

**FOR PUBLICATION****DERBYSHIRE COUNTY COUNCIL****REGULATORY - PLANNING COMMITTEE****31 October 2022****Report of the Director of Legal and Democratic Services****Commons Act 2006****Application to register land known as Norbriggs Field, Woodthorpe,  
Derbyshire as a town or village green (VG128)****1. Divisions Affected**

1.1 Parish of Staveley Parish.

**2. Key Decision**

2.1 This is not a Key Decision.

**3. Purpose**

3.1 To ask the Committee to determine an application made pursuant to section 15 of the Commons Act 2006 ("the 2006 Act") to register land known as Norbriggs Field, Woodthorpe ("the Application Land") as a town or village green (TVG).

**4. Information and Analysis**

4.1 The Director of Legal Services previously authorised the appointment of an Independent Inspector to make recommendations to the Council as to the determination of applications to register land owned by public authorities as TVG.

- 4.2 Miss Annabel Graham Paul of Counsel was appointed as Inspector on 08 June 2020.
- 4.3 Miss Annabel Graham Paul's report to the Council is at Appendix 3 and sets out her conclusions in relation to statutory incompatibility with regard to land which is owned by public bodies and that land being registered as a TVG.
- 4.4 The application to register the Application Land was made by local resident, Sarah Mettam, and the relevant date of the application was 25th April 2012. Objections to the application were received from the Norbriggs Primary School and Derbyshire County Council as the landowner.
- 4.5 The application was made pursuant to section 15 of the 2006 Act with the relevant 20-year period being from April 1992 to April 2012.
- 4.6 The headteacher of Norbriggs school, representing the Governing Body, submitted a statement of objection dated 27 July 2012 objecting to the application on the following grounds:
- The Application Land is owned by Derbyshire County Council and it's use is delegated to the school
  - The school pays for maintenance of the Application Land, which includes grounds maintenance, grass cutting and fencing including fencing off the stream on the property
  - The school has granted one of the parents' permission to run Saturday morning football for the local children
  - The school uses the hard play area daily and the lower portion of the field is used in summer months for athletics – noting the area is on a floodplain so not always available
  - The upper portion of the field has a footpath along its southern boundary used regularly by dog walkers some of which allow their dogs to defecate on the field cause a health and safety issues for the school
  - School staff have frequently spoken to members of the public straying off the footpath with dogs during school hours. Some children are afraid of dogs, but it is also a safeguarding issue as the school has a duty of care to protect the children from non-authorized person
  - The Applicant recognises the school rights to the Application Land as has paid to let the land for a 'Brass on the Grass' event (15 July 2012) which was licenced by Derbyshire County Council
  - The headteacher often works at the school from early morning till early evening and at weekends and has never been aware of any members of the community making use of the Application Land other than by

agreement. The school has turned a 'blind eye' to teenagers using the hard play area after school hours to play football; initially the facility was locked up but the fencing was broken down to gain access and the Governors decided to leave the facility unlocked to prevent further damage or potential accidents if anyone attempted to climb the 2.5 metre fence.

4.7 Derbyshire County Council (DCC) submitted a statement of objection dated 21 September 2012 objecting to the application on the following grounds:

- DCC is the owner of the Application Land
- The Application Land was purchased as part of a larger area for education purposes through conveyances dated 16 September 1963, 16 September 1963 and 31 March 1971
- The whole site has been used and occupied by DCC for educational purposes at all times since purchased and is currently the site of Norbriggs Primary School. There can be no reason to draw any distinction between the Application Land and the rest of the site
- DCC usage of the Application Land has been principally during school hours but there has also been use outside school hours on occasions over the years
- DCC accepts some use of the Application Land by the public has been tolerated and that some of that use may fall within the definition of lawful sports and pastimes. Such use is tolerated as long as it does not interfere with its own use or cause damage to the site. The only way to realistically prevent such use would be to erect security fencing which would be prohibitively expensive but also not something DCC would wish to do unless vandalism or anti-social behaviour became a real issue
- In determining whether use of the Application Land for lawful sports and pastimes has been as of right, the situation is viewed from the position of a reasonable landowner. The appropriate consideration being whether use by the public was such that it would have appeared to a reasonable landowner that they were asserting a right to use the land. Given that the overwhelming use of the Application Land has been outside school hours and has not interfered with any use which DCC wished to make of it either during or outside school hours, there could be no cause for a reasonable landowner to form the view that the public were asserting a right to the site or any part of it
- **Preliminary Conclusion** – The Application does not establish the matters necessary for the registration of the Application Land as a TVG within the definition contained in section 15(s2) of the Commons Act 2006 as, for the reasons stated above, use of the Application Land has not been as of right and therefore DCC would contend that the Application is fundamentally flawed and should be rejected.

- 4.8 Following a full meeting of the governing body, the headteacher of Norbriggs School submitted a letter dated 25 February 2013, stating that it was unanimously agreed that the school would rely on the representation made by DCC with regard to objecting to the Application.
- 4.9 The applicant was given the opportunity to respond to the objections and submitted their response in a letter dated 09 November 2012 stating:
- Neither objection can properly be considered to be objections as the school concede that the field is used for sports and pastimes by members of the local community - the times of such use is irrelevant. The Local Authority raises no evidence to contradict the basis of the application and cite no authority for their approach which can properly be answered. Nevertheless I would make the following representations:
  - Both organisations have vested interests in the land. Nobody else has raised any objection, and especially no local people nor other members of the community associated with the school or the locality.

RE Statement in objection on behalf of Derbyshire County Council:

- Derbyshire County Council state that they acquired part of the land in 1963 and part of the land in 1971. It is not clear that these two conveyances either refer in part or in whole to the total land being claimed as a Village Green. The land that the actual school is built on being separated by a security fence and a substantial hedge, the effect of which is to separate the school buildings and playing areas from the area claimed as the village green area. The separation of the two sites is clear on OS maps and separately labelled as “sch” and “playing field”. Comparably, Netherthorpe school and playing field are not separated on maps.
- “To address the statement by the local authority as to “educational use” I would seek to make reference to the 2006 Local Plan. The field is one of only three sites coloured pink on the 2006 Local Plan map governed by policy CMT1. All open spaces in established educational use in the Borough (such as enclosed playing fields at Netherthorpe) are coloured green to match open countryside. Green indicates policy protection for open spaces to support established land uses. Pink means safeguarding land from development that might jeopardise future uses not yet established.”
- “As Education Authority, DCC had a special interest in policy CMT1 and would have objected to any inaccuracy in the Plan map. DCC had greater opportunity to object to any part of the Local Plan in 2006 than any member of the public and yet this crucial differentiation in policy survived all reasonable scrutiny and test. The conclusion is inescapable. DCC had

not in 2006 begun to use the field in the exclusive way they now suggest and therefore made no claim at that time. Ten years have not passed in the mean-time and therefore DCC's allegation amounts to a concession that intermittent unauthorised use has been made by the school. DCC objections to the designation of the land as village green should be dismissed accordingly."

- "Furthermore, and in my submission fatal to DCC's objection, Policy CMT1 is conversely irrelevant to the merits of the Village Green application. Planning permission neither creates nor extinguishes public easements, nor is continued public use of the Green in the manner it has been used from time immemorial, development that the Local Planning Authority is entitled control."
- "Further, use of the land by local people has been continuous for in excess of 20 years, including the public footpath" (it should be noted that there is no definitive FP on the Application Land) "running across the land and linking with both Netherthorpe and the North Bridge on the A619. This usage pre-dates 1963 and such use was "as of right" at that time and has continued uninterrupted since. This is evidenced in the statements and questionnaires attached to the application, in particular numbers 4 and 5 in the bundle, Mrs Lord and CM Watts who state that local usage has continued since the late 1960's early 70's. Of particular note in their questionnaires is the statement that a sign had been present at the entrance, declaring the field to be a "playing field"."
- The whole of the site has not at all times continuously or even regularly been used by Norbriggs School for Educational Purposes; this is evidenced both by the hedge and fence separating the School from the site. Questionnaire 2 in particular is of interest as whilst the makers of that statement call the field the "school field" they provide detail as to the use of the field by the school, namely identifying the hard courts as used daily, and part of the field used for sports seasonally. It is conceded that an access through the hedge has been made to the hard games court which is used by the school. Nevertheless this forms a very small section of the plot used by the school, the remainder being used by the wider community.
- There is a clear notice at the school entrance warning people not to trespass on school property and quoting the relevant Act; clearly delineated by security fencing and gates. There is no such notice for the village green site which confirms that the County Council and the School have continuously regarded the actual school site as different in nature from the village green site.
- The Council 'accepts that some use by members of the public has been tolerated outside school hours'
- Time of use does not feature in the statutory requirements for an application for village green status to succeed. Nevertheless I will address the point. Use is made by members of the public during school

hours on a daily basis. The standard form questionnaire does not ask for times of use. The only evidence of times of use comes from the head teacher who cannot possibly continuously observe the field throughout the school day. Therefore the local authority cannot state that the “overwhelming use of the site has been out of school hours”. Such use during school hours has continued and residents report knowledge of this by school staff, in particular the caretaker who greets locals known to him.

- Secondly 'tolerated' confirms that no attempts have been made to restrict the public's right to use the field throughout the ownership by the Derbyshire County Council.
- The County Council agrees that some of the use would fall within the definition of lawful sports and pastimes. I would state that all of the use is lawful and the usage falling within 'sports and pastimes' is significant.
- Derbyshire County Council as a reasonable landowner must come to the conclusion that the local people have demonstrated a right to use the land; evidenced by the documents contained in the application and conceded by the local authority and school.
- Conclusion: -The application establishes the matters necessary for the registration of the site as a town or village green within the definition contained in section 15(2) of the Commons Act 2006.

RE Statement in objection from Norbriggs Primary School by the head teacher, an officer of the school representing the Board of Governors.

“The head teacher makes a number of points:

- *‘All of the area shown and marked on map A of the application is owned by Derbyshire County Council and its use is delegated to us as a school’*

The school itself is contained within a perimeter surrounded by a fence or a tall hedge plus a line of trees. Again, this is further enforced by a notice warning trespassers of possible prosecution which does not apply to the field in question. It is not doubted that the area of the school itself (as defined above) is delegated to the Board of Governors as a school however the fact that throughout the existence of the school the area in question has been used as a village green by local residents indicates that although the County Council own the land, they have accepted use by villagers and other general public without hindrance for over 36 years. This indicates an acceptance of the village green status. The correct approach appears to be that Derbyshire County Council allows the school to use the field for appropriate purposes, beneficial to the children. This benefits all concerned.

- *‘The school pays for the maintenance of the whole area as shown and marked on map A of the application. This includes ground maintenance,*

*grass cutting and the fencing of a stream which runs through the property'.*

Derbyshire County Council owns the land and thus has responsibility for it. The land which constitutes the village green requires little maintenance and if the owners wish to cut the grass then that is a matter for them. That this is then charged to the school is a matter between the School and the County Council. It is wholly irrelevant to the question of village green status. The hedges/fences which are regularly maintained are those which form the border between the school itself and the village green area. That these hedges and fences are regularly maintained and in existence indicates that the school regards the school (buildings and play area) as separate from the village green area (and therefore different). This difference has been maintained for in excess of 20 years. It should be noted that neither the school nor Derbyshire County Council takes full responsibility for maintenance of the Norbriggs Field as no attempt is made to deal with any litter or dog fouling which may accumulate there, for instance. The last litter and dog excrement clearing was performed by the Woodthorpe Village Community Group. A number of local residents also collect litter, particularly from around the hard courts during weekends and school holidays.

- *'With our permission, one of the parents runs a Saturday football event for the children of Norbriggs and Woodthorpe Schools'*

This is clearly not a completely independent event as it involves Norbriggs School and Norbriggs pupils. It involves pupils from a number of schools, not exclusively Norbriggs and Woodthorpe and is hugely beneficial to those children. Because Norbriggs School is party to the event the statement 'with our permission' is not valid reason for objection.

- *'The school makes daily use of the hard play area of the land with the lower portion of the field being used in the summer months for athletics activities (it should be noted that this area is frequently too waterlogged to be useful as it is a flood plain)'*

Use is made of the games court. However local residents have noted very infrequent use of the field by the children at the school. Even if use were made, this would still be allowable with the land as a village green. Therefore this cannot be regarded as a reasonable objection. It is conceded that the area is prone to flooding, in particular at the extreme west area.

- *'The upper part of the land in question is used occasionally by the school. This is largely due to the fact that the southern boundary has a public*

*footpath which is used regularly by dog-walkers. Whilst some owners respond to their responsibilities with regards to the animal's toileting not all do and the resulting dog faeces makes it a real Health and Safety issue for us especially when owners allow their dogs off lead to defecate at will*

If the upper part of the field has been used occasionally by the school then this has not been witnessed by local residents. This would be irrelevant as an objection as the School would still be able to make use of the field as a village green. Furthermore, the recognition of the field as a village green may promote respect for it by the more irresponsible users of it currently. This would be promoted by the community group. There is certainly a public footpath. This links with a stile in the Western hedge some significant distance from the Southern boundary. The existence of the stile in this location is consistent with the public footpath running through the middle of the field - not along its border. Likewise the corresponding stile on Norbriggs Road is near the main school entrance - not on the Southern border, again indicating that the footpath runs centrally through the field there. Some dog owners play 'fetch' with their dogs. That the dog is not on a leash does not mean that the dog is not under control and the School should not make this assertion. There are, and always will be, a few irresponsible dog owners in the same way that there are some irresponsible parents, some irresponsible drivers, etc. This is a society problem and is irrelevant to Norbriggs Field being a village green.

- *'Staff have frequently spoken to members of the community who have strayed off the footpath with their dogs whilst the school has been in session. Some children are afraid of dogs, but we have a duty of care to protect our children from non-authorised persons on site, this is a safeguarding matter'*

A footpath runs across the middle of the village green as is evidenced by the stiles giving entrance and egress. The public use both the footpath as a footpath and the village green as a whole as a village green. Therefore to 'stray off it' and for that to be visible to an observer is an unreasonable assertion as both usages apply - the school has already admitted that the public use the field as a whole. It is disputed that staff 'have frequently spoken to members of the community'. No-one locally has reported being spoken to by staff or other officials of the school. Dogs are being exercised whilst football coaching is taking place and there have been no reported problems. Sometimes those involved with the football have brought their own dogs. The football activity takes place right across the line of the public footpath - dog owners and other village-green users are careful to circumnavigate the football activity so as not to interfere with the event. The school has a duty of care to protect children from non-authorised persons on site and to this end there is a notice for the school



grounds itself (not the village green area) warning of prosecution for trespass. Crossing the village green is a public footpath available to all citizens. That all citizens have access to the Norbriggs field poses no more risk than that presented by the public road (Norbriggs Road) which runs past the school entrance and is also a public right of way. Primary school children are supervised by appropriate adults whether in secure school grounds or engaging in activities outside school grounds. This provides the safeguards. The safeguarding reason stated here is irrelevant to the question of the field being a village green.

- *'The applicant does recognise that we have rights to the land in question, as she recently paid for a letting for the use of the land for a 'Brass on the grass' event (15<sup>th</sup>. July 2012). A licence was issued for this event by Jeremy Goacher who acted as agent for Derbyshire County Council. A representative of the group had to visit the school to be given a key to the field gate which she returned at the agreed time. She was also made fully aware of the faeces problem and the health and safety issues of the stream running through the area'*

The applicant does not recognise that 'we have rights to the land in question'. The applicant did not pay for 'a letting'. The Brass on the Grass event was organised by a separate group of villagers who were completely taken by surprise by the insistence of the school of a payment or licence. To allow the event to go ahead (the key to the gate was needed), and a **force majeure** situation having been created by the school, this group obtained a licence from the Local Authority. This is without prejudice to this application. The 'Brass on the Grass' event carries no weight in opposition to the application for village green status. Rather, it reinforces it. The site was used with the utmost care and respect, being cleared of litter and dog faeces beforehand, and inspected afterwards. It was left in a better state after the event than before. With regards to the stream, this does not so much run 'through the area' being mainly in the school itself area and at the boundary of Norbriggs Field. The stream has its source in Woodthorpe village near the watershed of Woodthorpe Road and drains a limited area. Consequently it is neither deep, wide nor fast flowing. Derbyshire County Council has created a banking and a tall (and unsightly) fence protects this stream from access by anyone in the Norbriggs field area. This stream presents a very low risk to users of Norbriggs Field especially because it is fenced off and, as opposed to other water courses, including canals which have no fencing, the danger is very small.

- *'I regularly work from early morning until early evening in school and am often in school at weekends. I have never been aware of any members of the community making use of this area of land, other than that which*

*has been agreed with us. We have, however, turned a 'blind eye' to teenagers making use of the hard play area after hours, to play football, initially we had locked the facility up, but they broke the fencing down to gain access. Governors therefore decided to leave the facility unlocked both to prevent further damage and potential accidents as they attempted to climb a 2.5 metre (approx) fence'*

- The following points need to be made:-

The school buildings are behind a high hedge and it would be impossible to monitor activity on the field from the school buildings. The head teacher's office is not well placed as an observation point even without the hedges and trees preventing observation. Members of the community have most certainly made use of the land during school hours Residents have been observed by school maintenance staff when using the field - this is in school time and no challenge has ever been made.

Dog exercising takes place at all times of day including as early as 6.00 a.m. in summer so staff would not see this. Evening use is frequent, as stated in the evidence submitted, for all manner of recreational purposes, often until it gets dark. A survey shows that Woodthorpe villagers enjoy high employment rates thus use would be very much more frequent when they are not at work (and the school is not operating).

I strongly dispute the assertion that this does not occur as it occurs both whilst staff are present on the school site and when they are not; that they may not have witnessed it bears no evidential weight at all. Weekend attendance by staff appears to be very exceptional - staff did not know whether the 'Brass on the Grass' event had taken place and certainly took no interest in monitoring this event on the day. Staff would not be a reliable monitor for those parts of the day when local people can actually use the field.

Furthermore, due to the extensive school holidays, staff are not around sufficiently to realistically comment on usage,

The idea that local residents do not use the land unless they ask permission first is completely rejected (where does the litter come from if they are not there?). Many local people have stated that they have never sought permission or been challenged. Not one villager has complained of any challenge whatsoever.

That the School has allowed 'teenagers' to use the hard play area is further acknowledgement that the school has accepted that Norbriggs field is a local common ground.

- The objections raised by the school are rejected excepting those which actually support Norbriggs Field being a village green.

4.10 In light of the Supreme Court judgment in Lancashire County Council v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58 (Lancashire) where a decision was reached that land owned by a public authority for statutory purposes was incompatible with registration as a TVG, the landowners were written to and given the opportunity to make further submissions in relation to any perceived statutory incompatibility. The landowner has made submissions stating that the land is held for educational purposes and as evidence of such has provided a copy of a land searches record from Staveley Urban District Council, dated 11 March 1971 (Appendix 4) which specifies the land is designated as Primary School. It is therefore held for a statutory purpose. The applicant was emailed on 05 May 2022 (following a letter being returned in December 2020 as 'Not at address') and offered the opportunity to submit their comments on statutory incompatibility in relation to application VG128 and responded on 23 May 2022 as detailed below:

- "This application was made in 2012 which predates the judgement and I would therefore question whether it has retrospective effect. The application should have been decided within a reasonable time scale and the 10-year delay has been wholly caused by the Local Authority (LA). Even if the judgement were to apply the LA must look at the facts of the application as at the date it was submitted.
- I submit that the Norbriggs application can be distinguished from R (on the application of Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs and another ("The Lancashire Case") on the facts.
- A: Preliminary questions of fact:

In the Lancashire case, the LA held land adjacent to a primary school and objected to the land's registration as a town or village green (TVG), arguing that, in exercise of its statutory powers as education authority, the land was acquired for and remained appropriated for educational purposes. This raises two preliminary questions:

- a) Acquired or appropriated, and
- b) Educational purposes?

- Before considering the incompatibility test introduced by the Supreme Court's decision in *R (on the application of Newhaven Port and Properties Ltd) v East Sussex CC* [2015] UKSC 7 ("Newhaven") the LA must establish that the LA acquired or appropriated the whole of the piece of land in question in the first instance and the purpose for which it was appropriated. I would invite the LA to show evidence of this before moving on to look at the incompatibility test, as if this cannot be shown, the question of incompatibility does not arise.
- The LA must also show the general statutory purpose for which the land is held (as set out in the Newhaven case). I would submit that the LA cannot establish by evidence that it was acquired or held for educational purposes. The field was neither appropriated nor held solely for educational use. I know first-hand, and many residents attest that the land has not and is not used for educational purposes by the school. The hard-court area is used regularly by the school but was not in existence for 20 years prior to the application. In my knowledge as a resident over 40 years, and on the evidence of other residents, educational use for the remainder of the land in question cannot be established, either now, in 2012 or for the 20 years preceding the application.
- In the 1960's, prior to the school being built, the land was used for recreation by local people.
- No signs or fencing have ever denoted the field as being a school field. Public access has never been restricted within the time period in question. Fencing and signs erected in 2021 and 2022 are irrelevant to the LA's decision-making process in this application.
- The public perception of the space in living memory is one of free access and public use.
- Historic evidence shows public signs denoting the field as a public space.
- No consultation as to change of use has ever been undertaken.
- I note recent reports of the head teacher bringing groups of children out onto the field at intervals but would suggest this is irrelevant to the application because it is very recent, not in the 20 years prior to the application being lodged and is a deliberate reaction to the recent strength of feeling toward these issues by residents.

- Even if the LA find the space to be appropriated and held for educational purposes (which I submit it cannot), the case law does not establish a clear, all-encompassing precedent which defines spaces used for educational purposes as wholly incompatible with public use. It must be a question of fact determined on a case by case basis.
- B: Norbriggs Field can be distinguished on the facts from the Lancashire case for the following reasons:
  - The land is extensive and varied, some of which is not suitable or safe for educational use by a primary school. It is bordered by, and provides access to open water, footpaths, a disused quarry and woodland. Significant parts of the land are prone to extensive flooding at the school side and far end which would make it incompatible with educational use. These factors clearly set apart this application from the Lancashire case, and this alone is reason to distinguish the case on the facts. The precedent therefore cannot apply.
  - Time is an important factor to which the Planning Committee must attribute significant weight. Even if the land were used for educational purposes at the time in question, (which the evidence clearly shows it was not) it was certainly never used for educational purposes for the majority of the year. For 12 weeks outside term time it is not used at all by the school. Outside school opening times it is not used by the school. For the majority of the time in term-time it is not used by the school. Annual sports day is held beyond the hard-courts on one or two days a year. This is insufficient to establish that the land is held by the LA for educational use.
  - Rather, the field is and has been utilised by a significant number of the inhabitants of this locality as of right in lawful sports and pastimes for a period of at least 20 years for the majority of the time, daytime and evenings throughout the whole year. This is entirely on all fours with the purpose of the statute. It would be wholly disproportionate to deny the general public access to the field.
  - Even if the LA were to be able to establish educational use (and I reiterate that they simply cannot) the use of the land as a village green is not incompatible with that use. The land is sufficiently large to accommodate a range of uses at any one time. Historical maps and records show fenced off areas, a footpath and “dog walk” which have successfully delineated the field for mixed uses, including segregating dog walkers from other users.

- The Lancashire case cites dog faeces as a reason why public use may be incompatible with educational use. This is an offence which should be dealt with under the council's powers to enforce or dogs could be banned from the field altogether. A Dog Control Public Spaces Protection Order is the proper approach to any such problem. To refuse the application solely on these grounds is wholly disproportionate and denies the enjoyment of the amenity due to the actions of a minority who should be separately prosecuted. It is a matter of resources to enforce such actions which is not relevant to the statute to be applied in this case.
- Norbriggs Primary School have sought to exclude the public from the field pending this application. The erection of signs and a fence has been carried out without recourse to the LA or consultation. The suggestion by the Head that there are safeguarding concerns raised by Ofsted as to the public use of the field is not supported, but rather contradicted, by the 2 Ofsted Reports produced during his time as Head. The report of 3-4 July 2018 praises the school for its safeguarding policy, raises no concerns and does not mention the field at all. The report of February 2017 raised no safeguarding concerns about the field.
- The school has a significant amount of green and outdoor space within the curtilage of the school buildings, bordering Worksop Road and adjacent to the first house, none of which is accessible to the public.
- Documents in possession of the LA reveal that on 2/9/93 NJ Turner, Acting Head and Richard Camm, DCC Estates acknowledged that the field was open to dog walkers, hosted annual public carnivals, a footpath and was used by the community for a number of years.
- The CHE/17/00469/OUT 14/10/19 consultation document acknowledges the TVG application and cites no formal objection by DCC.
- The LA and Chesterfield Borough Council promote their green initiatives. To refuse this application would be contrary to the stated aims of both. Recent correspondence between Mr Ramsey (CBC) and local councillors (albeit misinformed as to the dates and purpose of this application) rightly acknowledges the expansion of residential areas around Woodthorpe, including the Cranleigh Development and the Chatsworth Development (both of which post-date this application). Mr Ramsey's comments highlight the need for this green space to be preserved all the more. The need for this TVG is enhanced as a result of an increase in the local population and depletion of existing green spaces by building.

- I was lucky enough to use the field for a range of recreational purposes as a child. I taught my own children to cycle, throw, catch and kick a ball 30 years later. It is a safe, visible and accessible space. Due to the decisions made by local planners to expand the village, there are a significantly greater number of young families in the area now who require and deserve the same amenity.
- I would submit that the LA must grant the application for Village Green status as not to do so would be contrary to the wording and purpose of the statute, against public policy and against the principles of natural justice.
- I would also remind the LA that following registration, the owner would not be excluded altogether, but would retain the right to use the land in any way which does not interfere with the recreational rights of the inhabitants, with “give and take on both sides”. This approach is exactly what must happen in the Norbriggs case.”

4.11 The County Council, as Landowner was offered the opportunity to respond to the Applicant’s submission in relation to statutory incompatibility and replied in an email dated 3 August 2022. In the email, it stated that, “The Council does wish to raise an objection on this ground and our justification is set out below.

The Council acquired the land on the 31st March 1971. Whilst the Conveyance does not specifically mention the purpose for which the land was to be used, an extract of a local search carried out at that time confirms that the land was part of a development plan for a local primary school.

- My understanding from CAYA and the headteacher is that the land has been used since 1971 as playing fields for the adjoining primary school.
- The intended future use of the land is primarily for use as a playing field for the primary school. Part of the site will need to be converted at some stage into a playground to compensate for the loss of the playground area at the school due to expansion of the buildings at the main school site.

4.12 The Independent Inspector was asked to give advice on the affect that Lancashire and statutory incompatibility would have on an application to register land held by a public body for statutory purposes.

4.13 The Inspector considers the recent case law on Statutory Incompatibility from paragraph 10 to paragraph 14 in the attached document (Appendix

3), where two public authorities held land for statutory purposes. On 11 December 2019 a majority of the United Kingdom Supreme Court; Lord Carnwath, Lord Sales and Lady Black JJSC, held that parcels of land owned by Lancashire County Council and NHS Property Services Ltd could not be registered as TVGs because the land was held by the authorities for defined statutory purposes, and registration as a TVG would be in conflict with those statutory purposes. This is known as the principle of 'statutory incompatibility'

- 4.14 The Inspector considers whether land subject to a TVG application needs to be owned by a public authority for the whole of the claim period in paragraph 17, concluding:

*"...that if at any point in a period of twenty years a parcel of land is held by a public authority for relevant statutory purposes, a continuous and uninterrupted period of qualifying use of the land by the public cannot arise, because whilst the land is held for those statutory purposes the provisions of the 2006 Act do not apply to it: it is not registrable."*

- 4.15 In respect of a public authority providing evidence of the statutory powers under which it holds land, the Inspector considers Lancashire and the need to identify the statutory purpose for which land was held, concluding:

*"Statutory incompatibility does not apply like a blanket policy to all land in public ownership. The powers must be identified so that it can be examined if there is, in fact, an incompatibility at all. Therefore, in my view, there needs to be more than an assertion. However, the evidence need not be conclusive and it is reasonable to make presumptions about pieces of evidence that cannot be found anymore."*

- 4.16 Further she states that where a public body has identified the reason for which land was acquired but hasn't identified the specific statutory power that is pursuant to:

*"I do not consider that that is necessarily fatal to an argument that statutory incompatibility applies because all local authority powers to acquire and hold land must be derived from some statutory power to hold land for a particular purpose."*

- 4.17 At paragraph 33 Miss Graham Paul considers whether there is an incompatibility between use of the land for 'highways and depots' and registration as a TVG. She observes that use for 'highways and depots' may require potential building operations and vehicular access which would be prohibited by the 19<sup>th</sup> century Victorian legislation in s. 29 of the



Commons Act 1976 and s. 29 of the Commons Act 1876 which applies to nuisances. This observation in relation to 'highways and depots' can also be attributed to other purposes for which land may be held. In this matter, the land known as Norbriggs Field is held for educational purposes, as part of the Norbriggs Primary School playing fields. The school, or indeed the landowner (Derbyshire County Council) would have been free to develop the land as appropriate in order to provide the best facilities for the education of the school's pupils. The landowner has confirmed the Application Land is part of Norbriggs Primary School and it is accepted that the land is, and has been since 1971, held for educational purposes, which is a statutory function of the council.

4.18 The Inspector's conclusion at paragraph 35 is that:

*"I therefore consider that the application should fail on account of a statutory incompatibility between the Borough Council's holding of the land for "highways and depots" and the recreational rights that would flow from TVG registration. The consequence is that the Borough Council's rights prevail, and it is not open to the applicant to register this land as a TVG. I would therefore advise that the application is dismissed."*

4.19 It therefore follows that the application to register the Application Land as a TVG, which has been held by Derbyshire County Council for educational purposes since 1971, should also fail on account of a statutory incompatibility between the County Council's holding of the land for educational purposes and the recreational public rights that would flow from TVG registration.

## **5. Consultation**

- 5.1 Notice of the Application was published in The Derbyshire Times on 28 June 2012 and posted on site.
- 5.2 Two objections were received following the Notice of the Application. One from the headteacher of Norbriggs School and one from Derbyshire County Council (as landowner)
- 5.3 The details and issues raised in response to the consultation are summarised above.

## **6. Alternative Options Considered**

- 6.1 Committee rejects the recommendation in relation to VG128 and resolves that further detailed investigation and analysis is required of the evidence available, both in support and objection to the Application, if Committee members believe that the evidence and assertion provided by Derbyshire

County Council, that the Application Land is held for educational purposes, is unfounded and does not show there is a statutory incompatibility between the statutory purpose for which the Application Land is held by the County Council and registration as a TVG. This option should be rejected because the evidence submitted by the County Council shows that the land is held for educational purposes and is a part of Norbriggs School and such use would be incompatible with registration as a TVG which would allow local inhabitants to use the land freely for lawful sports and pastimes.

- 6.2 That Committee neither rejects or accepts the recommendation and resolves not to determine the application. This option should be rejected because to neither accept nor reject the recommendation would leave the application undetermined.

## **7. Implications**

- 7.1 Appendix 1 sets out the relevant implications considered in the preparation of the report.

## **8. Background Papers**

- 8.1 Application file VG128 (legal Services reference 49145) held by the Director of Legal Services.

## **9. Appendices**

- 9.1 Appendix 1 – Implications.
- 9.2 Appendix 2 – Plan showing the land subject to the TVG application.
- 9.3 Appendix 3 – Independent Inspector's report considering the implications of statutory incompatibility on the determination of applications for registration of land as TVG
- 9.4 Appendix 4 – The landowner's submission – Land Searches record from Staveley Urban District Council, dated 11 March 1971

## **10. Recommendation(s)**

That Committee resolves to refuse the application to register the land known as Norbriggs Field in Woodthorpe as a TVG.

## **11. Reasons for Recommendation(s)**

- 11.1 Derbyshire County Council is the Registration Authority for Woodthorpe where the Application Land is located.
- 11.2 For the reasons set out in this report and as considered in Appendix 3, it has been shown that the statutory purpose for which the Application Land is held is incompatible with registration of the Application Land as a town or village green and that the land cannot therefore be legally registered as a TVG.

**Report Author: Pete Shimwell**

**Contact details: [pete.shimwell@derbyshire.gov.uk](mailto:pete.shimwell@derbyshire.gov.uk)**

**Implications**

**Financial**

- 1.1 The cost of determining this matter will be met from the existing budget

**Legal**

- 2.1 Legal considerations are considered within the main body of the report and in the Inspectors report at Appendix 3

- 2.2 As noted in this report the Application was made pursuant to section 15(2) of the 2006 Act which provides:

15 Registration of greens:

(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.

- 2.3 In order for an applicant to succeed in an application to have land registered as a TVG, the Registration Authority must be satisfied that each and every part of the foregoing statutory test is met. In the event that any part of the test is not satisfied the application must fail.

- 2.4 The principle of ‘statutory incompatibility’ (as outlined by the Inspector in her report at Appendix 3:

“On 11 December 2019 a majority of the United Kingdom Supreme Court... held that parcels of land owned by Lancashire County Council and NHS Property Services Ltd could not be registered as TVGs under s. 15 of the Commons Act 2006 because the land was held by the authorities for defined statutory purposes under general acts of parliament, and registration as a TVG would be in conflict with those statutory purposes...

In the Lancashire case, the land was held for statutory education purposes...

The Supreme Court held that the rights which TVG registration conferred on local residents to use the land for recreation in perpetuity were incompatible with the use of any of the land for education purposes, including for example construction of new school buildings or playing fields. It was not necessary for Lancashire County Council to show that the land was currently being used for such purposes, only that they are held for such statutory purposes.”

## **Human Resources**

3.1 None associated with this report

## **Information Technology**

4.1 None associated with this report

## **Equalities Impact**

5.1 None associated with this report.

## **Corporate objectives and priorities for change**

6.1 *None associated with this report.*

## **Other (for example, Health and Safety, Environmental Sustainability, Property and Asset Management, Risk Management and Safeguarding)**

7.1 In preparing the Report the relevance of the following factors as far as they are not covered by the Report has been considered: social value, environmental, health, personal and property considerations, the prevention of crime and disorder, equality of opportunity.

**Plan showing the land subject to the town or village green application**



**PLEASE NOTE: THIS REPORT IS NOT WRITTEN SPECIFICALLY FOR THIS MATTER AND SHOULD ONLY BE READ FOR CLARIFICATION IN RELATION TO THE PRINCIPLE OF STATUTORY INCOMPATIBILITY**

**Independent Inspector's report considering the implications of statutory incompatibility on the determination of applications for registration of land as TVG**

**RE: APPLICATION TO REGISTER LAND OFF FALL ROAD AND LOWER GLADSTONE STREET,  
HEANOR AS A TOWN OR VILLAGE GREEN**

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**OPINION**

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**Introduction**

1. I am asked to advise Derbyshire County Council ('the registration authority') in respect of an application to register land off Fall Road and Lower Gladstone Street, Heanor as a town or village green (Ref: VG90). I am particularly asked to advise in respect of whether the application ought to fail in light of the recent Supreme Court judgment in Lancashire County Council v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58 and generally with regard to the principles of statutory incompatibility.

**Factual Background**

2. The relevant facts are as follows.
3. The application was validly made on 23 July 2004 by Kenneth Armstrong under s. 13 of the Commons Registration Act 1965. The relevant period is April 1984 to April 2004.

4. Part of the land is currently owned by Amber Valley Borough Council (Title number DY357952) and part (Title number DY353196) by Futures Homescape Ltd (trading as Futures Housing Group).
5. The application land was originally acquired in full by Heanor UDC on 26 April 1923 for the purposes of providing “highways and depots” (see the Land Terrier attached to Amber Valley Borough Council’s Additional Submissions). It passed through local government reorganization to Amber Valley Borough Council. From the late 1970s, the land was laid out as a car parking area and part of it was made into a roadway along the rear of the houses along Lower Gladstone Street. From 1980, Amber Valley Borough Council let out plots on the land to local residents to enable them to erect garages on them (one garage currently remains).
6. On 24 February 2003, Amber Valley Borough Council transferred part of area to Amber Valley Housing Limited. The current owner (Futures Homescape) was formed from Amber Valley Housing Limited and Daventry and District Housing. These are private not-for-profit companies that operate as registered social landlords. Future Homescape have made a planning application to develop the car park for four affordable housing dwellings (Ref AVA/2019/1243). The land is subject to a formal designation in the Amber Valley Borough Council Local Plan (April 2006) under Policy LC3 Playing Fields, Parks and Informal Open Space which restricts development which would result in its loss.

### **Instructions**

7. I am asked to consider any impact that statutory incompatibility may have on this particular application and advise how the registration authority should seek to determine the application. I am also asked to consider, in relation to Title Number DY353196 (Future Homescape’s part of the land) on whether the restrictive covenants might relate to statutory incompatibility. I have had sight of submissions from the



objectors on the issue of statutory incompatibility and a response from the applicant by email.

8. I am also asked to advise on statutory incompatibility in a broader sense that may be appropriate to other applications where land is owned by a public body, giving specific advice on:

- (a) Does the land subject to the application need to have been owned by the public authority for the full 20 year period under consideration?
- (b) If use of the land as a town or village partly or fully predates the ownership of the land by the public authority, does statutory incompatibility apply?
- (c) If a private company is undertaking a statutory function for a public authority, does statutory incompatibility apply regardless of whether the land is still within the ownership of that public body or owned by the private company? I.e. would the company be considered a 'public authority'?
- (d) What procedure should the Council put in place for dealing with applications where it considers statutory incompatibility is relevant i.e. should the Council ask interested parties for their comments based on statutory incompatibility?
- (e) Should land, regardless of ownership, subject to a Local Authority's Local Plan be protected from being registered as a TVG as a result of the recent case law?
- (f) When considering TVG application where land is owned by a public authority, is it enough for the public authority to prove ownership and assert the reason for which it is held or would the public authority need to provide evidence that the land is held for a statutory purpose for statutory incompatibility to be relevant?

9. I propose dealing with the general points of advice first before moving to consider the implications of statutory incompatibility for this specific application.

### **The Decision in Lancashire and NHS Property Services**

10. On 11 December 2019 a majority of the United Kingdom Supreme Court – Lord Carnwath, Lord Sales and Lady Black JSC – held that parcels of land owned by Lancashire County Council and NHS Property Services Ltd could not be registered as TVGs under s. 15 of the Commons Act 2006 because the land was held by the authorities for defined statutory purposes under general acts of parliament, and registration as a TVG would be in conflict with those statutory purposes. This is known as the principle of ‘statutory incompatibility’. Lord Wilson JSC gave a dissenting judgment and Lady Arden JSC gave a partially dissenting judgment.
11. In the Lancashire case, the land was held for statutory education purposes. In the NHS Property Services case, the owner was a limited company, created by the Secretary of State for Health under his power to form companies “to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under [the National Health Service Act 2006]”. The land was held for statutory health purposes.
12. The Supreme Court held that the rights which TVG registration conferred on local residents to use the land for recreation in perpetuity were incompatible with the use of any of the land for education purposes, including for example construction of new school buildings or playing fields. It was not necessary for Lancashire County Council to show that the land was currently being used for such purposes, only that they *are* held for such statutory purposes (see [65]). Similar points arose in relation to the NHS land.
13. A “factual inquiry” into the present or likely future uses of the land in question was not part of the proper application of the statutory incompatibility principle, according to the majority judgment. Thus, whilst there must be some consideration by the decision-maker as to (i) those uses or activities which might, in the abstract, be required on the land as a result of a particular applicable statutory duty, and (ii) whether the rights of local inhabitants to use a green, and the effect of the 19<sup>th</sup> century statutes which prohibit disturbance of the soil, fencing and so on would be in conflict with those uses or activities. Nevertheless, the question is whether there could be

conflict by reference to the statutory powers in question, and not by reference to the state of affairs on the ground either now or in the future.

14. In a similar vein, the majority of the court did not accept the proposition that for statutory incompatibility to be engaged, the statute which conferred on the public authority its powers and functions must also identify the land on which those powers and functions were to be exercised.

15. The consequences of the decision, in terms of which pieces of public authority land are and are not affected by the statutory incompatibility principle, is still at large. The case of TW Logistics v Essex County Council (UKSC 2018/0234) was heard by the Supreme Court on 1-2 April 2020, however the judgment has not yet been handed down. That case will consider how the legislation prohibiting activities on town or village greens interacts with the registration regime i.e. whether rights of the landowner to continue pre-existing uses are inconsistent with the uses which led to registration. This may affect whether there is an 'incompatibility' at all in some cases.

16. I will therefore address the questions that I have been asked to advise on, but with the caveat that these are my opinions as to how the Courts are most likely to consider the situation, rather than a definitive statement of the law as it stands.

**Question 1: Does the land subject to the application need to have been owned by the public authority for the full 20 year period under consideration?**

17. It appears from the majority judgment in Lancashire that if the principle of statutory incompatibility is engaged for *any part* of the relevant 20 year period then an application to register the land as a TVG will fail. At [55], the Supreme Court stated that where there is an incompatibility between the statutory purpose for which the land is held and use of that land as a TVG: "This has the result that the provisions of

the 2006 Act are, as a matter of construction of that Act, not applicable in relation to it". What the Court appears to be saying is that the existence of relevant statutory duties means that such land cannot be registered and the right to apply to register the land does not apply to it. It would seem to follow, therefore, that if at any point in a period of twenty years a parcel of land is held by a public authority for relevant statutory purposes, a continuous and uninterrupted period of qualifying use of the land by the public cannot arise, because whilst the land is held for those statutory purposes the provisions of the 2006 Act do not apply to it: it is not registrable.

**Question 2: If use of the land as a town or village partly or fully predates the ownership of the land by the public authority, does statutory incompatibility apply?**

18. If the relevant TVG period overlaps with a period of statutory incompatibility, the application will fail for the reasons set out above. If the statutory incompatibility arises after the TVG application is made, then I do not see that it could operate retrospectively. Otherwise, any TVG application – validly made – could be defeated simply by transferring land to a local authority to hold for an incompatible statutory purpose. The point about the incompatibility is that it must arise simultaneously with the right to register the land as a TVG for the former to ‘trump’ the latter.

19. The question is more complicated if there is a statutory incompatibility at the time of the application to register the land as a TVG but that only arose after the relevant period of user ended. In my view, in light of the comments in [55] of Lancashire above, TVG registration would not be possible, because – if there is an incompatibility as at the date of the application – the operation of s. 15 Commons Act 2006 is not applicable and so the tests cannot be met, even by reference to an earlier period. However, this is not a point that I am aware has been tested as yet.

**Question 3: If a private company is undertaking a statutory function for a public authority, does statutory incompatibility apply regardless of whether the land is still within the**

**ownership of that public body or owned by the private company? I.e. would the company be considered a 'public authority'?**

20. As set out above, NHS Property Services was a private company. However, it was created by the Secretary of State for Health under his power to form companies “to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under [the National Health Service Act 2006]”. The land was held for statutory health purposes.

21. The question is not determined so much by who the owner of the land is, but by whether it is held for a statutory purpose (which is incompatible with rights flowing from TVG registration). Therefore, if a private company owns land in order to fulfil statutory functions for a public authority, then I consider that statutory incompatibility could arise. However, it would depend on the nature of the relationship between the private company and the public authority and whether it is clear that the statutory functions have passed to the private company (this was clear in the case of NHS Property Services, but may not be so clear in other cases).

**Question 4: What procedure should the Council put in place for dealing with applications where it considers statutory incompatibility is relevant i.e. should the Council ask interested parties for their comments based on statutory incompatibility?**

22. There is obvious public interest in ensuring that TVG applications are dealt with in as timely and efficient manner as possible. If it is clear from objections (or the registration authority's own consideration of the matter) that an issue of statutory incompatibility may arise, then I would treat this as a preliminary issue requiring determination before an application proceeds any further (akin to consideration of trigger events). It may be that specific written submissions are needed and, even potentially, the opportunity for oral legal argument to be made to the registration authority. This can be done as a preliminary issue without the need to hear witness evidence in relation to the use. I

do not see why the procedure rules prevent active case management of an application in this way.

23. I have experience of advising registration authorities on trigger events, having received opposing legal opinions from the parties, and this has been a successful way of dealing early on with a determinative issue. If a party is aggrieved by the conclusion on the issue, then they have the opportunity to judicially review the registration authority's decision on that single issue, rather than having to wait for the outcome of a public inquiry and going to the time and expense of preparing the case on all the other issues.

**Question 5: Should land, regardless of ownership, subject to a Local Authority's Local Plan be protected from being registered as a TVG as a result of the recent case law?**

24. I do not consider that the concept of statutory incompatibility extends this far. Although statutory incompatibility is judge-made and there is no clear definition of when it will arise, it is predicated on there being an Act of Parliament that says that a public body should use land, which it holds for a particular purpose, for that purpose. The village green registration statutes confer rights on certain individuals to do things on that same land. There is a conflict – whether actual, or potential – between the statutory rights of individuals to do certain things, and the requirement for a public body to do other things.

25. Allocation of land in a Local Plan is not the same as a public body holding land for a particular purpose. One might also argue that, now that the trigger events include identification of land in planning policy, such legislation would be wholly otiose and unnecessary if such land was already incapable of being registered as a TVG. I therefore do not consider that Local Plan allocation is in and of itself determinative of whether statutory incompatibility arises.

**Question 6: When considering TVG application where land is owned by a public authority, is it enough for the public authority to prove ownership and assert the reason for which it is held or would the public authority need to provide evidence that the land is held for a statutory purpose for statutory incompatibility to be relevant?**

26. An issue in the Lancashire case was whether the land was held for statutory education purposes as a matter of fact. In general terms, public authorities cannot simply own land for no particular purpose. Being statutory creations, all their powers to acquire and hold land must be derived from some particular statutory power.
27. Lancashire County Council presented evidence at the public inquiry, all of which pointed towards the conclusion that the land was acquired and thereafter held for statutory education purposes, albeit none of the evidence was definitive. There was no evidence to suggest the land had been acquired for any other purpose or appropriated to some other purpose. Nevertheless the Inspector concluded that she was not satisfied the land was acquired and held for statutory education purposes. The High Court and Court of Appeal opined that they would have reached the opposite conclusion, but that the Inspector's decision was not irrational.
28. The majority in the Supreme Court held that the Inspector's assessment was irrational, having regard to the relevant standard of proof and the evidence available. "There was no evidence to support any inference other than that each part of the land had been acquired for, and continued during the relevant period to be held for, statutory educational purposes. An assessment made without any supporting evidence cannot stand" [32]. Neither of the dissenting judgments dissented on this issue.
29. It is notable that Lancashire County Council did produce some evidence as to how the land was held i.e. more than an assertion. Often with historical records, there are gaps in knowledge and it is appropriate to apply the presumption of regularity in respect of a public authority's record keeping. In my view, given the point about statutory incompatibility is that there is particular statute which enables the public authority to

use the land in a certain way, it is essential that at least the purpose for which the public authority owns the land is identified. Statutory incompatibility does not apply like a blanket policy to all land in public ownership. The powers must be identified so that it can be examined if there is, in fact, an incompatibility at all. Therefore, in my view, there needs to be more than an assertion. However, the evidence need not be conclusive and it is reasonable to make presumptions about pieces of evidence that cannot be found anymore.

### **Application of the Principles of Statutory Incompatibility to this Particular Case**

30. Having set out my views to the general questions I have been asked to advise on, I will turn now to consider the particular facts of this case.

31. The Lancashire case concerned the Commons Act 2006 and not the Commons Registration Act 1965 (which is the relevant Act for the application under consideration). I do not, however, consider that effects the potential applicability of the doctrine of statutory incompatibility. Whilst the question of statutory construction was specifically undertaken in the context of s. 15 of the 2006 Act, that Act consolidated and updated the Commons Registration Act 1965. I do not consider that there is any fundamental distinction between the drafting of the 1965 and 2006 Acts. The context of statutory incompatibility is that it is entirely judge-made, as a concept. It does not derive from any particular enactment and thus it will, in my view, apply equally if there is a conflict with the 1965 Act as it does if there is a conflict with the 2006 Act.

32. Amber Valley Borough Council have identified that the land was acquired by their predecessor local authority for the purposes of providing “highways and depots”. They have not, however, identified which particular statutory power that is pursuant to. I do not consider that that is necessarily fatal to an argument that statutory incompatibility applies because all local authority powers to acquire and hold land must be derived from some statutory power to hold land for a particular purpose.



However, it would have been more useful to know the exact statute which the Council relies on.

33. There then needs to be consideration given as to whether there is, in fact, an incompatibility between the use of the land for “highways and depots” (which it must be assumed is pursuant to a statutory power) and registration as a TVG. In my view, there would be an incompatibility because the use of the land for highways and depots requires potential building operations on the land (i.e. construction of garages etc.) and vehicular access and parking on the land. Both of these activities (construction of buildings and driving and parking of vehicles) would be prohibited by the 19<sup>th</sup> century Victorian legislation in s. 29 of the Commons Act 1976 (which is particularly aimed at preventing building on greens) and s. 29 of the Commons Act 1876 which applies to nuisances. It is an offence under s. 34 of the Road Traffic Act 1988 to drive a mechanically propelled vehicle onto or upon a registered green without lawful authority. Although there may be an argument to be canvassed by the Supreme Court in the forthcoming judgment in TW Logistics v Essex CC concerning the extent to which rights of the landowner can co-exist with the rights flowing from TVG registration, I do not consider that there would be any doubt cast on the fact that TVG registration would be incompatible with use of the land as a car park.

34. I have also considered whether any issue arises in this case in light of the transfer of part of Amber Valley Borough Council’s land to the registered social landlord company in February 2003 (i.e. before the end of the relevant 20 year period). I have set out my views on the issues of whether the land needs to be in public authority ownership throughout the 20 year period and the role of private companies carrying out public functions in my general advice above. In my view, so long as, during at least part of the 20 year period, there has been a statutory incompatibility in relation to the whole of the land, that will be sufficient to mean that the right to register the land as a TVG is simply not available. In this case, Amber Valley Borough Council have, in any event, owned the whole of the land for the vast majority of the 20 year period. I do not consider it is therefore necessary to consider the relationship between the private

company and the Borough Council to establish whether any ‘quasi’ statutory public functions are being carried out by them.

35. I therefore consider that the application should fail on account of a statutory incompatibility between the Borough Council’s holding of the land for “highways and depots” and the recreational rights that would flow from TVG registration. The consequence is that the Borough Council’s rights prevail and it is not open to the applicant to register this land as a TVG. I would therefore advise that the application is dismissed for the reasons I have given.

36. I note also that I was advised to consider the effect of the restrictive covenant on the title DY357952 (i.e. the land retained by the Borough Council) to the effect that the purchasers must erect and maintain good and substantial fences. I do not consider that the covenant is relevant to the issue of statutory incompatibility as it is a private land charge rather than an issue of statutory powers and duties.

### **Conclusion and Next Steps**

37. As set out above, I consider that the application should be rejected on the basis that the statutory power to register the land as a TVG would be incompatible with the statutory power under which Amber Valley Borough Council held the land during the relevant period, namely for highways and depots. I should add that there are some untested matters which have informed my conclusion – in particular, whether statutory incompatibility applies to applications made under the Commons Registration Act 1965, and whether it is sufficient to identify the purpose for which the land was required and not the express statutory power itself. However, my advice is that a Court would be most likely to reach the conclusions on these issues that I have.

38. In terms of procedure, I do not consider that a public inquiry is necessary to determine this preliminary point, since no witness evidence needs to be tested. I would

recommend that my conclusions and reasoning are copied into a delegated report to make the decision. I note that at the registration authority's meeting on 23 March 2020, it was resolved to appoint an Inspector to advise the Council. I have provided that advice. However, if the Council would prefer a summary of the points specific to this application in a separate 'Report' for presentation reasons then I can provide that.

39. Please do let me know if any questions arise as a result of this advice or if I can be of further assistance.

**ANNABEL GRAHAM PAUL**

**Francis Taylor Building  
Inner Temple  
EC4Y 7BY**

**17 June 2020**

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## DIRECTIONS AND NOTES

1. This form should be completed together with the duplicate attached hereto, and sent by post or delivered personally to the local registrar.
2. A separate requisition for search should be made in respect of each parcel of land in respect of which a search is requested, except where, for the purpose of a single transaction, a certificate is required in respect of two or more parcels of land which have a common boundary or are separated only by a road, railway, river, stream or canal.
3. "Parcel of land" means a piece of land in separate occupation or separately rated at the time of the requisition for search or a building or a part of a building so occupied or rated. For the purpose of this definition any land or building or part of a building which is neither occupied nor rated shall be deemed to be occupied by the person who receives the rackrent therefor, whether on his own account or as agent or trustee for any other person, or who would so receive it if the land, building or part of a building were let at a rackrent.
4. The certificate of the result of an official search in the register refers to any subsisting entries, including priority notices, recorded against the land defined in the application for search, in the Parts of the register in respect of which search is requested. The Parts of the register record:

Part 1	General financial charges.
Part 2	Specific financial charges.
Part 3	Planning charges.
Part 4	Miscellaneous prohibitions and restrictions.
Part 5	Charges for improvement of ways over fenlands.
Part 6	Certain compulsory purchase orders.
Part 7	New towns orders.
Part 8	Civil aviation orders, directions, grants and agreements.
Part 9	Opencast coalmining orders.
Part 10	Lists of buildings of special architectural or historical interest.
Part 11	Light obstruction notices.
Part 12	Land drainage schemes.

5. An office copy of any entry in the register can be obtained on payment of the prescribed fee.

### FEES

	s. d.
Official search (including issue of official certificate of search)	
in any one Part of the register	4 0 [20p]
in the whole of the register	10 0 [50p]
and in addition, but subject to a maximum additional fee of £2, in respect of each parcel of land above one, where several parcels are included in the same requisition (see notes 2 and 3 above) whether the requisition is for search in the whole or any Part of the register	2 6 [12½p]
Office copy of any entry in the register (not including a copy or extract of any plan or document filed in the registry)	3 0 [15p]
Office copy of any plan or other document filed in the registry	Such reasonable fee as may be fixed by the local registrar according to the time and labour involved.

*All fees must be prepaid*

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## BOROUGH OR DISTRICT COUNCILS (other than LONDON BOROUGHS)

## ENQUIRIES OF LOCAL AUTHORITY

- N.B.—(1) This form of enquiry is approved by The Law Society, the Association of Municipal Corporations, the Urban District Councils Association, the Rural District Councils Association, the Society of Town Clerks, the Society of Clerks of Urban District Councils, and the Society of Clerks of Rural District Councils, and is printed by authority of The Law Society. The Law Society advises solicitors to use this form and the local government bodies mentioned above recommend their members to answer enquiries made upon this form.
- (2) The replies below are furnished after appropriate enquiries, and in the belief that they are in accordance with the information at present available to the officers of the Council, but on the distinct understanding that neither the Council nor any officer of the Council is legally responsible therefor.
- (3) It is pointed out that, so far as the replies may relate to proposals, they may yet change.
- (4) References to the property concerned in the enquiries and replies are intended to include reference, where appropriate, to any part of the property.
- (5) References to any Act, Regulation or Order are intended to include reference to any amendment or re-enactment thereof.
- (6) References to the "Council" are intended to include reference to a Committee of the Council acting under delegated powers.

Insert name of Borough or Urban or Rural District and delete as necessary.

To the

Town Clerk..... Borough Council.

Clerk of the STAVELEY URBAN District Council.

Insert short description of property.

Land owned by Mr. J. Hodgkinson.  
 Re Agricultural land situated on the west side of  
 Norbriggs Road Staveley shown edged red on annexed map  
 containing an area of 5.146 acres or thereabouts

The undersigned is acting in connection with the above property and requests you kindly to reply to the enquiries overleaf sent in duplicate for which the fee of 75p. is enclosed.

Delete and complete as necessary

A Requisition for an Official Search for Local Land Charges (Form L.L.C.1), together with the prescribed fee,† accompanies these enquiries ~~(was submitted on 19 )~~  
 Your reference (if known) is ~~( )~~ [will shortly be submitted].

Dated this 9th day of March 1971

H. Crossley  
 Solicitor.

\*The fees for answering the enquiries are as follows:—

## PART I ENQUIRIES:—

- (a) Where relating to one parcel of land only, as defined in Rule 2 (2) of the Local Land Charges Rules, 1966 .. .. . 15s.
- (b) Where relating to several parcels of land (which a single Requisition for an Official Search would cover) and delivered on a single form:—
- For the first parcel of land .. .. . 15s.
- For each additional parcel of land .. .. . 3s. 9d.
- provided that where the fee on that basis would exceed £10, the amount is to be fixed by arrangement between the solicitor and the Clerk of the Local Authority.

The above fees cover all the enquiries in Part I.

## PART II ENQUIRIES:—

- Where relating to one parcel of land only or to several parcels (as above-mentioned) and delivered on a single form:—
- For each printed enquiry numbered in the form .. .. . 2s.
- For any and each further enquiry added by solicitors and which the Town Clerk/Clerk of the Council is willing to answer .. .. . 5s.
- No maximum fee.

†Where a Requisition for an Official Search and these enquiries are delivered together, the fees may be included in a single remittance in favour of the local authority.

This space must be filled in

NAME AND ADDRESS IN BLOCK LETTERS TO WHICH THIS FORM IS TO BE RETURNED

H. CROSSLEY, ESQ.,  
 DERBYSHIRE COUNTY COUNCIL,  
 COUNTY OFFICES,  
 MATLOCK,  
 Derbys.

(Reference: AWS/DLB/GB/EOP 1664 B)

Telephone No.

THE SOLICITORS'  
 LAW STATIONERY SOCIETY  
 LIMITED  
 181-183 Fleet Street, E.C.4  
 1 Bockleybury, E.C.4  
 40 Bedford Row, W.C.1  
 15 Hanover Street, W.1  
 55-59 Newhall Street Birmingham, 3  
 81 Charles Street, Cardiff CF1 4EA  
 19 & 21 North John Street, Liverpool 2  
 25-31 John Dalton Street, Manchester, 2

CON. 29A

April, 1970



BOROUGH OR DISTRICT COUNCILS (other than LONDON BOROUGHs)

ENQUIRY

PART I

NOTE.—Inappropriate enquiries should be deleted. In view of the possible delegation of functions by County Councils, it is unsafe, however, to delete enquiries 1, 9, 10, 12, 13, 14, 15 and 16, if otherwise appropriate.

1. (A) Are the highways (including footpaths) known as Norbrigg Road

abutting on the property maintained at the public expense?

(NOTE.—All highways including paths and passages must be named or identified, unless a plan (in duplicate) showing the names of or otherwise identifying the highways is furnished with the Requisition for Official Search or herewith. Omission to do so may result in the Enquiry not being answered.)

(B) If not, please state whether the Council have passed any resolution to make them up at the cost of the frontagers.

(C) (i) Has any agreement under section 40 of the Highways Act, 1959, been made in respect thereof, which is still operative?

(ii) If so, is the agreement supported by a bond?

(D) If the Local Authority is a highway authority, have any proposals (other than such as are referred to in Enquiries 2 and 11 below) for the improvement, widening, alteration or construction of any road been approved by the Council which are likely to affect the property?

2. (A) Has any Order, draft Order or Scheme, under the Trunk Roads Act, 1936, the Trunk Roads Act, 1946, the Special Roads Act, 1949, or Part II of the Highways Act, 1959, relating to a road or proposed road, the centre line of which is within 200 yards of the property, been notified to the Council by the Minister of Transport, or have the Council made, or resolved to make, a Scheme under any such statutory provision in respect of such a road or proposed road?

(B) Apart from the matters disclosed by the replies to Enquiries 1 (D) and 11, have the Council (i) resolved to construct a subway, underpass, flyover, or elevated road, the centre line of which is within 200 yards of the property, or (ii) been notified that the Minister of Transport proposes to construct any such works?

3. (A) Is the property controlled land within the meaning of the First Schedule to the Public Utilities Street Works Act, 1950?

(B) If so, have the Council authorised or have they under consideration an application to authorise any undertakers to execute works on, under or affecting the property in pursuance of that Act?

4. Are there any outstanding notices (whether statutory or informal) which have been issued by the Council other than notices shown in the Official Certificate of Search? If so, please give particulars thereof.

- \*5. Is there a public sewer within 100 ft. of the property physically available to serve it by gravity?

6. Is there any enactment, statutory scheme or Order relating to combined drains, or any agreement, within the meaning of section 24 of the Public Health Act, 1936, applying to the property?

- \*7. Have any entries been made in respect of the property in the register kept under section 74 of the Rent Act, 1968, or the corresponding provisions of the repealed Acts?

REPLY

1. (A) Derbyshire County Council

(B) " " "

(C) (i) " " "

(ii) " " "

(D) " " "

2. (A) " " "

(B) " " "

3. (A) " " "

(B) " " "

4. No

5. No

6. No

7. -



BOROUGH OR DISTRICT COUNCILS (other than LONDON BOROUGHs)

ENQUIRY	REPLY
8. Have the Council authorised any proceedings in respect of any infringement of the building regulations ?	8. No
9. Has any enforcement notice under the Town and Country Planning Acts, 1947 or 1962, been authorised by the Council for service, but not yet registered ?	9. No
10. If there was an operative Planning Scheme in force prior to the 1st July, 1948, is the property affected by any of the matters (relating to the continuance in force of certain matters under the Town and Country Planning Act, 1932) referred to in paragraph 7 of the Tenth Schedule to the Town and Country Planning Act, 1947, as continued in force by the Thirteenth Schedule to the Town and Country Planning Act, 1962 ?	10. None
11. If the property is included in a Development Plan approved by the Minister or in any proposals approved by the Local Planning Authority, or by the Council for submission to the Local Planning Authority, for inclusion in a Development Plan, or in any such proposals for alterations or additions to any Development Plan, please specify whether the Development Plan or proposals— (A) designate the property as subject to compulsory acquisition ; (B) indicate the primary use for the area in which the property is situated, and if so, what that use is ; (C) include any other matter which specifically affects the property. If so, please give short particulars thereof. [NOTE.—It is intended that this enquiry should be answered so far as possible by Borough and District Councils, although such proposals made by them may not yet have been conveyed to the Local Planning Authority.]	11. (A) No (B) Primary School (C) None
12. If the register is kept by the Council, are there any, and if so, what, entries relating to the property in the register kept under section 19 (4) of the Town and Country Planning Act, 1962 ?	12. This land lies within an area for which outline application for residential development was <u>refused</u> 3/11/65 (STA/765/3 refers). Outline application to erect primary school. Approved 22/5/70 (STA/270/6 refers)
13. Is there in force any direction referred to in Article 4 of the Town and Country Planning General Development Orders, 1950 or 1963 (relating to the restriction of permission to develop), which may affect the property ?	13. No
14. Have the Council made an Order, or passed any resolution for the making of an Order, under section 27, section 28, section 29 or section 30 of the Town and Country Planning Act, 1962, or the corresponding repealed provisions of the Town and Country Planning Act, 1947, in relation to the property ?	14. No
15. Has compensation in respect of the property been paid by the Council under section 123 of the Town and Country Planning Act, 1962, or the corresponding repealed provision of the Town and Country Planning Act, 1947 ?	15. No
16. (A) Is the register under the Town and Country Planning (Control of Advertisements) Regulations, 1960, maintained by the Council or by the County Council ? (B) If by the Council, are there any entries relating to the property in such register ? (C) Is there any notice served under Regulation 8 of such Regulations outstanding in respect of the property ? (D) Has any Order been made or have the Council passed a resolution to make an Order defining the area in which the property is situated as an area of special control under Regulation 10 of such Regulations ?	16. (A) Council (B) No (C) No (D) No
17. Have the Council made any Order (whether or not confirmed by the appropriate Minister) or passed any resolution for the compulsory acquisition of the property ?	17. No
18. Is the property situated in a locality which may make it the subject of action under Part III of the Housing Act, 1957 ?	18. No

[Attention is drawn to the fact that the Plan/proposals may be altered or modified.]

BOROUGH OR DISTRICT COUNCILS (other than LONDON BOROUGHS)

- ENQUIRY
19. (A) If any smoke control area Order under section 11 of the Clean Air Act, 1956, or any similar Order under any local Act, has been made affecting the property, has the Minister confirmed the Order with or without modifications, and, if so, on what day did or does it come into operation ?  
(B) Has any Order been made under section 11 (4), (5), (7) or (8) of the Act, and, if so, has it, where necessary, been confirmed ?
20. Is a resolution in force bringing into operation Schedule 1 to the General Rate Act, 1967, as to rating of unoccupied property ?

PART II

NOTE.—If the applicant wishes to make any of the following enquiries, he should place his initials clearly against those concerned. Enquiries not initialled will not be answered. For fees, see first page.

21. Has compensation been paid by the Council in regard to the property in respect of any Improvement Lanes prescribed under section 33 or section 34 of the Public Health Act, 1925, or section 72 of the Highways Act, 1959 ?
22. (A) Has the discharge of trade effluent from the premises into the sewers of the Council been permitted ?  
(B) A reference to any Agreement, Consent or Refusal under the Public Health (Drainage of Trade Premises) Act, 1937, or otherwise would be appreciated.
- [NOTE.—Enquiry 22 (A) and (B) to be made in the case of trade premises only.]
23. Is any building on the property included in any list of buildings of special architectural or historic interest supplemental to the lists for which provision is made by section 32 of the Town and Country Planning Act, 1962 ?
24. Have the Council issued and is there still in force :—  
(A) any Certificate of disrepair under paragraph 4 of Schedule 9 to the Rent Act, 1968, or the corresponding repealed provision of the Rent Act, 1957 ?  
(B) any Certificate under paragraph 8 (2) of Schedule 9 to the Rent Act, 1968, or the corresponding repealed provision of the Rent Act, 1957 ?
25. Please specify whether the Development Plan or proposals referred to in Enquiry 11 above define a "Green Belt area" within which the property is situated.
26. Have the Council passed any resolution :—  
(A) under section 12 or section 13 of the Public Health Act, 1961, which affects the property ?  
(B) under any local Act as to the recovery from frontagers of the expense of sewerage highways, which affects the property ?
27. Has a map been deposited under section 35 of the Pipe-lines Act, 1962, showing a pipe-line within 100 ft. of the property ?

- REPLY
19. (A) No  
(B) No
20. No
- 21.
22. (A)  
(B)
- 23.
24. (A)  
(B)
- 25.
26. (A)  
(B)
- 27.

Dated this 19th day of March, 1971.

*Edward S. Hall*

~~Edward S. Hall~~ Clerk of the Council.