourhood park serving the Whitchurch area. The Council proposes to improve part of the land and to provide a young children's play area. Part of the site is proposed for residential development.

[58] The Council had a power to acquire land under section 120(1)(b) of the Local Government Act 1972 for the benefit, improvement or development of its area.
[59] A/A95

7.78. As part of the consultation process for the Area Green Space Plan a meeting was held on 17th June 2009 to consider the value of Briery Leaze Road Open Space prior to identifying it in the Area Green Space Plan for potential partial disposal for development. The Applicant asked me to note in particular two comments:

> "Level of use: No user survey has been commissioned, but through visits to site at all times of day have always seen use. Area adjacent to Fortfield Road is used as kickabout area, and other evidence of young people using site. During daytime site is heavily used by dog walkers and people accessing services at Whitchurch district Centre.
> Equalities considerations: Well used pathways through site by all sectors of the community. Tarmac pathway is accessible by wheelchair users and mobility scooters. Young people use (in particular) Fortfield Road edge as visible kickabout area.

8. The Objector's submissions

8.1. Mr Webster prepared helpful written submissions and made oral submissions at the conclusion of the hearing.

As of right

8.2. The Objector's primary case was that parts of the land had been appropriated by the Council to public open space purposes, and, following *Beresford*, use of those areas by the local inhabitants had been "by right" rather than "as of right". I have dealt in detail with the appropriation argument below: if I were to accept the Objector's case on appropriation, those parts of the amended application land which fell within Terrier references W20/3 and W21/7 would be held according to their zonings on the 1959 Amended Development Plan. If I do not accept the Objector's case on appropriation, those parts of the amended application land which fell within Terrier references W20/3 and W21/7 would be held for planning purposes. In either event the Objector's case was that the dark blue land was held for highway purposes, the orange land for housing purposes and the purple land for development purposes.

Use of land held by the authority for housing purposes rendering use by right rather than as of right

8.3. Mr Webster submitted that it was difficult on the basis of the present authorities to know which holding powers of local authorities will create a quasi-public use trust and therefore prevent use being as of right. He pointed out that there is no binding authority on amenity land held under housing powers. Mr Webster acknowledged that neither the 1957 Housing Act nor the 1985 Housing Act elaborated on the status of the land laid out as recreation grounds or as open space, but submitted nevertheless that such land is public open space which the public have a statutory entitlement to use. He submitted that housing open space is a species of public open space which should not be treated any differently to other public open space in terms of its impact on the part of the test for registration which requires that use should be "as of right". He submitted that it would be inconceivable that a local authority, having laid

out such land, would be entitled to deny the public access to it. The public have an entitlement to go on to the land. He submitted that accordingly the same reasoning as applies to all the other categories of local authority open space applies to this category of land also.

8.4. I do not accept Mr Webster's submissions on this point. The open space which the authority is empowered to provide under the Housing statutes is not described as "public" open space, but is specifically open space in connection with housing accommodation provided by the authority, and is subject to consent given on the basis of the Minister's opinion that the facility would serve a beneficial purpose in connection with the requirements of the occupants of the accommodation provided by the authority. The class of persons for whom the land is made available is restricted. It is not made available for the use of the general public. Even if it may be arguable that the tenants of the authority have some right to use land so provided, that argument does not apply to other users. I do not consider the fact that part of the application land has been held for housing purposes means that use of that area by local inhabitants (other than, arguably, use by the Council's own tenants) has not been as of right.

8.5. Even if I am wrong on this point as a matter of law, on the facts, the area held for housing purposes, the orange land, has not been laid out as recreation grounds or as open space: it is merely a cleared site.

Use by the authority of the land as public open space rendering use by right rather than as of right

8.6. Mr Webster further submitted that land "held and used" for other functions of the authority under section 158(2) of the Local Government Act 1933 and later "used" for other functions of the authority under section 120(2) of the Local Government Act 1972), which had in fact been used as public open space, was held and used for public open space purposes, and therefore was used pursuant to a statutory-trust, by right, rather than as of right.

8.7. This submission applied in relation to all of the land the subject of the amended application, although part was held for planning purposes, part for highway purposes and part for housing purposes, all parts had been "held and used" under section 158 of the 1933 Act for public open space purposes.

8.8. This is not an argument which was considered specifically in *Beresford.* Lord Walker, with whom Lords Bingham, Hutton and Rodger agreed considered that counsel for the registration authority had been correct not to argue for some general implied exclusion of local authorities from the scope of section 22 of the Commons Registration Act 1965. Lord Scott, in the minority, considered that there were strong arguments for contending that the statutory scheme under the Local Government Act 1972 excluded the operation of section 22. I was not referred to any other case or report in which such an argument was considered. There is no binding authority of which I am aware on the point. In my judgment this submission is not correct as a matter of law. Although the section contemplates use for another statutory purpose, and uses in that connection (in the 1933 Act but not the 1972 Act) the word "held", it is

clear in my judgment from the context that the statutory purpose for which the land is held does not change by reason of its use for another purpose. The land is not temporarily held for the alternative purpose until it is required. It continues to be held for the original statutory purpose, but is permitted to be used temporarily for the alternative purpose until it is required for the original purposes.

8.9. Use of land temporarily for open space purposes cannot in my judgment give rise to a statutory trust, entitling the public to a right sufficient to negative use of the land "as of right". A temporary public right to use land as a result of the authority's decision to use it for open space purposes pending it being required for the purpose for which it is held clearly does not give rise to a statutory trust for enjoyment by the public under section 10 of the Open Spaces Act 1906, because the statutory trust only applies where land is held for the purposes of that section. The scheme for ministerial approval and later for advertising in respect of open space land which is being appropriated does not apply. The provisions for releasing the land from a statutory trust or a quasi-statutory trust contained in section 122(2B) of the Local Government Act 1972 do not apply. I note that it was said in *Greytown* that the trusts imposed by section 10 of the Open Spaces Act 1906 could previously be abrogated by use of the machinery provided by section 42 of the Town and Country Planning Act 1947 and later by section 121 of the Town and Country Planning Act 1971. These provisions again only apply where there is to be an appropriation from open space purposes to another purpose.

8.10. If it were correct that temporary use of land for open space purposes did give rise to a quasi-statutory trust, then this would give rise to difficulties when the authority required the land for its original purpose. If use of itself gave rise to a statutory trust, and there was no provision to abrogate it when the land was required for its original purpose, that purpose might be frustrated by the continuation of the statutory trust. This supports my conclusion that although the words "held and used" are used in the 1933 Act, they should be interpreted as meaning "use", and not as referring to a temporary change in the statutory purpose for which the land is held.

8.11. Finally, I note that the provisions relied upon by Mr Webster relate to land acquired for a particular purpose. I was not directed to any provision which related to land appropriated for a particular purpose but not required immediately for that purpose. On the facts this distinction is relevant in relation to the land appropriated to planning purposes in 1964.

Appropriation

8.12. At the preliminary hearing Mr Webster did not rely on the zoning of the land as public open space as giving rise to a statutory right of entry on the land, or as evidence, by itself, of appropriation to open space purposes, but said that it was consistent with an appropriation having taken place. At the final hearing Mr Webster submitted that I could and should imply an appropriation of the land zoned as public open space in the development plan from the appropriation to planning purposes in 1964 in all the circumstances. The 1964 appropriation implied a change of purpose for which the application land was

held from that of land ancillary to an airfield to use as public open space. The effect of the implied appropriation was as if the land had been acquired on 1st April 1963 for the purposes of section 164 of the Public Health Act 1875 (i.e. as a pleasure ground) or section 9 of the Open Spaces Act 1906 (i.e. as open space). In consequence the land had been held on a statutory trust to allow the public to exercise a right of recreation over the land and user had been by right rather than as if of right

8.13. Mr Webster submitted that a change of use to public open space could be a planning purpose. A further resolution appropriating the land specifically as public open space would have been unnecessary (since the Planning and Public Works Committee was already responsible for public open space). Mr Webster said that I should inquire into the surrounding circumstances in order to see what must have been intended by the resolution appropriating the land for planning purposes: I should look at the documents and draw the necessary inferences in order to resolve the apparent ambiguity on the face of the 1964 resolution and determine the intended future statutory purpose of the land.

8.14. Mr Webster said that I should consider what the term "planning purposes" meant when used in the 1964 resolution. He submitted that "planning purposes" was a very wide purpose and would include acquiring or appropriating land in order that it could, in accordance with its zoning in the development plan, be used as open space. In this instance the land was zoned for public open space in the development plan and was suitable for use as public open space. There were no other extant proposals for its use for any other purpose.

8.15. Mr Webster said that the minutes and reports prior to the 1964 appropriation contained material dealing with allocation of public open space from within the area which was the subject of the appropriation. The documents leading up to the 1964 resolution showed that a parcel of land within the land to be appropriated would be permanent public open space, not an interim provision until an ulterior use came to fruition. Mr Webster submitted that although the acreage involved changed from 200 acres to 185 acres and although the area concerned could no longer be specifically identified because no plan showing its location survived, the area allocated for public open space would have been within the area zoned as public open space on the Development Plan. He submitted that I should find on the balance of probabilities that the area allocated for public open space included the application land. He accepted that there were wrinkles, in that the boundaries on the Development Plan were not accurate, and he accepted that, in relation to the land zoned for housing on the Development Plan, there could be no implied appropriation to public open space purposes, because that land was not zoned for public open space purposes, but said that in relation to that part of the application land which was zoned for public open space purposes, it would be right to infer an appropriation to public open space purposes. There was no question of changing the reservation of 185 acres for public open space purposes. Mr Webster emphasised that the report to the full council by the Planning and Public Works Committee stated that when the drainage works had been carried out that the land *not otherwise required as POS* would be re-appropriated or

sold [emphasis added]. I should infer from this that, so far as the area reserved for public open space was concerned, the appropriation was looked upon by the Council as the final appropriation necessary. In order for there to be no need to appropriate again to public open space purposes, this resolution had to be interpreted as an appropriation of that part of the land which was reserved for public open space to open space purposes.

8.16. In my judgment the concession given at the preliminary hearing that the zoning of the land as public open space in successive Development Plans did not amount to an appropriation to use as open space or give rise to a statutory right of entry was correctly given: zoning is a question of planning policy, not of the statutory purpose for which land is held, even where the planning authority is also the owner of the land concerned. I do not consider that a decision to appropriate any part of the application land for public open space purposes can be inferred from the decision to appropriate the 341 acres for planning purposes by reason of the fact that part of that area was zoned for public open space in the Development Plan. I am unable to see any apparent ambiguity on the face of the 1964 resolution. That resolution is clearly worded, and is a resolution to appropriate the land concerned to planning purposes. Planning purposes is a purpose for which the Council was at the relevant time empowered to hold land. It is not necessary to go behind those words in order to ascertain what the planned future use of the land was to be, in order to ascertain the purpose to which it was appropriated.

8.17. Further, in the light of the evidence that the Council and the Planning and Public Works Committee in particular understood the need to appropriate land from one statutory purpose to another, even when the same committee was responsible for both statutory functions, I am unable to accept Mr Webster's submission that the Council would not have considered a further appropriation necessary because both planning and open space functions were exercised by the Planning and Public Works Committee, or his submission that a decision to appropriate that part of the land the subject of the 1964 resolution which was zoned in the Development Plan as public open space to open space purposes ought to be read into the decision to appropriate the whole of the area for planning purposes. The Council had power, pursuant to section 79 of the Town and Country Planning Act 1962, to develop land held for planning purposes as a public open space. It had power under section 158 of the Local Government Act 1933 (and later under section 120(2) of the Local Government Act 1972) to allow the land to be used by the public as a public open space, until it was required for planning purposes. There is no need to imply an appropriation to open space purposes in order to prevent the Council having acted ultra vires.

Use

8.18. Mr Webster helpfully made a number of factual concessions in closing. Mr Webster said that the Objector accepted that there was a mass of written and oral evidence supporting the Applicant's case that there had been qualifying use of most of the application land throughout the relevant period. Mr Webster said that there was no evidence that the use of the application land had been permissive: if the Council's argument that the land had been appropriated to

open space purposes and held for open space purposes during the relevant period did not succeed, then such use of the land as there had been would have been use as of right.

8.19. Mr Webster said that although there was no use of the hedgerow to the rear of the houses on Fortfield Road, the Objector considered that the Applicant had shown qualifying use of this area as part of the greater whole. The Objector accepted that the Applicant had shown qualifying use of the tongue of land between Kingscourt Close and Cranwell Grove.

8.20. Mr Webster submitted that the Applicant had failed to show qualifying user of the verge to the west of the bund and to the west of the hedgerow along Briery Leaze Road. Mr Webster submitted that this area had not been subject to qualifying user since the erection of the bund in 2002. The effect of the bund had been to create a new perimeter to the land. The use of this area since then had been transit use. In addition he submitted that in any event there had been no lawful sports and pastimes taking place on the land occupied by the toilet block.

8.21. Mr Webster also invited me to consider the evidence in relation to the old drove carefully. He said that this area had been subject to some tipping. There was not much space to walk because of the trees. He suggested that it was not much used, although he said it may be used by children playing hide and seek and building dens. He submitted that I should consider how the matter would have appeared to a reasonable owner, and that I should find that the use had been trivial, rather than qualifying TVG use.

8.22. Mr Webster submitted that the land to the south of 200 and 202 Fortfield Road was more impenetrable still. He submitted that the Applicant had failed to show qualifying user of the land between the south and western boundaries of 202 Fortfield Road and Briery Leaze Road (the area added in the south eastern corner of the amended application land). The Applicant had failed to show that the area added in the south eastern corner of the application land had been used by the inhabitants of either the claimed locality of the Ecclesiastical Parish of Whitchurch or of the claimed neighbourhood. The application in respect of this part of the application land should not succeed: the applicant had not shown a sufficient spread of users throughout the claimed locality or neighbourhood, and had not shown that the users came from the claimed locality or neighbourhood as a whole (spread and fit). If there was qualifying use of this area, it was not by the inhabitants of the claimed locality or neighbourhood as a whole, but by the inhabitants of one or two close-by streets.

8.23. Mr Webster reminded me in this connection of Mrs Bullock's evidence that the use of the south eastern corner of the application land was concentrated from nearby streets, and of Mr Gardiner's evidence that use of this area was by people from the streets on that side of Fortfield Road. Mr Webster submitted that this evidence accorded with common sense: the area was suitable for a local kick-about or for a quick dog toileting: if a user was looking for anything more, he would continue onto the main part of the field. The primary use of the open grassy area, he submitted, was as a place of transit.

Locality and neighbourhood

8.24. On the issue of locality and neighbourhood, Mr Webster said that the Objector accepted that the Applicant had shown that both the inhabitants of the Ecclesiastical Parish of Whitchurch, and also by the inhabitants of the alternative claimed neighbourhood of the two conjoined electoral wards had made qualifying use of the application land, with the exception of the area added in the south eastern corner. He accepted that the parish of Whitchurch is a qualifying locality, and that the two electoral wards were capable of being qualifying neighbourhoods within the locality of the City of Bristol, provided that they were sufficiently cohesive to be neighbourhoods as a matter of law.

9. The Applicant's submissions

9.1. Mr Bennett prepared helpful written submissions and made oral submissions at the conclusion of the final hearing.

As of right

9.2. Mr Bennett submitted that the purpose of section 15 of the Commons Act 2006 was to assist applicants in registering town and village greens. Both the Royal Commission which had led to the passing of the Commons Registration Act 1965 and the government in bringing forward clause 15 of the Commons Bill recognised the importance of greens and the importance of preserving them. Mr Bennett submitted that when interpreting the legislation, any interpretation which made the registration of a TVG impossible or impracticable or simply extremely complicated, costly and over-involved should be rejected. Mr Bennett referred me in this connection to the comments of Lord Hoffman in *Sunningwell* at 359E, in *Trap Grounds* at 690G and at paragraph 44 and of Lord Walker in *Redcar* at paragraph 48. Mr Bennett submitted that a number of additional hurdles introduced by lawyers acting for objectors had been rejected by the courts:

a) The subjective state of mind of the users; [60]

b) The exclusive use of the land by locals and then the predominance test;

c) The need to show the land being used for both sports and for pastimes;

d) The need to show that each sport or pastime has continued for 20 years and has not interfered with any other;

e) An irrefutable precise legal boundary of a precise locality;

f) Toleration being inconsistent with user as of right; [61]

g) The need to show the character of the land matched some historical concept of a village green;

h) The need to show continued use at the date of the application;

[60] *Sunningwell page 354G*
[61] *Sunningwell* at page 358F

i) The rules on license implied by conduct short of express notice or exclusion;

j) The need to show access to all of the land – ie no scrub or wetland (eg *Trap Grounds*);

k) The need to show some interruption of the farmer's use of the land or some dominance of the applicant's rights over the objectors;

l) The need to show that locals did not defer to other use of the land;

m) The need to show that use was trespassory

n) The need to prove that the use of the land would have appeared to a reasonable landowner that the users were asserting a right to use the land (see *Redcar*).

9.3. Mr Bennett submitted that the authorities showed that use of land "as of right" is use without force, stealth or permission ("*nec vi nec clam nec precario*"). It does not turn on the subjective beliefs of users.[62] Lord Hoffman explained in *Sunningwell* that "the unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user ..." [63]. If there is no force, secrecy or permission, then the use is "as of right". In *Redcar* Lord Hope stated "I agree ... that all the authorities show there are only three vitiating circumstances ... There is no support for the proposition that there is an additional requirement".[64] Mr Bennett submitted that there are no further tests, hurdles or stages.

9.4. There was no force used in this case. There were no fences, barriers or other impediments to use of the land for recreation. There was no stealth in this case. The land was used openly and freely at all times of the day by the local inhabitants. There was no permission in this case. There was no by-law or notice, no licence and no charge for admission. No one had ever been stopped from using the land for recreation. Access had never been blocked. No one had ever been made to apply (or has ever applied) for a licence to use the land for recreation. The local inhabitants used the land as if they had a right to use it, despite the fact that they had been granted no such right by the landowner.

9.5. Mr Bennett said that the Applicant did not accept that land held under Open Spaces Act powers is as a matter of law excluded from registration. A statutory trust to use land for recreation does not give rise to a right to use the land at any time, and was not equivalent to a right to use the land. The use could be regulated, for instance a park could be shut at night, and certain

[62] *Sunningwell*
[63] *Sunningwell* at page 351 A
[64] *Redcar* at page 677

activities might be prohibited. He submitted that such a right was a statutory licence rather than a right, and as such use pursuant to such a licence was not use "by right", because the right conferred was not an absolute right to use the land. He accepted that there was obiter support for the Council's case that land held under open space powers was not vulnerable to registration as a TVG because it was not used as of right in *Beresford*, but said that there was no direct authority binding on me on the point. He noted that Lord Walker specifically stated that the question did not arise for decision in *Beresford*, and would be better left for another occasion[65]. He pointed out that Parliament did not expressly exclude such land from registration, or give any indication that such land should be excluded from registration.

Appropriation

9.6. Mr Bennett submitted that as a matter of law, an appropriation of land must be adequately and formally recorded. Use of land, even on a long-term basis, as open space did not give rise to an implied appropriation to the relevant purpose. If such implied appropriation were permitted, there would never been any need for an express appropriation: an authority could use land for any purpose or purposes at any time. This would render the statutory provisions in relation to appropriation redundant. Further, if land used as open space were impliedly appropriated to that purpose, this would be inconsistent with the Council's power to hold that land as development land, with the intention that it should be used as open space in the short to medium term.

9.7. Mr Bennett submitted that, if contrary to his primary submission that all appropriations must be express, if there were circumstances in which an appropriation could be implied they were as follows: in order for an implied appropriation to take place, two conditions had to be satisfied before a finding of implied appropriation could be made: (1) the use made of the land by the authority without an appropriation must be ultra vires (2) the implication of an appropriation must resolve the ultra vires issue. The facts in this case did not support and implied appropriation.

Was there an appropriation of parts of the application land to open space purposes?

9.8. Mr Bennett submitted that the evidence showed that most of the application land had been held for development purposes and used as open space in the short to medium term. There was an express appropriation in 1963 to planning purposes. This appropriation was recorded accurately and clearly in the minutes, and reflected by the Terrier cards. There was no evidence of any subsequent express appropriation. Following the 1963 appropriation, the land was not used by the public pursuant to any statutory right. The land was used as open space pending its future development. There was no evidence that use was by express or implied licence. The evidence did not support the Council's case that the application land (or parts of it) had been appropriated to open space purposes. Mr Bennett reminded me that the Council's evidence at the preliminary hearing that the land was held for planning purposes up to 1980 was inconsistent with the Council's case at the final hearing. The Objector

[65] At paragraph 88.

sought to go behind its position previously stated in evidence and conceded by counsel that the 1964 appropriation was not to either Open Spaces Act 1906 or Public Health Act 1875 powers and behind its previous concession that zoning of land as public open space in development plans did not amount to evidence of appropriation.

9.9. Mr Bennett made detailed submissions on the relevant Council minutes. He submitted that it was clear that the action being considered by the Planning and Public Works (Works and General Purposes Sub) Committee at its meeting on 27th November 1963 was an appropriation for development, with a re-appropriation envisaged in the future. I accept this submission.

9.10. Mr Bennett drew my attention to the fact that the entry in the Appropriation of Land 1963/64 At 1st April 1963 schedule in the "by" column in relation to W20/3 was "P & P Works (Redevelopment)". This could be contrasted with other entries on the same page where the entry in the "by" column was "P & P Works (Parks and O.S.)". This showed that the entry related to the statutory purpose for which the land appropriated was to be held, and confirmed that the whole of the 324 acres which was appropriated under W20/3 was appropriated for redevelopment, contrary to the Objector's case that some of it was appropriated for public open space. I accept this submission.

9.11. The Applicant did not accept the Council's contention that the appropriation to planning purposes should be interpreted as an appropriation to the purposes for which each of the areas within the area appropriated was zoned in the Development Plan. Mr Bennett submitted that the Development Plan was aspirational: a plan, not a document intended to set the future conduct of the Council in stone. Mr Bennett gave as an example the calculations for the Public Open Space figures: he submitted that those figures are calculated on the basis of the population base: how much open space should there be? The calculations are accompanied by a broad intention as to where the public open space would be. When the plan was amended the intention was to build more houses. There would therefore be a need for more open space.

9.12. I do not accept Mr Bennett's contention that the figures for public open space in the Development Plan and the Amended Plan were based solely on how much open space there should be for the projected population base. The figure of 4.5 acres of playing fields per 1000 population is the aspirational figure ("it is intended to achieve an ultimate standard of playing fields of 4.5 acres per 1000 population as redevelopment takes place in the central and eastern areas of the City"). The figures given of 3 acres of playing fields per 1000 population in the Development Plan and 3.34 acres per 1000 population in the Amendment No 1 Plan are actual figures, based on the projected population, relative to the actual acreage of land zoned in the respective plans for playing fields. However, I do accept Mr Bennett's more general submission that the Plan itself was aspirational and not intended to bind the Council completely.

9.13. Mr Bennett asked me to note in this connection that the application land in *Beresford* was identified in the Washington New Town Plan 1973 as "parkland/open space/playing fields". It was not suggested that this zoning

could give rise to a statutory right to use the land. The argument that zoning of the land was the clearest possible indication of intended statutory purposes was both contrary to *Beresford* and contrary to the express appropriation to "planning purposes". Mr Bennett submitted that the idea that "planning purposes" meant anything other than for the purposes of planning or that the term "planning purposes" can engage the statutory mechanism of PHA 1875 or OSA 1906 made no sense.

9.14. Mr Bennett submitted, and I accept, that there was no room in the 1963 resolution to imply appropriation to a further different statutory purpose: the purpose to which the land concerned was appropriated was expressly stated and was planning purposes. Mr Bennett submitted that had the effect of the appropriation to planning purposes been to appropriate each part of the land appropriated to the purpose for which it was zoned in the amended Development Plan, then any further appropriation of land zoned for public open space in that plan would have required Ministerial consent under section 23(2)(a) of the Town and Country Planning Act 1959. There was no evidence that Ministerial consent had been sought or obtained in relation to the development of areas in the vicinity of the application land, also parts of W20/3, which had been zoned as public open space in the Amended Development Plan.

9.15. Mr Bennett submitted that when one looked at the post-1964 treatment of the land by the Council, including the development of the enclosed athletics track, the proposal to re-site the rugby club on part of the application land and the Hengrove Park development, it was only consistent with the Council having regarded it has being held for planning purposes. Had the land zoned as public open space within W20/3 been appropriated to open space purposes by virtue of the 1964 appropriation to planning purposes, the development and fencing of that land would have been ultra vires. He drew my attention to the enclosed athletics track, to the Rugby club, to the plan to move the Rugby club onto the application land and to the developments taking place on the land at Hengrove Park at Phase 1. Housing has been built on this land.

9.16. Mr Bennett asked me to consider the history of the St Giles Estate. The area which has been developed as the St Giles Estate was shown on the Development Plan Amendment No 1 map as in part zoned for housing and in part zoned for open space. It formed part of the area appropriated by the Planning and Public Works Committee as part of W20/3. On 13th September 1966 the Council approved the appropriation of 25 acres of land from the Planning and Public Works Committee to housing purposes. The Schedule of Appropriations for the relevant year (1st April 1966-31st March 1967) shows this appropriation as from "P & P Works (Redevelopment)" to "Housing". If the Objector's argument that the zoning of part of the application land as public open space plus the appropriation of that area to redevelopment purposes equated to an appropriation of the area zoned for public open space to public open space purposes, the equivalent result in the case of the St Giles estate would have been that the part (approximately half of the area) which was zoned for housing would not have needed to be appropriated to housing, and the remainder, which was zoned as public open space, would have been

recorded as having been appropriated from P & P Works (Parks and O.S.). I accept Mr Bennett's submissions in this regard. It follows that the Council's treatment of the St Giles Estate was consistent with an appropriation of the whole of W20/3 to planning purposes in 1963, and not with the appropriation of the various parts of W20/3 to the purposes for which it was envisaged those parts would be developed.

9.17. Mr Bennett submitted further, and I accept, that this transaction showed that the Council knew and understood at this time that it was immaterial that the statutory purpose from which the land was being appropriated, and the statutory purpose to which it was being appropriated were discharged by the same committee: an appropriation was still necessary where there was a change of statutory purpose for which the land was held. This was supported by other appropriations at this time from highways to development purposes.

9.18. There had been no appropriation of the land on which the Pinkhams Twist development was built to housing purposes: that land was zoned partly for housing purposes and partly for open space purposes in the Amended Development Plan. There had been no appropriation of the land on which the Court Meadow development was built: that land was zoned partly for housing, partly for open space and partly for industrial in the Amended Development Plan.

9.19. Mr Bennett said that the other "appropriations" relied upon by the Council of the areas marked A, B, C and D on the Hengrove Park development were not in fact appropriations, but were disposals, and that was why they had been advertised. He submitted that all the evidence confirmed that the land within W20/3 had been held for planning purposes.

9.20. The Applicant supported my finding on the preliminary hearing that the events of 1980 did not constitute an appropriation of the land to open space purposes. Other appropriations were clearly recorded. There was no evidence to support a finding that there had been an appropriation: all the evidence referred to a "transfer".

9.21. Mr Bennett drew my attention to the fact that the application land was not identified as parkland or as land held pursuant to open space purposes the Adopted Bristol Local Plan of 1997.

Land held under other powers

9.22. In relation to Mr Webster's suggestion that the effect of section 158 of the Local Government Act 1933 was that any land used by the Council for another purpose until it was required for the purpose for which it had been acquired (or appropriated) was to effect a temporary appropriation of the land to that temporary purpose, Mr Bennett submitted that, if that point was correct, there would never be any need for an authority to appropriate land acquired for one purpose to another purpose. He submitted, and I accept, that the correct interpretation of this section is that land may be used for a different statutory purpose by an authority on a temporary basis, but the statutory purpose for which it is held remains the same. Use of land as an open space under this

power could not give rise to a quasi-statutory trust. If it did so, the effect would be that all council-owned land used as open space during the qualifying period would be exempt from registration as a TVG, and *Beresford* showed that this was not so.

9.23. In relation to Mr Webster's argument that land held for housing purposes but used as open space was used by right, Mr Bennett asked me to note that amenity open space around housing was often fenced off to form a garden for a particular block or blocks, or provided with "residents only" signage. There was no inherent right for local inhabitants to use such space. The statute referred to "open space", not to "public open space". Mr Bennett asked me to look at the highway tripper cases of *Lees v. Devon CC* and *Gullittson v. Pembrokeshire CC* on this point.

Use

9.24. Mr Bennett responded to Mr Webster's submissions in relation to the use of particular areas of the application land. Whilst the land contains hedges and trees, the land is not divided in the sense that one can walk freely from one part to another. Mr Bennett submitted that it was clear from the Objector's own documents that the landowner regards this land as one land parcel. The land has never been divided. The land is open to use and has several open access points not requiring gates. There is full, free and unrestricted access to the land 24 hours a day. An alert owner who was on the spot could not have failed to recognise that the locals' use of the land was an assertion of a right. Large numbers of locals gave evidence of using the land. The user evidence supported use of the whole. Standing back and applying common sense, it was obvious that the land is used extensively by local inhabitants for informal recreation.

9.25. Mr Bennett submitted that there could be no doubt that the numbers of people using the land in question has been more than sufficient to indicate that their use of the land signified general use by the local community for informal recreation, rather than occasional use. There were no competing uses and no interruptions.

9.26. Mr Bennett drew my attention to the Council's own assessment of the use of the grassy area fronting Fortfield Road at A/A/50. Officers visiting the site at all times of day had always seen use, primarily kick-about football. He said that one would not expect to see footprints across such an area because it was open. The Council's report said that it was a "visible kick-about area", and although there was no scuffing visible on the site visit, it was clear from this that Council officers saw such signs of use. The area was highlighted as an area of heavy use by the value assessment.

9.27. In relation to the former site of the prefabs, Mr Bennett reminded me of the evidence of the following adults: Ward (wildflowers in spring); Everett (bats in spring); Rowley (blackberries); and Perry (dog chasing squirrels). He also reminded me of the evidence that children played in that area, and said that it was an area that would be inherently attractive to children.

9.28. In relation to the land to the west of the bund, Mr Bennett said that I should bear in mind that the purpose of the bund was to enhance the whole of the land and make it better for use. There were multiple crossing points over the bund. The use of this area was not a footpath-type use because there was no defined route: it was a leisure use. The leisure use started as soon as people got onto the land.

10. The Law

10.1. This application was made under section 15(2) of the Commons Act 2006. Section 15 provides (as relevant):

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where—
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
> (b) they continue to do so at the time of the application."

10.2. The Commons Registration Act 1965 provided for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31st July 1970 for the registration of greens. By s. 1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be…a town or village green unless it is so registered".

10.3. The concept that land could be registered as a new town or village green if it had been used as of right by the inhabitants of any locality for lawful sports and pastimes for more than 20 years was introduced by sections 13 and 22 of the Commons Registration Act 1965. These sections provided for the amendment of the register where any land could be shown to have become a town or village green after the end of the original registration period. The courts placed a narrow construction on the words "inhabitants of the locality". By section 98 of the Countryside and Rights of Way Act 2000, this part of the test for registration was widened, so that it was sufficient if user was by "a significant number of the inhabitants of any locality or of any neighbourhood within a locality".

10.4. The amended provisions were repealed and replaced by section 15 of the Commons Act 2006. Section 15 was brought into force on 6th April 2007 by the Commons Act (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007[66].

Interpretation of section 15

[66] SI 456/2007

10.5. Many of the words and phrases used in section 15 of the Commons Act 2006 are identical to the words and phrases used in section 22 of the Commons Registration Act 1965. The decided cases on what those words meant in the 1965 Act remain authoritative when considering the meaning of the same words in the 2006 Act. In the following section I examine each element of the statutory test separately.

"A significant number…

10.6. "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers[67]. It is not necessary that the users come predominantly from the claimed locality or neighbourhood: provided a significant number of the inhabitants of the claimed locality or neighbourhood are among the users, it matters not that many or even most come from elsewhere[68]. The requirement is that the users include a significant number of inhabitants of the claimed locality or neighbourhood, so as to establish a clear link between the locality or neighbourhood and the proposed town or village green, even if such people do not comprise most of the users.[69]

…of the inhabitants of any locality…

10.7. A "locality" cannot be created by drawing a line on a map[70]. A "locality" must be some division of the county known to the law, such as a borough, parish or manor[71]. An ecclesiastical parish can be a "locality"[72] but it is doubtful whether an electoral ward can be a "locality"[73].

…or of any neighbourhood within a locality…

10.8. The clear intention of Parliament in introducing these words was to relax the requirements necessary and to weaken links with the old rules relating to common law village greens. In a neighbourhood case, the technical difficulties in the word "locality" that have arisen in relation to common law greens should not be imported. As a result, where the locality relied upon is, for instance, a town, it can be a relevant locality even if it is not (or is no longer) a recognisable local government unit.[74] A "neighbourhood" need not be a recognised administrative unit. A housing estate can be a neighbourhood[75]. A neighbourhood need not lie wholly within a single locality[76]: the claimed

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[67] R (McAlpine) v Staffordshire CC [2002] EWHC 76 (Admin) at para. 77

[68] Oxfordshire and Buckinghamshire Mental Health Trust v. Oxford City Council [2010] EWCH 2010, paragraph 71.

[69] Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 69.

[70] R (Cheltenham Builders Ltd) v South Glos, DC [2004] 1 EGLR 85 at paras 41-48

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

[72] R (Laing Homes) Ltd v Buckinghamshire CC

[73] R (Laing Homes) Ltd v Buckinghamshire CC

[74] Leeds Group PLC v. Leeds City Council [2010] EWHC 810, paragraph 89.

[75] R (McAlpine) v Staffordshire CC

[76] Oxfordshire County Council v. Oxford City Council ("the Trap Grounds case") [2006] UKHL 25, para. 27 disapproving R (Cheltenham Builders Ltd) v South Glos. CC at para. 88

neighbourhood can fall within two or more localities. Further an Applicant may rely on two or more qualifying neighbourhoods within a locality or localities[77].

...have indulged as of right...

10.9. Use of land "as of right" means use that is not by force, nor stealth nor with the licence of the owner ("*nec vi, nec clam, nec precario*")[78]. Whether use is of right does not turn on the subjective beliefs of users[79].

...in lawful sports and pastimes...

10.10. The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play[80]. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way[81].

...on the land...

10.11. "Land" is defined as including land covered by water[82]. In *Oxfordshire County Council v Oxford City Council*[83] it was held that land, substantial parts of which were overgrown and inaccessible for recreation, could be registered as a new green, provided that the land could be regarded as having been used as a whole for recreation.

...for a period of at least 20 years and they continue to do so at the time of the application."

10.12. The House of Lords held in *Oxfordshire* that the relevant 20 year period under section 22(1)(a) of the Commons Registration Act 1965 was the 20 years immediately before the date of the application (rather than the date of registration, as the Court of Appeal had held). The 2006 Act sets out this aspect of the test clearly in the statute: in order to satisfy the criteria contained in section 15(2), the qualifying use must continue at the date of the application.

Procedure

10.13. The procedure on applications to register new greens made to Bristol City Council has since 6th April 2007 been governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

Who can apply?

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

Application

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[77] Leeds Group PLC, paragraph 96.
[78] R (on the application of Lewis) v. Redcar and Cleveland BC [2010] UKSC 11, para 20.
[79] R v Oxfordshire CC ex p Sunningwell PC
[80] R v Oxfordshire CC ex p. Sunningwell PC [2000] 1 AC 335 at pp 356F-357E
[81] Oxfordshire CC v Oxford CC [2004] Ch 253 at paras 96-105
[82] Commons Act 2006, section 61.
[83] [2006] UKHL 25, [2006] 2 AC 674, at para 44.

10.15. An application made under the 2007 regulations is required to be made in prescribed form 44, signed by or on behalf of the Applicant and must be supported by a statutory declaration in the prescribed form[84].

Accompanying documents

10.16. The application is required to be accompanied by every document relating to the matter which the Applicant had in his possession or under his control or to which he had a right to production, or a copy of every such document[85]. In many cases, there are few documents other than user questionnaires or statements as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Preliminary consideration

10.17. Where an application appears on preliminary consideration by the authority not to be duly made, the authority may reject it without publicising it, but must give the Applicant an opportunity to put the application in order, if it appears that he might be able to do so[86].

Publicity and inspection

10.18. The registration authority must publicise any application which it does not reject on preliminary consideration[87]:

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

10.19. The date to be inserted in the notice as the date by which statements in objection to an application must be submitted to the registration authority must be such as to allow an interval of not less than 6 weeks from the latest of the receipt in the ordinary course of post or publication and display of the notice[88].

Objections

10.20. Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land. The authority must consider any written statement that it receives before the date on which it proceeds to further consideration of the application and may consider any objection received after that date, but before the authority finally disposes of the application.[89]

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[84] 2007 Regulations, regulation 3.
[85] 2007 Regulations, regulation 3.
[86] 2007 Regulations, regulation 5(4)
[87] 2007 Regulations, regulation 5
[88] 2007 Regulations, regulation 5(2)
[89] 2007 Regulations, regulation 6

10.21. The authority must send the Applicant a copy of every statement in objection which it is required to consider and of every statement which it is permitted to consider and intends to consider.

Determination of application

10.22. Regulation 6(4) provides that the authority must not reject the application without giving the Applicant a reasonable opportunity of dealing with the matters contained in any objection statement sent to him, and with any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application. Other than this provision, the 2007 Regulations make no specific provision as to how an authority ought to determine a contested application.

10.23. A practice grew up under the Commons Registration (New Land) Regulations 1969, which was repeatedly approved by the courts, whereby the registration authority appointed an independent legally qualified inspector to conduct a non-statutory public inquiry into the application and to report whether it should be accepted or not. This practice is now reflected in the Commons Registration (England) Regulations 2008 which govern the procedure to be followed on applications made to the six pilot authorities. Where the same authority is Registration Authority and landowner, regulation 27 of the 2008 Regulations requires the authority to refer the application to the Planning Inspectorate for determination by it. Regulation 28(2) specifically states that the determining authority may decide that a public inquiry is to be held in relation to any application.

10.24. The question of when an inquiry should be held, and when it is not necessary to hold an inquiry was considered carefully by the Court of Appeal in *R (Whitmey) v Commons Commissioners*[90]. The Court of Appeal held that the Registration Authority's duty is to decide the application reasonably and fairly. The duty to act reasonably requires the authority to bear in mind that its decision carries legal consequences. The registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. If the authority accepts the application, amendment of the register may have a significant effect on the owner of the land. Likewise, if the authority wrongly rejects the application, the rights of the applicant and of local inhabitants will not receive the protection intended by Parliament[91].

10.25. In cases where it is clear to the Registration Authority that the application or any objection to it has no substance, the course it should take will be plain and the Registration Authority may dismiss or accede to the application without holding a public inquiry. However, in any case where there is a serious dispute, the Registration Authority will almost invariably need to appoint an independent expert to hold a non-statutory public inquiry, and find the requisite facts, in order to obtain the proper advice before proceeding to decide

[90] [2005] QB 282.

[91] Lady Justice Arden at paragraphs 28-30 and Lord Justice Waller at paragraph 66 (Pumfrey J agreeing).

the application[92]. Additionally, the authority may consider in any event that it has an obligation to hold an inquiry if the matter is of great local interest, because the public also has an interest in the outcome of the inquiry[93].

Other procedural issues

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

- **Burden and Standard of Proof.** The onus of proof lies on the Applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[94]. However, in my view, this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.
- **Defects in the application form.** The House of Lords has held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form, provided that there is no procedural unfairness to the Objectors. The issue for the registration authority is whether or not the application land has become a new green.
- **Part registration.** The House of Lords also held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green
- **Withdrawal of application.** Also in the *Oxfordshire* case, the Court of Appeal held that the Applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the Applicant's wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view.
- There is no power to award costs.

11. A detailed consideration of the "as of right" element of the test for registration

11.1. The Council as Objector here contends that the use of the application land has been "by right", rather than "as of right", as required by the section 15(2). This distinction merits detailed consideration.

Use "as of right"

11.2. In *R v. Oxfordshire CC ex p. Sunningwell PC*[95] the House of Lords considered the relevant legal principles. The importance of acquiescence on the part of the landowner in considering whether use was as of right was emphasised in Lord Hoffman's speech[96]:

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[92] Ibid.
[93] Ibid per Lady Justice Arden at paragraph 30.
[94] R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in R (Beresford) v Sunderland at para. 2
[95] [2000] 1 AC 335.
[96] At 350H-351B

"It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see Mills v Colchester Corporation (1867) LR 2 CP 476, 486). The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in Dalton v Angus (1881) 6 App.Cas. 740, 773, Fry J. (advising the House of Lords) was able to rationalise the law of prescription as follows:

> "the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.""

11.3. In the case of *R v. City of Sunderland ex part Beresford*[97], the House of Lords considered the meaning of the phrase "as of right". It was accepted that the words "as of right" imported the absence of any of the three characteristics of compulsion, secrecy or licence – nec vi, nec claim, nec precario.[98] The appeal turned on the question of whether the inhabitants' use of the land had been by virtue of the implied licence of the council. The House of Lords held that in order to imply a licence, the permission given must be revocable or time-limited. A licence could not be implied from the fact that the landowner encouraged or facilitated recreational use by local people, or from the fact that he was simply inactive in the face of such use.

11.4. In *R (on the application of Lewis) v Redcar & Cleveland Borough Council*[99] the Supreme Court once again looked at the issue of as of right. The Supreme Court allowed the appeal and disapproved the judge-made law that had grown up to the effect that, in addition to the question whether the use was nec vi, nec clam, nec precario, there was an additional question to be answered, viz, whether it would have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging, the effect of which had been that, so long as the local inhabitants' recreational activities did not interfere with the way in which the owner had chosen to use his land, there would be no suggestion to him that they were exercising or asserting a public right to use it for lawful sports and pastimes. The Supreme Court held that, where the land had been used

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[97] Ibid.

[98] Para 16, taken from the headnote in *Jones v. Bates* [1938] 2 All ER 237, and described by Lord Hoffman in *R v. Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, as summarising the holding on this point in entirely orthodox terms.

[99] [2010] UKSC 11 delivered on 3rd March 2010

concurrently by both the landowner and by local people during the qualifying period, the apparent deference of the recreational users to the landowner's own use of the land did not preclude their use being use as of right. However if there had been successive periods in the qualifying period during which recreational users are first excluded and then tolerated as the owner decides, for instance a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals are indoors for the worst of the winter, the use over the qualifying period as a whole would not be use as of right[100].

11.5. The emphasis on acquiescence as an essential element of user as of right tends to support the argument that where land is held by an authority for the purpose of being made freely available for use by the public, the use by the public is not as of right, because the essential element of acquiescence is missing: the owner is under a duty to allow access, and therefore could not have resisted the exercise of the right.

Statutory powers of the Council

11.6. The Council is a creature of statute and can only hold land under its statutory powers to do so. It is necessary therefore to consider what relevant powers to hold land the Council would have enjoyed in 1964 and in 1980 to acquire land and to appropriate it from one purpose to another.

Powers to hold land for planning purposes

11.7. In 1964 the Council had a power to acquire by agreement land for planning purposes under section 71 of the Town and Country Planning Act 1962. Section 71 provided (as relevant):

> "(1) The council of any county, county borough or county district may acquire by agreement-
>
> (a) any land (whether or not being land designated by a development land as subject to compulsory acquisition) which they require for any purpose for which a local authority may be authorised to acquire land under section sixty-eight of this Act
> (b) ...
>
> (2) The powers conferred by the preceding subsection shall not be exercisable by a council except with the consent of the Minister, unless the land which is to be acquired either-
>
> (a) is immediately required by the council for the purpose for which it is to be acquired, or
> (b) if it is not so required, is land within the area of the council,
>
> and shall not be exercisable except with the consent of the Minister in respect of corporate land."

[100] Per Lord Walker at paragraph 27

11.8. Section 68 provided (as relevant):

> "(1) Where any land is designated by a development plan as subject to compulsory acquisition by the appropriate local authority, then if the Minister is satisfied-
>
> (a) in the case of land comprised in an area defined by the plan as an area of comprehensive development, or of land contiguous or adjacent to any such area, that the land is required in order to secure the development or redevelopment of that area or that it is expedient in the public interest that the land should be held together with the land so required, or
> (b) in any other case, that it is necessary that the land should be acquired under this section for the purpose of securing its use in the manner proposed by the plan.
>
> ..."

11.9. Section 87(1) of the Act provided that "any reference in [Part V of the Act] to the acquisition of land for planning purposes is a reference to the acquisition thereof under section sixty-eight or section seventy-one of this Act, and any reference to the appropriation of land for planning purposes is a reference to the appropriation thereof for purposes for which land can be acquired under those sections."

11.10. Section 77 of the 1962 Act gave the Council the power to appropriate land held for planning purposes for any purpose for which they were authorised by any other enactment to acquire land. Section 78 contained a power to dispose of land held for planning purposes, and section 79 a power to develop land held for planning purposes. That power included power "to erect, construct or carry out any building or work on any land" to which the section applied. Mr Webster submitted, and I accept, that this power would have included a power to carry out other forms of development, such as development involving a material change of use from use ancillary to airfield use to public open space use.

11.11. Mr Bennett submitted, and I accept, that the effect of these provisions was that the Council was entitled to hold land for redevelopment, as a lawful purpose in itself.

11.12. In 1980, the equivalent power was to be found in sections 119 and 112 of the Town and Country Planning Act 1971.[101]

11.13. Section 119 of the 1971 Act provided (as relevant):

101

"(1) The council of any county, county borough, London borough or county district may acquire by agreement-

(a) any land which they require for any purpose for which a local authority may be authorised to acquire land under section 112 of this Act
(b) ...
(c) ...

(2) The powers conferred by the preceding subsection shall not be exercisable by a council except with the consent of the Secretary of State, unless the land which is to be acquired either-

(c) is immediately required by the council for the purpose for which it is to be acquired; or
(d) if it is not so required, is land within the area of the council.

..."

11.14. Section 112 of the 1971 Act provided (as relevant)

"(1) The Secretary of State may authorise a local authority to whom this section applies to acquire compulsorily any land within their area if he is satisfied-

(a) that the land is required in order to secure the treatment as a whole, by development, redevelopment or improvement, or partly by one and partly by another method of the land or of any area in which the land is situated; or
(b) that it is expedient in the public interest that the land should be held together with the land so required; or
(c) that the land is required for development or redevelopment, or both, as a whole for the purpose of providing for the relocation of population or industry or the replacement of open space in the course of the redevelopment or improvement, or both, of another area as a whole; or
(d) that it is expedient to acquire the land immediately for a purpose which it is necessary to achieve in the interests of the proper planning of the area in which the land is situated.

(2) ...".

11.15. Section 133(1) of the Town and Country Planning Act 1971 provided that "any reference to the acquisition of land for planning purposes is a reference to the acquisition thereof under section 112 or 119 of this Act or section 68 or 71 of the Act of 1962 and any reference to the appropriation of land for planning purposes is a reference to the appropriation thereof for purposes for which land can be or could have been acquired under those sections".

11.16. Section 122 of the 1971 Act gave the Council the power to appropriate land held for planning purposes for any purpose for which they were authorised by any other enactment to acquire land. Section 123 contained a power to dispose of land held for planning purposes, and section 124 a power to develop land held for planning purposes.

Powers to hold land for open space purposes

11.17. The Council had a power at all material times to provide places of public recreation under section 164 of the Public Health Act 1875, which provides:

> "Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.
> ..."

11.18. The Council had a power at all material times under section 9 of the Open Spaces Act 1906 to acquire any open space or burial ground and to undertake the entire or partial care, management and control of any such open space or burial ground, whether or not any interest in the soil was transferred to it. Section 10 of the Open Spaces Act 1906 provides:

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

Power to hold land for housing purposes

11.19. Section 96 of the Housing Act 1957 conferred the power on local authorities to acquire land proposed to be used for any purpose authorised by section 93, which included a power to provide and maintain, with the consent of the Minister in connection with housing accommodation provided under Part V of the Act, any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister would serve a beneficial purpose in connection with the requirements of the persons for

whom housing accommodation was provided pursuant to the authority's powers under Part V of the Act. Section 107 conferred on local authorities the power to lay out and construct public streets or roads and open spaces on land acquired by them for the purposes of Part V of the Act. Section 97(2) authorised the acquisition of land for the purposes of Part V notwithstanding that the land was not immediately required for those purposes. Section 99 enabled a local authority to appropriate land for the time being vested in them or at their disposal for the purposes of Part V of the Act, subject to Ministerial consent.

11.20. Part II of the Housing Act 1985 contains equivalent powers at sections 12 (the provision of recreation grounds with the consent of the Secretary of State), 13 (laying out open spaces on land acquired under the Act), 19 (appropriation for the purposes of Part II powers).

Power to use land for the purpose of any of the functions of the local authority until it is required for the purpose for which it was acquired

11.21. Where land has been acquired by the authority for one statutory purpose but is not immediately required for that purpose, it may be held and used by the authority for the purpose of any of the functions of the authority, without being appropriated to that new purpose. Section 158 of the Local Government Act 1933 provided (as relevant):

> "(1) A local authority may, with the consent of and subject to any conditions imposed by the appropriate Minister, acquire by agreement, whether by way of purchase, lease, or exchange, any land, whether situate within or without the area of the local authority, for any purpose for which the local authority are authorised by this or any other public general Act to acquire land, notwithstanding that the land is not immediately required for that purpose.
> (2) Any land acquired under this section may, until it is required for the purpose for which it was acquired, be held and used for the purpose of any of the functions of the local authority.

11.22. The equivalent provision in the Local Government Act 1972 is section 120(2).

Power to appropriate land from one statutory purpose to another

11.23. In 1964 the Council's power to appropriate land was contained in section 163 of the Local Government Act 1933, which provided (as relevant):

> "(1) Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land...."

11.24. The equivalent provision in 1980 was section 122 of the Local Government Act 1972 which provided (as relevant):

> "(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are

authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purposes for which it is held immediately before the appropriation…"

Restrictions on appropriation or disposal of open space land

11.25. Section 122 of the Local Government Act 1972 contains restrictions on the appropriation of land which consists of or forms part of an open space to other uses (as relevant):

> "122 Appropriation of land by principal councils
> (1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.
>
> (2A) A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.
>
> (2B) Where land appropriated by virtue of subsection (2A) above is held—
>
> (a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),
>
> the land shall by virtue of the appropriation be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

11.26. Section 123 of the Local Government Act 1972 contains restrictions on disposal of open space. Section 123 provides:

> 123 Disposal of land by principal councils
> (1) Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.
>
> (2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short

tenancy, for a consideration less than the best that can reasonably be obtained.

(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.

(2B) Where by virtue of subsection (2A) above a council dispose of land which is held—

(a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or

(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),

the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

11.27. Subsections 122(2A) and (2B) and 123(2A) and (2B) were inserted by the Local Government, Planning and Land Act 1980, s 118, Schedule 23, paragraphs 12(2) and 14, respectively.

11.28. "Open space" is defined for the purposes of the Town and Country Planning Act 1990 in section 336(1) of that Act as follows:

> "'open space' means any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground"

11.29. "Open space" has the same meaning in the Local Government Act 1972 as it does in the Town and Country Planning Act 1990 by virtue of section 270(1) of the 1972 Act:

> "'open space' has the meaning assigned to it by section 336(1) of the Town and Country Planning Act 1990"

11.30. The provisions contained in these sections tend in my judgment to suggest that Parliament considered when passing these provisions that a trust for the enjoyment of land by the public arose where a local authority held that land under its powers contained in section 10 of the Open Spaces Act 1906, or under its powers contained in section 164 of the Public Health Act 1875. Specific provision is made for the release of the land from such trusts on disposal or appropriation. No similar provision is made in respect of land laid

out as a public garden, or used for the purposes of public recreation, but not held under those powers.

11.31. Section 23(2) of the Town and Country Planning Act 1959, the provision applicable in 1963-64, also contained a restriction on appropriation of open space land (as relevant):

> "(2) The exercise after the commencement of this Act, by any authority to whom this Part of this Act applies, of any power of appropriation in relation to which the preceding subsection has effect shall be subject to the following provisions, that is to say,-
>
> > (a) land which consists or forms part of any open space (not being land which consists or forms part of a common or of a fuel or field garden allotment) shall not be appropriated except with the consent of the Minister of Housing and Local Government"

11.32. Section 24 of the Town and Country Planning Act 1959 provided that on an appropriation of land for any purpose by a local authority (other than an appropriation falling within subsection (2)), such adjustment shall be made in the accounts of the authority as may be requisite in the circumstances.

11.33. Mr Webster referred me to the decision of Templeman J in *Third Greytown Properties Ltd v Peterborough Corporation*[102] as authority for the proposition that the question the words "which is or forms part of a common, open space or fuel or field garden allotment" in the equivalent section in the Town and Country Planning Act 1971 address is the purpose for which the land is held, rather than the physical state of the land. In that case a corporation had authorised a developer to build on land held for open space purposes, and then sought to say that it no longer had power to make an order appropriating the land for development purposes from open space purposes because the land was no longer open space. Templeman J held that the corporation had power to make the order. The power to make the order applied where land was held for the time being for a particular purpose and it was desired to appropriate it for another purpose. Since it was the purpose which had to be altered, the factual situation was irrelevant.

11.34. I was not directed to any provision which defined "open space" for the purposes of the 1959 Act, but I note that Templeman J states that the equivalent section in the 1947 Town and Country Planning Act referred to the Acquisition of Land (Authorisation Procedure) Act 1946. The definition of open space for the purposes of the equivalent provision in the 1947 Act was: "any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground".

11.35. Whilst I accept that *Greytown* shows that where land was held for open space purposes but is not in fact an open space within the statutory definition under

[102] [1973] 3 All ER 731

the 1971 Act, the power to appropriate and the restrictions on appropriation applicable to open spaces continued to apply, I do not think that it shows that the corollary is necessarily the case under the present legislation: that it is only open spaces which are held for open space purposes to which the restrictions apply. In my experience many authorities (including, according to the evidence before the inquiry, Bristol Council) consider themselves bound by the statutory restrictions under the current legislation in relation to the disposal or appropriation of land which is physically open space, regardless of the statutory purpose for which it is held: thus the disposal or appropriation of land which physically is an open space is as a matter of practice advertised, despite the fact that the land is held for housing, education or highway purposes (for instance).

11.36. Although the 1964 resolution here stated that the appropriation was subject to Ministerial consent where necessary, there was no evidence as to whether Ministerial consent was in fact considered necessary and/or sought. If the definition of open space was the same as in the equivalent provision of the 1947 Act, consent would not have been required, as the land being appropriated was not laid out as a public garden, used for the purposes of public recreation, or a disused burial ground.

A detailed consideration of the *Beresford* case

11.37. The land the subject of the application in *Beresford* was held under the very wide powers contained in the New Towns Act 1965. It was not acquired for any specific purpose, and the authority was not under an obligation to appropriate it for any specific purpose (such as housing, public buildings, or open space). The issue of whether the use of the land was "by right" or "as of right" had not been raised in the lower courts, but the House of Lords invited the parties to make written submissions on the question of whether the inhabitants had indulged in lawful sports and pastimes for the qualifying period of 20 years not "as of right" but pursuant to a statutory right to do so.[103]

11.38. On the facts in *Beresford*, the House of Lords was not satisfied that any statutory right existed which conferred on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes.[104] Counsel for the council disclaimed reliance on section 21 of the New Towns Act 1981 and the question of whether that section might confer a statutory right was not therefore open for determination by the House of Lords, although it appears that Lord Scott, at least, had the point been argued, might have been persuaded that that section did confer such a right.[105]

Express acquisition or appropriation under the Open Spaces Act 1906 or section 164 of the Public Health Act 1875

11.39. It was accepted by both parties that, had the council acquired the application land under the Open Spaces Act 1906, the local inhabitants' use of the land for recreation would have been use under the trust imposed by section 10 of the

[103] Para 9.
[104] Ibid.
[105] Para 26.

Act[106]. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965. [107]

11.40. Lord Walker addressed this matter at paragraph 87:

> "Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers)."

11.41. Thus, where land the subject of a town or village green application has been expressly acquired or appropriated to use under section 10 of the Open Spaces Act 1906, the "as of right" part of the statutory test for registration as a town or village green cannot be satisfied. In my judgment the position must be the same where land is held under the statutory trust which arises under section 164 of the Public Health Act 1875.

Inferred acquisition or appropriation under the Open Spaces Act 1906 or section 164 of the Public Health Act 1875

11.42. Counsel for the council in *Beresford* accepted that the appellant applicant was correct in contending, on the facts, that the application land had not been acquired under the Open Spaces Act 1906, and that therefore section 10 did not apply. The question of whether the land had been acquired under the Open Spaces Act 1906 was therefore not open for decision by the House of Lords[108]. However, it appears that, had it been, Lord Scott (at least) might have been persuaded that it was not necessary in order to prove that land had been acquired under the Act for reference to the Act itself to be expressly stated either in the deed of transfer or in some council minute relating to the acquisition. Lord Scott commented:

> "*Attorney-General v Poole Corporation* [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation:
>
> > 'in fee simple to the intent that the same may for ever hereafter be preserved and used as a pleasure or recreation ground for the public use.'
>
> There was no express reference in the conveyance to the 1906 Act, but the Court of Appeal thought it plain that the Act applied. Indeed, counsel on both sides argued the case on the footing that that was so: see Sir Wilfrid Greene MR, at p30. It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the

[106] Para 30.
[107] Para 30.
[108] Ibid and paragraph 88.

council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation, and if the land had not been purchased for some other inconsistent use and the local authority had had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply: cf. counsel's argument in Poole Corporation, at p27."

11.43. Thus, where there is material in the transfer or in the relevant council minutes relating to the acquisition from which it can be inferred that land the subject of a town or village green application was acquired or appropriated to use under section 10 of the Open Spaces Act 1906, the "as of right" part of the statutory test for registration as a town or village green cannot be satisfied. Again, in my judgment the position must be the same where there is material from which it can be inferred that land was acquired or appropriated to be held under the statutory trust which arises under section 164 of the Public Health Act 1875.

Land held under other statutes for the purposes of public recreation

11.44. Further there is some indication that Lord Walker's view was that, even if there is nothing from which acquisition or appropriation under section 10 of the Open Spaces Act 1906 specifically could be inferred, where land owned by a local authority has been acquired or appropriated for the purpose of recreation (including perhaps under section 19 of the Local Government (Miscellaneous Provisions) Act 1976), the use by the public will be use "by right" rather than use "as of right". Lord Walker continued in paragraphs 87 and 88:

> "Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). **The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation.** [emphasis added]
>
> 88 Those situations would raise difficult issues, but, in my opinion, they do not have to be decided by your lordships on this appeal, and would be better left for another occasion. The undisputed evidence does not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land as recreational open space."

11.45. Lord Walker's view was that where land had been appropriated for the purpose of public recreation, even though it was not held under section 10 of the Open Spaces Act 1906, the "as of right" part of the statutory test for registration as a town or village green cannot be satisfied. Although Lord Walker referred solely to appropriation, there is no reason of principle why a different rule should apply where land has been acquired for the purposes of public recreation, so that there has been no need for an appropriation.

11.46. Lord Walker's words highlighted in bold above were *obiter dicta*, as he himself specifically emphasised by stating that the issue did not arise for decision on that appeal, and would be better left for another occasion. However, there is no judicial authority at any level to support the contrary view, and Lord Walker's words must be accorded substantial weight.

Assistance to be derived from taxation cases and legislation

11.47. In *Lambeth Overseers v. London County Council*[109] (the *Brockwell Park* case) the House of Lords held that land purchased by London County Council under the powers in sections 4 and 5 of the London Council (General Powers) Act 1890, which provided that once the land had been acquired the Council must hold the same and every part thereof as a park, and should lay out, maintain, and preserve the same and every part thereof as a park, for the perpetual use thereof by the public for exercise and recreation, was not rateable, because it was not occupied by the Council, the Council being merely custodians and trustees for the public, and being obliged to allow the public the free and unrestricted use of it.

11.48. In the decades following the *Brockwell Park* case, there were a number of cases in which the boundaries of the exemption were tested. A detailed account is given in Ryde on Rating at paragraph D[716]. In *Blake v. Hendon*[110] the Court of Appeal held that land purchased under the power contained in section 164 of the Public Health Act 1875 was held by the local authority on trust for the public to be used for the purposes set out in the section, and that the public had free and unrestricted use of it for those purposes (which right might be qualified by a limited exclusion for ancillary purposes).

11.49. The non-rateability of parks and public open spaces was made the subject of a statutory exemption for the first time in the Rating and Valuation Act 1961. The current provision is Schedule 5, paragraph 15 of the Local Government Finance Act 1988 which provides (as relevant):

> 15(1) A hereditament is exempt to the extent that it consists of a park which—
>
> > (a) has been provided by, or is under the management of, a relevant authority or two or more relevant authorities in combination, and
> > (b) is available for free and unrestricted use by members of the public.
>
> (2) The reference to a park includes a reference to a recreation or pleasure ground, a public walk, an open space within the meaning of the Open Spaces Act 1906, and a playing field provided under the Physical Training and Recreation Act 1937.

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[109] [1897] 1 AC 625
[110] [1962] 1 QB 283

(3) Each of the following is a relevant authority—

(aa) a Minister of the Crown or Government department or any officer or body exercising functions on behalf of the Crown,
(a) a county council,
(aa) a county borough council,
(b) a district council,
(c) a London borough council,
(d) the Common Council,
(e) the Council of the Isles of Scilly,
(f) a parish or community council, and
(g) the chairman of a parish meeting.

(4) In construing sub-paragraph (1)(b) above any temporary closure (at night or otherwise) shall be ignored."

11.50. The definition of "a park" is thus extended for the purposes of the rating legislation to include public walks and pleasure grounds provided under section 164 of the Public Health Act 1875, playing fields provided under the Physical Training and Recreation Act 1937[111] and recreation grounds[112]. The statutory exemption applies in respect of any park within the extended definition which has been provided by or is under the management of a local authority and which is for the time being available for free and unrestricted use by members of the public. In effect, it seems to me, the enactment of this provision was an acknowledgement by Parliament of the strength of the arguments as to liability for rating which had been made successfully in relation to land held under sections 10 of the Open Spaces Act 1906 and 164 of the Public Health Act 1875 and under the various private and local acts which had been the subject of the earlier reported decisions. There is no extension of the definition of "park" to include land used for the purposes of public recreation but not falling within the classes described.

Land held by a local authority and used as open space land

11.51. Lord Scott commented in *Beresford*[113] that although the point had not been argued before the House of Lords, he thought that there were strong arguments for contending that where "open space" land was within the ownership of a principal council, even if the Open Spaces Act 1906 was not applicable, the statutory scheme under the Local Government Act 1972 excluded the operation of section 22(1) of the Commons Registration Act 1965:

> "For these reasons, I would, on the basis upon which the case has been argued before your lordships, allow the appeal. I am, however, for reasons that will have appeared, uneasy about this conclusion. Where open space land comes into the ownership of a "principal council", I think there are strong arguments for contending that the statutory

[111] From 14th February 1977 held under section 19 of the Local Government (Miscellaneous Provisions) Act 1976.
[112] Land allotted and awarded under the Inclosure Acts as a place for exercise and recreation: Inclosure Act 1857 s 12
[113] At paragraph 52 in his speech

scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed to your lordships. I think also, as at present advised, that the power of disposal of open space land given to principal councils by section 123 of the 1972 Act will trump any town or village green status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion."

11.52. On the other hand, Lord Walker thought that counsel for the registration authority had been correct not to argue for some general implied exclusion of local authorities from the scope of section 22 of the Commons Registration Act 1965[114]. None of the other Law Lords expressed an opinion on this point. Lord Walker gave his own reasons and agreed with Lord Bingham and Lord Roger. Lord Bingham gave his own reasons, and stated that he agreed with Lords Scott, Rodger and Walker. Lord Hutton agreed with Lords Walker, Bingham and Rodger. Lord Rodger gave his own reasons and agreed with Lords Bingham and Walker. Lord Scott's opinion was effectively therefore a minority opinion, whereas three of the other Law Lords concurred in Lord Walker's opinion. I consider therefore that I must give Lord Walker's opinion on this point more weight than Lord Scott's opinion.

Conclusions on the law in relation to as of right/ by right

11.53. In my opinion the better view is that where a local authority holds land under the statutory powers contained in section 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875 on trust for the free and unrestricted use of the public, it is wrong and unrealistic to characterise as "acquiescence" the fact that the Council did not seek to treat members of the public using the land as trespassers. I do not accept Mr Bennett's submission that use in those circumstances can be use as of right. The correct analysis must be that by withholding any claim in trespass, the Council was observing its duty to admit the public to the land for the purposes of recreation. In my judgment therefore, where it is established that the local inhabitants do enjoy a statutory right under section 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875 to use the land for lawful sports and pastimes, a registration authority should not find that their user has been use "as of right", and accordingly should not find that the statutory test for registration as a town or village green has been satisfied in relation to that land.

11.54. Where the land is held as a playing field under section 19 of the Local Government (Miscellaneous Provisions) Act 1976, or as a recreation ground under the Inclosure Acts, it may be arguable (as a matter of law, and as a matter of fact) that use by the public is not use as of right. That question does not arise for decision here.

11.55. Where land is not held under any of the above-mentioned powers, but is held under other statutory powers, but used for the purpose of public recreation, the

[114] Para 88.

better view is that use of the land may be "as of right", and the operation of sections 122 and 123 of the Local Government Act 1972 and the scheme of the Act as a whole do not prevent land held by a local authority from being registrable if the other relevant qualifying criteria for registration as a green under section 15 are met.

11.56. These conclusions accord with the views expressed by Lord Walker in *Beresford* and set out above, with which the majority of the House of Lords concurred.

The case law on what constitutes an appropriation

11.57. In the instant case there was no express resolution to appropriate the land to open space or recreation purposes. There is little assistance in the form of case-law as to what, other than an express resolution, can amount to an appropriation.

11.58. On the issue of appropriation for planning purposes Mr Webster referred me to the cases of *Edmunds v. Stockport MBC* [1990] 1 PLR 1; *Oxy-Electric Ltd v. Zainuddin* [1990] unreported; and *R v. City of London Council ex p The Barbers of London* [1996] 2 EGLR 128.

11.59. The land in the *Edmunds* case had been acquired under section 112 of the 1971 Act for planning purposes. The judge commented that in his view the local authority had acted *intra vires* in that the land was at the relevant time suitable for and required in order to secure the carrying out of development, redevelopment or improvement, but the applicant took no issue as to the propriety of the resolution. The issue in the case concerned the construction of section 127 of the 1971 Act. Mr Webster relied on the Judge's comment in *Oxy-Electric* that it followed from *Dowty* and from *Edmunds* that a resolution to acquire or appropriate for planning purposes need not mention a specific purpose. In the *Oxy-Electric* case it was common ground between the parties that the acquisition had in fact been under the Council's powers contained in section 120 of the 1971 Act, rather than under section 112 or 119. The issue in the *Dowty* case was whether the appropriation for planning purposes had been valid on the basis that the land was still required for the purpose for which it was acquired, rather than the scope of an appropriation for planning purposes.

11.60. The *Barbers* case was more helpful, in that the issue in that case turned on the meaning of the phrase "for planning purposes". Dyson J held that the phrase was quite general. There was no reason to construe the phrase as restricted to the initial planning scheme for which the land was acquired or appropriated. If an authority continued to hold a site for planning purposes, section 237 would apply if it were redeveloped in accordance with planning permission. The phrase "for planning purposes" was used to distinguish the case from one where acquisition or appropriation was made for other purposes, such as investment purpose or educational purposes. The judge commented that sometimes, if land was acquired by an authority for planning purposes, there may at that time be no definite decision as to the form of the actual development which is to take place. Sometimes it may be intended that there is

to be a development with a number of phases. If the phrase was to be narrowly construed as referring to the first development after acquisition or appropriation, this would give rise to practical difficulties: it may be uncertain whether a development was to be regarded as part of the initial development, or a later addition or variation of it.

11.61. Mr Bennett submitted in relation to the *Barbers* case, and I accept, that the factual circumstances of that case demonstrated that it was lawful for an authority to hold land for development for a long period. He submitted, and I accept, that there is nothing unlawful about holding land for redevelopment and using it for another purpose, such as for public open space.

11.62. In *Oxy-Electric v. Zainudin*, a decision of Mr Terence Cullen QC, sitting as a Deputy Judge of the High Court, one of the questions for decision was whether land had been appropriated for planning purposes, so as to engage section 127 of the Town and Country Planning Act 1990. It was common ground that the local authority could only change the purpose for which it held land under a statutory power of appropriation. Counsel for the defendants contended that appropriation was not a technical term and merely meant that the Council in fact applied the land for purposes which could be planning purposes as defined by section 133 of that Act. It was not necessary for there to be an express appropriation nor an implicit appropriation. One simply looks at the facts to see if the local authority applied the land for purposes which could be planning purposes under section 133. Counsel for the plaintiff contended that, as appropriation carried out by the local authority could only be carried out by it under a statutory power, it must be a conscious decision or it must be an implicit step in a conscious decision.

11.63. The Judge said that he was looking for the exercise of a statutory power by the local authority. He held, following *Dowty v Wolverhampton Corporation (No 2)*[115], and *Edmunds v Stockport Metropolitan Council*[116], that there need not be a specific purpose mentioned in the local authority's resolution: the mention of "planning purposes" was sufficient. He described the exercise he had to undertake as looking for the exercise of a statutory power by the local authority. He said that he was "quite prepared to accept that, if the local authority dealt with the land in such a manner that it could only have dealt with it lawfully if it had made an appropriation, then the resolution need not record such appropriation". However, on the facts, the local authority had expressly acquired the land under section 120 of the Local Government Act 1972. Had the Council wished to acquire or appropriate the site for planning purposes under section 119 of the Town and Country Planning Act 1971, it would have had to consider whether the criteria for planning under section 133 were met. The Council did not consider those criteria. It had had power to hold the land and to sell the land under section 120. Even if it was not necessary for there to be an express or implicit appropriation, the facts did not amount to an exercise of the statutory powers of appropriation.

[115] [1976] Ch 13.
[116] [1990] 1 PLR 1.

11.64. Mr Webster also referred me to the report of Mr Vivian Chapman QC dated 30th March 2009, acting as Inspector in the matter of an application to register Castle Park, Bristol as a new town green. Mr Chapman dealt with what he termed "the appropriation argument" at paragraphs 172-193 of his report. Mr Chapman said that, although the words were not entirely free from ambiguity, reading the judgment in *Oxy-Electric* as a whole, he considered that what the Judge had meant when he said that he was "quite prepared to accept that, if the local authority dealt with the land in such a manner that it could only have dealt with it lawfully if it had made an appropriation, then the resolution need not record such appropriation" was that if a local authority resolves to use land in a way that would only be lawful if there were an appropriation to a new statutory purpose, an appropriation is implicit in this resolution. Mr Chapman said that he concurred with this view, and that he did not think that counsel for the defendant's wider submission could be correct, otherwise section 122 could simply have provided that a local authority could use land for any purpose it wished.

11.65. At the final hearing Mr Webster referred me also to the Inspector's reports in the matters of applications in respect of Slades Farm, Ensbury Park, Bournemouth (February 2010) and Branksome Recreation Ground, Poole (December 2010), and in particular to paragraphs 6.57 and 6.58 of the Slades Farm report and to paragraph 208 ff of the Branksome report.

11.66. The Slades Farm case was one of incomplete records: no express resolution for an appropriation a particular area of the application land (the green area) to public open space purposes had been found, but there was a "consent to borrowing" document referring to the acquisition of 26 acres of land at Slades Farm under the Public Health Acts, and a subsequent appropriations plan identifying a total area of 26.25 acres of public open space. The area shown as public open space on that plan was the green area. The land had been managed by the Leisure Services Department as a public open space and was subject to byelaws covering such recreational areas. The Inspector found that the land had been appropriated to public open space purposes on the balance of probabilities.

11.67. The Branksome Recreation Ground case similarly was one of incomplete records. The Inspector looked at all the surrounding evidence, in particular a resolution of one committee referring to an intention to use the application land as a recreation ground, from which he inferred that the missing reports presented to full council from that committee and from another committee also dealt with that issue, a resolution of the Parks Committee which showed that the Council was developing the land in ways which could only have been lawful if it was an open space or pleasure ground, and byelaws made in respect of the application land which could only have been validly made if the application land was an open space or a pleasure ground or both. From all of this evidence he inferred that an appropriation of the application land to open space or pleasure ground purposes must have taken place at some point during the period 1926-1930.

11.68. In *Beresford* Lord Scott considered the situation where records in relation to an acquisition of land were complete, but the resolution to acquire itself did not refer to the purpose for which the land was acquired was acquired. Lord Scott considered it arguable that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been acquired for some other insistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, section 10 of the Open Spaces Act 1906 would apply. Lord Walker said that where land was vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, the inhabitants of the locality were beneficiaries of a statutory trust of a public nature. It would be difficult to regard those who used the park or other open space as trespassers. The position would be the same if there was no statutory trust in the strict sense, but the land had been appropriated for the purpose of public recreation. Lord Walker went on to say that the undisputed evidence on the facts of *Beresford* did not establish or give grounds for inferring any statutory trust of the land or any appropriation of the land as recreational open space. Mr Webster relied on the remarks of Lord Walker as support for his submission that Mr Chapman's approach was correct, and that it was possible to infer an appropriation in appropriate circumstances. I agree that Lord Walker's remarks provide support for the contention that it is possible for an appropriation to be inferred, but I do not find any assistance in those words as to in what circumstances an appropriation may be inferred. I do not accept Mr Webster's submission that an appropriation may be inferred from the surrounding factual circumstances where all the records are complete; in my judgment this approach is far too wide.

11.69. It is important, in my judgment, to bear in mind, that, as stated by Mr Cullen in *Oxy-Electric*, one is here looking for the exercise by the local authority of a statutory power to appropriate. An authority may make decisions by resolution, or, where powers are delegated, by decisions made under those delegated powers. I consider that Mr Chapman's interpretation of Mr Cullen's judgment in *Oxy-Electric*, adopted by Mr Carter in the Branksome case, is correct: I agree that Mr Cullen was rejecting Mr Carnwath's submission, and stating (albeit obiter) that he considered that if a local authority resolved to use land in a way that would only be lawful if there were an appropriation to a new statutory purpose, an appropriation was implicit in this resolution.

11.70. In my judgment it is clear from the authorities that it is not essential for a council to be able to produce a copy of an express formal resolution to appropriate in order to prove that a decision to appropriate land was made. Where records are incomplete, there may be material from which, as a matter of fact, it is possible to infer that an express resolution must have been made, but the record of it has been lost.

11.71. However the situation where the records are complete, but there is no express resolution to appropriate is different. The exercise of a power involves a conscious decision by the local authority. A resolution to appropriate may be implicit in an express resolution of the authority. The implication of a decision to appropriate involves looking at the decisions expressly made, and finding

that it is implicit in those decisions that a decision to appropriate must also have been taken. It is not enough to look at the factual circumstances, such as the use to which the land was being put, and to seek to infer from a decision the factual circumstances. That would be to adopt the test put forward by Mr Carnwath, which I respectfully agree with Mr Cullen and Mr Chapman should be rejected. One looks for a resolution of the authority to act in some way in relation to land held for one purpose which, without the implication of a decision to appropriate the land to another purpose, would be ultra vires. In that event a decision to appropriate is implied into the express decision to act. An example of such a resolution might be a resolution to pass bylaws in relation to a piece of land under a particular enactment: unless the land was held pursuant to the corresponding statutory power, the passing of the bylaws would be ultra vires, and therefore a decision to appropriate is implied, or where the records are incomplete, it can be inferred that a decision to appropriate the land to the appropriate purpose must at some time have been made.

11.72. The correct approach therefore, in the absence of an express resolution to appropriate, and in a situation where the records are complete, is to identify the statutory purpose for which the land the land is held by identifying the purpose for which it was purchased and any purpose to which it was subsequently expressly appropriated, and then to ascertain whether the Council subsequently passed any resolution to use the land for a purpose for which it could not lawfully have used the land unless an appropriation to new purposes was implicit in the resolution. Where there is no such resolution, no decision to appropriate the land can be inferred merely from the use to which the land is put, if that use would be lawful pursuant to the statutory power under which the land is for the time being held.

12. Conclusions as to for what statutory purposes the various parts of the application land have been held during the relevant period

12.1. I am satisfied that those parts of the application land coloured light blue, green, yellow and pink on Plan No N5028c have been held for planning purposes since the resolution of the Council to appropriate those areas for that purpose, made on 11th February 1964. There is no evidence that these areas were ever expressly appropriated to another statutory purpose. I do not consider that it is possible to infer that these parts of the application land were appropriated to open spaces purposes in 1980 from the evidence produced to the inquiry. There is no resolution of the Council to use the land in a way which would only have been lawful if there were an appropriation to a new statutory purpose, from which an appropriation can be implied. There is no other decision of the Council from which an intention on the part of the Council to appropriate the land to open space use can be inferred. I conclude that those areas continued to be held by the Council throughout the relevant period for planning purposes.

12.2. The orange land was acquired for housing purposes. There is no evidence to show that any part of the orange land was included within the land appropriated to planning purposes in 1964, or that it has since 1948 been

appropriated to any other purpose. I therefore conclude that the orange land continued to be held for housing purposes throughout the relevant period.

12.3. The dark blue land was, on the balance of probabilities, acquired for highway purposes. There is no evidence that it has been appropriated to any other purpose. I therefore conclude that the dark blue land continued to be held for housing purposes throughout the relevant period.

12.4. The purple land was, on the balance of probabilities, acquired for planning purposes. There is no evidence that it has been appropriated to any other purpose. I conclude that this area continued to be held by the Council throughout the relevant period for planning purposes.

13. Evaluation of the user evidence

13.1. Mr Webster made a number of general submissions on the quality of the user evidence which I accept. He submitted that the evidence of people who are prepared to attend the inquiry and have their evidence tested by cross-examination is likely to be significantly more reliable that that of any number of people who do not. Evidence in the form of responses on the Open Spaces Society's pro forma questionnaires or which result from informal surveys to standard questions or petitions is stereotyped and of a generalised nature. In itself such evidence is of little evidential value, but it may support other more reliable evidence. Mr Webster also asked me to take into account, which I have, the fact that twenty years is a very long time, and that memories will inevitably dim over that period. As an example of this, where an activity has been carried on in the recent past, it is easy to believe that the activity has been carried on longer and / or more often and / or more continuously than it really has.

13.2. The user evidence questionnaires were in the common form, based on the Open Spaces Society's questionnaire. Such questionnaires suffer from inherent weaknesses: the questionnaire assumes that the respondent has used the land, the questions fail to elicit sufficient detail, the respondent is not invited to give time-spans for particular activities, which can lead to over-reporting. There were a number of questionnaires included in the applicant's evidence in which the witness reported no use or no qualifying use. I was satisfied therefore that all questionnaires completed had been included. The evidence contained in the questionnaires supported the individually written statements and the oral evidence given at the inquiry.

13.3. In some instances it was clear from the answers given by witnesses that walking use was merely crossing the land to get somewhere, most frequently to ASDA or to the Health Centre. I have discounted this evidence, and where this is the only type of walking mentioned, have not included walking in the list of activities enjoyed by the witness. Where a witness has stated that their walking was recreational walking, dog walking or walking with children, it seems to me likely, in the context of the size of the application site and as a matter of inference from the more detailed description of use given by those who provided oral evidence, that the site itself was the destination for most of

these activities, and therefore that it is likely that most (although not all) of the walking in this context would have been village green type use rather than right of way type use. Some of the evidence was equivocal: where the evidence referred to walking, jogging or to cycling but was no more specific, these might be right of way type users rather than village green type use. The burden is on the applicant to prove use of the land for lawful sports and pastimes, and I have therefore discounted this use when considering whether sufficient use of the land as a whole has been proved.

13.4. The overwhelming majority of the users of the land understood that the land was owned by Bristol City Council. (A few thought that it was owned by ASDA). They were aware that the Council arranged for the grass to be cut and provided the dog bins, and, when there were problems associated with the land, they understood that they should complain to the Council. Many witnesses referred to the children's play equipment and toilet block. Some witnesses knew that the Council had erected the earth bund on the land in response to local residents' complaints about stolen vehicles being driven onto the land. Many witnesses referred to the application land as a park. None of the witnesses recalled there being any signs restricting use. None of the witnesses had been prevented from using the land. Mrs Ward sought permission to use the land with horses but not for other recreational activities. No other witness reported having sought or been given permission to use the land for any purpose.

13.5. Taking all these matters into account, I am satisfied that there was a substantial amount of evidence to support the Applicant's case that the whole of the area known locally as "the ASDA field" (the original application land) is regularly and openly used by local inhabitants for recreational activities without force or permission. The land is used by local residents for dog walking and walking, for children's play, for sporting activities including football, cricket, rounders and hawk training, for practising golf and casting, for cycling (in particular learning to ride bikes), for picnics, for kite flying, for children's parties, and for socialising and relaxing. The land is used for sledging and snow play in the snow. People pick blackberries on the land in season. Bonfire parties have been held on the land. The land is also used by the local Scout and Brownie groups for outdoor activities.

13.6. I turn next to consider the areas added to the application land by amendment.

13.7. All of the witnesses who gave oral evidence stated that they had used the amended application land. Most of those witnesses had prepared their statements after the amendment, and therefore their statements expressly applied to the amended application land. The following witnesses provided a pro forma additional statement: Rowley, Andrews, Smith, Everett, Gardiner. Mrs Bullock provided an additional individually drafted statement specifically dealing with her use and knowledge of the land in the south-eastern corner of the amended application land.

13.8. In some instances it became clear under cross-examination that there were parts of the land which they had not used, for instance Mr Button, Mrs Steer

and Mr Mann said that they did not use the additional area added in the south east corner at all. Mrs Ward did not use the area to the west of the bund in the north western corner of the application land. Where witnesses referred to walking or running the perimeter of the land, they generally meant the perimeter of the original application land, the ASDA field, and inside the bund. They did not include the south-eastern corner of the amended application land in their circuits (Button, Perry, Smith).

13.9. There was some confusion amongst the witnesses who gave oral evidence about which area was being referred to as "the copse": whether it was the strip of woodland running parallel to the fronts of the houses in Bracton Drive, or whether it was the former site of the prefabs. Several people, initially at least, understood "the copse" to refer to the old drove road, when in fact Counsel for the Council intended to refer to the former site of the prefabs. It was not clear to me whether Mr Lines' evidence referred to the strip of woodland in front of the houses on Bracton Drive, or to the site of the old prefabs: whichever it was, he went into that area only occasionally, to retrieve his dog when it would not come out. He did not use the land to the west of the bund on Bamfield at all.

13.10. Similarly, it was not clear to me whether Mrs Perry understood that "the copse" was intended to refer to the former site of the prefabs or not. Her description of going right through the treed area does not fit with my impressions of the former prefab site on the site visit: there did not appear to be any route through that area, but fits rather better with the strip of woodland in front of the houses on Bracton Drive (the old drove road). Mrs Ward's description possibly also fits better with the old drove road.

13.11. Mr Andrews went into the site of the prefabs only to retrieve his dog. Mr Nevett described the former site of the prefabs as too overgrown to walk through and said that he did not use it. Mr Bayly said that he had been in there once when his children were young, but that he had no reason to go in there and did not go in there because he did not want his clothes snagged by brambles. Mr Hartles said that he had been into the area but only occasionally, and described his use of the whole of the south-eastern corner of the amended application land as occasional.

13.12. Of the witnesses who gave oral evidence, the following witnesses had used the site of the old prefabs themselves for specific purposes: Rowley (blackberrying), Everett (watching bats), Gardiner (riding mountain bikes across ramps made using the steps there). Others gave evidence of having heard children playing in that area as they passed.

13.13. The following witnesses had used the land to the west of the bund: Andrews, Perry, Mann, Bayly, Hartles.

13.14. 40 of the 42 witnesses who provided written statements but who did not give oral evidence had also signed the pro forma additional statement by which they confirmed that they had used the additional land as well as the original application land. These statements were given by reference to a map: I have taken into account in evaluating the weight to be given to these statements the

fact that it is often difficult for people to identify precisely the boundaries of land which they know on a map. However, those who were approached to provide the pro forma additional statements would in my judgment have been alive to the fact that the additional statement they were being asked to sign related to land beyond the original application land. I do not consider that it is likely that those witnesses would have signed the additional statement without making some effort to understand to what additional land the statement related.

13.15. Further, the pro forma witness statements were completed in relation to the application land as amended. None of the individuals who completed those statements queried the extent of the application land.

Locality/neighbourhood

13.16. All of the witnesses who provided written statements commented on their neighbourhood. Some witnesses defined their neighbourhoods as smaller areas within Whitchurch, for instance Elm Tree Park estate, or Meadow Green, but the vast majority defined their neighbourhood as Whitchurch.

Where did the users come from?

13.17. I accept that the Applicant's user survey provides good evidence of where the users of the amended application land came from. Although the survey was carried out after the end of the qualifying period, there was no suggestion that the pattern of use had changed in any way. The user evidence survey showed that approximately 75% of those who use the land came from the Ecclesiastical Parish, and approximately 84% came from the combined electoral wards.

14. Applying the law to the facts

14.1. I will consider each element of the statutory test in turn:

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

14.2. The Objector conceded and I am satisfied that the Ecclesiastical Parish of Whitchurch is a qualifying locality for the purposes of section 15 of the Commons Act 2006. I am satisfied that a significant number of the inhabitants of the parish of Whitchurch used the application land for lawful sports and pastimes throughout the relevant period. This element of the test is met.

14.3. Although I am satisfied that the electoral wards of Hengrove and Whitchurch Park were potentially qualifying neighbourhoods within the locality of the City of Bristol, and that the land was used by a significant number of the inhabitants of those combined wards, there was little evidence that either of these wards constituted a neighbourhood, properly so-called. The overwhelming majority of the Applicant's witnesses referred to the area within which they lived as Whitchurch, and gave evidence of their use of the facilities within Whitchurch, and of their experience of a sense of community within Whitchurch. The electoral wards are areas drawn for electoral purposes. It is self-evident that the area selected for those purposes will not necessarily coincide with the area which the local residents might regard as their neighbourhood. I am not

satisfied that either of the electoral wards of Hengrove and Whitchurch Park is a neighbourhood for the purposes of section 15.

...have indulged as of right...

14.4. I was not persuaded that any part of the application land was held for open spaces purposes or for public walks and pleasure grounds during the relevant period. In my judgment the fact that an authority uses land held for another statutory purpose to provide a recreational area does not prevent use of that area being use as of right. Similarly I am not satisfied that the fact that land is held under Housing Act powers and laid out as recreation grounds or open space prevents use of that area by local inhabitants being use as of right. Even if I am wrong on that point as a matter of law, on the facts here, I am not satisfied that the area held for housing purposes, the site of the former prefabs, had been in any way laid out as recreation grounds or open space: this area was merely a cleared site.

14.5. There was no evidence to show that use had been forcible, permissive or secretive. I therefore conclude that the local inhabitants used the application land throughout the relevant period, as of right.

...in lawful sports and pastimes...

14.6. There was a substantial amount of evidence to support the Applicant's case that the application land is a well-used and valued recreational resource for the people of Whitchurch. The site is attractive, and is situated in the middle of an extensive area of housing. It seemed obvious to me that it would attract local residents. The land is used extensively for all kinds of leisure pursuits. The Objector conceded that the evidence showed use of the main ASDA field, with the exception of the area on the road side of the bund. I am satisfied that the area on the road side of the bund should sensibly be regarded as having been used as part of the whole. I accept Mr Bennett's submission that the predominant use of this area was not a footpath-type use because there was no defined route, but was a leisure use which started as soon as people got onto the land.

14.7. There was a dispute as to whether the area added by amendment to the south-eastern corner of the application and had been used, and if so, in relation to the grassed area fronting Fortfield Road, whether it had been used by the inhabitants of the locality as a whole, or whether it had only been used by those who lived in the immediate vicinity of the land.

14.8. The area in the south eastern corner of the amended application land is separated from the main field by a gate. I consider that the Objector is correct to seek to separate this area from the main field, and to ask me to examine the evidence of use carefully. It would not in my judgment be right to treat it as part of a whole with the main ASDA field, so that use of the main field was attributable to this area as part of a larger whole. Many of the witnesses who use the ASDA field do not venture beyond the gate.

14.9. Although the evidence showed that use of the grassed area fronting Fortfield Road and the old drove road was less intensive than the use of the main ASDA

field, I am satisfied that there has been sufficient use of these areas to alert a reasonable landowner to the fact that local residents were asserting a right to use them for lawful sports and pastimes. Many of the witnesses gave evidence that they had seen or heard children using these areas. Had that been the only use, I might have been persuaded that these areas were used only by those who lived closer to them, rather than by the inhabitants of Whitchurch as a whole. However, there was also evidence of people using the grassed area fronting Fortfield Road and the old drove road area for dog walking. Not all of the dog walkers who gave oral evidence and who were asked about the grassed area fronting Fortfield Road or the old drove road used those areas, but some of those who used the main field also used this area. Most of those who gave oral evidence came from the Elm Tree Park estate, and so lived in the immediately vicinity of this land. However, some of the dog walkers who used this land came from further afield (Andrews and Perry). I am satisfied on the balance of probabilities that use was by the inhabitants of Whitchurch as a whole.

14.10. Although the former site of the prefabs has been included by the Council in the area identified as Briery Leaze Open Space in the Area Green Space Plan, this plan is aspirational and does not reflect the present situation or the likely situation over the qualifying period. The proposal is to thin and cut back the existing vegetation in the area to improve visibility and enhance the approach and views towards the main field. If that plan is carried out, the former site of the prefabs will become part of the larger whole. At present, however, this area has a separate feel to the remainder of the site, and in my judgment cannot sensibly be regarded as part of the whole. It is associated with the remainder of the site, in my judgment, simply as a result of its geographical proximity to the remainder of the site. It has not been maintained in the same way as the rest of the site, and is an overgrown derelict site.

14.11. I am not satisfied that there has been use of the former prefab site by a significant number of local inhabitants throughout the relevant period for lawful sports and pastimes. Most of the witnesses who gave oral evidence and were asked about this area had not used it for lawful sports and pastimes (Button, Andrews, Smith, Steer, Nevett) and others had been in only occasionally (Hartles, Bullock, Perry). Mr Nevett, unprompted, said that the area was too overgrown to use. This accords with my impression of the area on the site visit: it is not an area which would be attractive to adults, although it may well be used by children. Only four witnesses claimed to have used the area for lawful sports and pastimes: Mr Rowley for blackberrying, Mr Everett to observe the bat colony, Mr Gardiner to ride BMX bikes with his daughters and Mr Hewer (who was not cross-examined because of his age) to play with friends. I concluded that Mr Gardiner's evidence on this point was unreliable. Both Mr Rowley and Mr Everett live on Cranwell Grove (Mr Everett since 1991 and Mr Rowley throughout the relevant period). Several witnesses gave evidence that they had seen or heard children playing in this area (Rowley, Hartles, Bullock), but there was no evidence as to where those children came from, other than Mr Hewer's evidence that he and a group of up to 12 friends use the area along with the rest of the application land. In my judgment such use as there has been of this area is occasional and sporadic. The Applicant has

failed to persuade me that this area is in use by local inhabitants for lawful sports and pastimes.

...on the land...

14.12. The amended application land has been sufficiently clearly defined to constitute land within the meaning of the statute.

...for a period of at least 20 years and they continue to do so at the time of the application

14.13. The relevant period in relation to this application is 14th February 1988 to 13th February 2008. Use continued to the date of the inquiry. There was no evidence to suggest that there had been any interruption to use at any time during the relevant period. I am satisfied that this aspect of the test is met.

15. Conclusions and recommendations

Recommendation that the application for registration of the whole of the application land should be rejected

15.1. I conclude that the application to register the whole of the amended application land fails because the Applicant has failed to prove that the whole of the application land has been used as of right during the relevant period. I therefore recommend that the application to register the whole of the amended application land should be rejected.

Recommendation that part only of the application land should be registered

15.2. In *Oxfordshire* it was said that a Registration Authority is entitled, without any amendment of the application, to register only that part of the application land which the Applicant has proved to have used for the necessary period. The lesser area need not be substantially the same nor bear any particular relationship to the area originally claimed. I conclude that the applicant has satisfied the test for registration in relation to all parts of the amended application land other than the former site of the prefabs (the orange land) and recommend that the application should be acceded to in part, and that the amended application land, with the exception of the orange land, should be registered as a town or village green.

Lana Wood

[redacted]

Lincoln's Inn

Addendum to report

1. Following the close of the inquiry, I received submissions from Mr Webster dated 5th April 2011 in relation to the case of *BDW Trading Ltd (t/a Barratt Homes) v Spooner representing the Merton Green Action Group & Melin Homes Ltd*[117], a decision of HHJ Llewellyn QC, sitting as an additional judge of the High Court. Although judgment in that case was handed down on 15/02/2011, it had not been published on the internet, so far as I am aware, before the close of the inquiry. I therefore considered it proper to entertain these submissions, and asked the Registration Authority to write to both parties setting out the way in which I intended to deal with them. I indicated that I would proceed to write my report as if I had not received the submissions. I have done this. I stated that I would then read Mr Webster's submissions. If there were any points arising from Mr Webster's submissions which potentially might lead me to change the substance of any part of my report, I would issue directions to the Applicant giving him the opportunity to make submissions on those points. I would then proceed to finalise the report taking into account the submissions of both parties on those points.

2. The land at issue in the *Barratt Homes* case had been appropriated for planning purposes by the landowner council in March 2007, and sold by the council to Barratt Homes in October 2007. Outline planning permission for residential development had been granted in June 2006 and June 2007. In July 2009 Merton Green Action Group applied under section 15 of the Commons Act 2006 to register the land as a village green, having written to the council informing it of the Group's intention to do so in July 2008. The application was referred to an independent inspector, who recommended in January 2011 that the land should be registered as a village green. The Judge stated that the issue in the case was whether, notwithstanding any registration of the land as a village green under the Commons Act 2006, the provisions of section 241 of the Town and Country Planning Act 1990, and/or the statutory scheme in section 122 of the Local Government Act 1972 by which the land was appropriated and/or section 233 of the Town and Country Planning Act 1990, by which the land was disposed of, permitted development in accordance with the planning permission which had been granted.

3. Barratt Homes contended that the provisions of section 241 of the Town and Country Planning Act 1990 prevailed over the Commons Act 2006, so that, the land having been appropriated for planning purposes by the council, it could be used, notwithstanding the Commons Act 2006, by any person in any manner in accordance with planning permission. HHJ Llewellyn accepted this submission.

4. Mr Webster suggested that the Registration Authority might in the light of the Barratt Homes' case decide to do one of two things: (a) it could register the land immediately as a TVG if this was my recommendation, or (b) it could defer making any decision to register (despite my recommendation) if it were to take the view that, in the particular circumstances of the case,

[117] [2011] EWHC B7(QB)

registration would be pointless, because section 241 applied and the application land was going to be developed.

5. HHJ Llewellyn commented in *Barratt Homes*[118] that he was not attracted by the "pointlessness" argument: that it would be pointless for land to be registered as a village green, if the developer had the ability to build in any event. HHJ Llewellyn said that this situation would only pertain where section 241 applied, namely where the local authority had acquired or appropriated the land to planning purposes and planning permission had then been granted. There may, but there may not be, development of the land subject to the village green registration. Registration was not therefore pointless.

6. In my judgment the Registration Authority here similarly ought not to be swayed by a pointlessness argument: although parts of the application land are held by the Council for planning purposes, as I have found, it is not pointless for those parts of the amended application land which I have recommended for registration to be registered. There is as yet no grant of planning permission in respect of any part of the land. Planning permission may not be granted. Even if planning permission is granted, the land may not be developed in accordance with that permission. Having considered Mr Webster's further submissions, therefore, I do not think it right to change any part of my report, or any of the recommendations in it.

Lana Wood

[118] at paragraph 27