PLANNING AND REGULATORY COMMITTEE
NOTICE OF MEETING

Date: **Wednesday, 18 December 2024**
Time **10.30 am**
Place: **Council Chamber, Woodhatch Place, 11 Cockshot Hill, Reigate, Surrey, RH2 8EF**

Contact: Joss Butler, Committee Manager

Email: joss.butler@surreycc.gov.uk
Phone: 07929745197

[For queries on the content of the agenda and requests for copies of related documents]

APPOINTED MEMBERS [11]

Ernest Mallett MBE	West Molesey;
Jeffrey Gray	Caterham Valley;
Victor Lewanski	Reigate;
Scott Lewis	Woodham and New Haw;
Catherine Powell	Farnham North;
Jeremy Webster	Caterham Hill;
Edward Hawkins (Chairman)	Heatherside and Parkside;
John Robini	Haslemere;
Richard Tear (Vice-Chairman)	Bagshot, Windlesham and Chobham;
Jonathan Hulley	Foxhills, Thorpe & Virginia Water;
Chris Farr	Godstone;

EX OFFICIO MEMBERS (NON-VOTING) [4]

Saj Hussain	Chair of the Council	Knaphill and Goldsworth West;
Tim Oliver	Leader of the Council	Weybridge;
Tim Hall	Vice-Chair of the Council	Leatherhead and Fetcham East;
Denise Turner-Stewart	Deputy Leader and Cabinet Member for Customer and Communities	Staines South and Ashford West;

APPOINTED SUBSTITUTES [09]

Stephen Cooksey	Dorking South and the Holmwoods;
Nick Darby	The Dittons;
Amanda Boote	The Byfleets;
David Harmer	Waverley Western Villages;
Trefor Hogg	Camberley East;
Riasat Khan	Woking North;
Mark Sugden	Hinchley Wood, Claygate and Oxshott;
Buddhi Weerasinghe	Lower Sunbury and Halliford;
Fiona White	Guildford West;
Keith Witham	Worplesdon;
Luke Bennett	Banstead, Woodmansterne & Chipstead;
Harry Boparai	Sunbury Common & Ashford Common;

Register of planning applications: http://planning.surreycc.gov.uk/

AGENDA

1 APOLOGIES FOR ABSENCE AND SUBSTITUTIONS

To receive any apologies for absence and notices of substitutions under Standing Order 41.

2 MINUTES OF THE LAST MEETING

The minutes of the previous meeting are to follow within a supplementary agenda.

3 PETITIONS

To receive any petitions from members of the public in accordance with Standing Order 84 (please see note 5 below).

4 PUBLIC QUESTION TIME

To answer any questions received from local government electors within Surrey in accordance with Standing Order 85 (please see note 6 below).

5 MEMBERS' QUESTION TIME

To answer any questions received from Members of the Council in accordance with Standing Order 68.

6 DECLARATIONS OF INTERESTS

All Members present are required to declare, at this point in the meeting or as soon as possible thereafter

(i) Any disclosable pecuniary interests and / or

(ii) Other interests arising under the Code of Conduct in respect of any item(s) of business being considered at this meeting

NOTES:

- Members are reminded that they must not participate in any item where they have a disclosable pecuniary interest
- As well as an interest of the Member, this includes any interest, of which the Member is aware, that relates to the Member's spouse or civil partner (or any person with whom the Member is living as a spouse or civil partner)
- Members with a significant personal interest may participate in the discussion and vote on that matter unless that interest could be reasonably regarded as prejudicial.

7 SURREY COUNTY COUNCIL PROPOSAL WO/PLAN/2024/0633 - LAND AT ST JOHN THE BAPTIST SCHOOL, ELMBRIDGE LANE, WOKING, SURREY GU22 9AL (Pages 1 - 46)

Erection and use of a new Special Educational Needs classroom building and associated parking area, with access from Coniston Road.

8 **APPLICATION FOR VILLAGE GREEN STATUS - LAND AT LEACH GROVE WOOD, LEATHERHEAD** (Pages 47 - 332)

The committee is asked to consider whether or not to register the land the subject of this application as a Village Green.

9 **DATE OF NEXT MEETING**

The next meeting of the Planning & Regulatory Committee will be on 29 January 2025.

Terence Herbert
Chief Executive
10 December 2024

MOBILE TECHNOLOGY AND FILMING – ACCEPTABLE USE

Those attending for the purpose of reporting on the meeting may use social media or mobile devices in silent mode to send electronic messages about the progress of the public parts of the meeting. To support this, County Hall has wifi available for visitors – please ask at reception for details.

Anyone is permitted to film, record or take photographs at council meetings. Please liaise with the council officer listed in the agenda prior to the start of the meeting so that those attending the meeting can be made aware of any filming taking place.

Use of mobile devices, including for the purpose of recording or filming a meeting, is subject to no interruptions, distractions or interference being caused to the PA or Induction Loop systems, or any general disturbance to proceedings. The Chairman may ask for mobile devices to be switched off in these circumstances.

It is requested that if you are not using your mobile device for any of the activities outlined above, it be switched off or placed in silent mode during the meeting to prevent interruptions and interference with PA and Induction Loop systems.

Thank you for your co-operation

Note: *This meeting may be filmed for live or subsequent broadcast via the Council's internet site - at the start of the meeting the Chairman will confirm if all or part of the meeting is being filmed. The images and sound recording may be used for training purposes within the Council.*

Generally the public seating areas are not filmed. However by entering the meeting room and using the public seating area, you are consenting to being filmed and to the possible use of those images and sound recordings for webcasting and/or training purposes.

If you have any queries regarding this, please contact the representative of Legal and Democratic Services at the meeting

NOTES:

1. Members are requested to let the Democratic Services Officer have the wording of any motions and amendments not later than one hour before the start of the meeting.

2. Substitutions must be notified to the Democratic Services Officer by the absent Member or group representative at least half an hour in advance of the meeting.

3. Planning officers will introduce their report and be able to provide information or advice to Members during the meeting. They can also be contacted before the meeting if you require information or advice on any matter. Members are strongly encouraged to contact the relevant case officer in advance of the meeting if you are looking to amend or add conditions or are likely to be proposing a reason for refusal. It is helpful if officers are aware of these matters in advance so that they can better advise Members both before and during the meeting.

4. Members of the public can speak at the Committee meeting on any planning application that is being reported to the Committee for decision, provided they have made written representations on the application at least five days in advance of the meeting, and provided they have registered their wish to do so with the Democratic Services Officer no later than midday on the working day before the meeting. The number of public speakers is restricted to four objectors and four supporters in respect of each application.

5. Petitions from members of the public may be presented to the Committee provided that they contain 100 or more signatures and relate to a matter within the Committee's terms of reference. The presentation of petitions on the following matters is not allowed: (a) matters which are "confidential" or "exempt" under the Local Government Access to Information Act 1985; and (b) planning applications. Notice must be given in writing at least 14 days before the meeting. Please contact the Democratic Services Officer for further advice.

6. Notice of public questions must be given in writing at least 7 days before the meeting. Members of the public may ask one question relating to a matter within the Committee's terms of reference. Questions on "confidential" or "exempt" matters and planning applications are not allowed. Questions should relate to general policy and not detail. Please contact the Democratic Services Officer for further advice.

7. On 10 December 2013, the Council agreed amendments to the Scheme of Delegation so that:
   - All details pursuant (applications relating to a previously granted permission) and non-material amendments (minor issues that do not change the principles of an existing permission) will be delegated to officers (irrespective of the number of objections).
   - Any full application with fewer than 5 objections, which is in accordance with the development plan and national polices will be delegated to officers.
   - Any full application with fewer than 5 objections that is not in accordance with the development plan (i.e. waste development in Green Belt) and national policies will be delegated to officers in liaison with either the Chairman or Vice Chairman of the Planning & Regulatory Committee.
   - Any application can come before committee if requested by the local member or a member of the Planning & Regulatory Committee.

   The revised Scheme of Delegation came into effect as of the date of the Council decision.

Town and Country Planning Act 1990 – guidance on the determination of planning applications

This guidance forms part of and should be read in conjunction with the Planning Considerations section in the report.

Surrey County Council as County Planning Authority (also known as Mineral or Waste Planning Authority in relation to matters relating to mineral or waste development) is required under Section 70(2) of the Town and Country Planning Act 1990 (as amended) (1990 Act) when determining planning applications to '*have regard to (a) the provisions of the development plan, so far as material to the application, (b) any local finance considerations, so far as material to the application, and (c) any other material considerations*'. This section of the 1990 Act must be read together with Section 38(6) of the Planning and Compulsory Purchase Act 2004 (2004 Act), which provides that: '*If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise*.'

Development plan
In Surrey the adopted development plan consists of the:

- Surrey Minerals Local Plan 2011 (comprised of the Core Strategy and Primary Aggregates Development Plan Documents (DPD))
- Surrey Waste Local Plan 2020 (for the period 2019-2033 and comprised of the Surrey Waste Local Plan Part 1 Policies and Surrey Waste Local Plan Part 2 Sites)
- Aggregates Recycling Joint Development Plan (DPD) for the Minerals and Waste Plans 2013 (Aggregates Recycling DPD 2013)
- Any saved local plan policies and the adopted Local Development Documents (development plan documents and supplementary planning documents) prepared by the eleven Surrey district/borough councils in Surrey
- South East Plan 2009 Policy NRM6 Thames Basin Heaths Special Protection Area (apart from Policy NRM6 and a policy relating to the former Upper Heyford Air Base in Oxfordshire the rest of the plan was revoked on 25 March 2013)
- Any neighbourhood plans (where they have been approved by the local community at referendum)

Set out in each report are the development plan documents and policies which provide the development plan framework relevant to the application under consideration.

Material considerations
Material considerations will vary from planning application to planning application and can include: relevant European policy; the National Planning Policy Framework (NPPF) 2023 and subsequent updates; the March 2014 national Planning Practice Guidance (PPG) and subsequent updates; National Planning Policy for Waste (NPPW) October 2014; Waste Management Plan for England 2021; extant planning policy statements; Government Circulars and letters to Chief Planning Officers; emerging local development documents (being produced by Surrey County Council, the district/borough council or neighbourhood forum in whose area the application site lies).

National Planning Policy Framework and Planning Practice Guidance
The National Planning Policy Framework (NPPF) was revised on 19 December 2023. The revised NPPF replaces the previous NPPF published in March 2012 and revised in July 2018, February 2019, July 2021 and September 2023. It continues to provide consolidated guidance for local planning authorities and decision takers in relation to decision-taking (determining planning applications) and in preparing plans (plan making).

The NPPF sets out the Government's planning policies for England and how these are expected to be applied and the associated March 2014 Planning Practice Guidance(PPG), as amended, provides related guidance. The NPPF should be read alongside other national planning policies for waste; traveller sites; planning for schools development; sustainable drainage systems; parking and Starter Homes.

At the heart of the NPPF is a presumption in favour of sustainable development (paragraphs 10 and 11). The NPPF makes clear that the planning system has three overarching objectives in order to achieve sustainable development, which are interdependent and need to be pursued in mutually supportive ways in order to take opportunities to secure net gains across each of the different objectives. These objectives are economic, social and environmental.

The presumption in favour of sustainable development in the NPPF does not change the statutory principle that determination of planning applications must be made in accordance with the adopted development plan unless material considerations indicate otherwise. The NPPF is one of those material considerations. In determining planning applications the NPPF (paragraph 11) states that development proposals that accord with the development plan should be approved without delay. Where there are no relevant development plan policies, or the policies which are most important in determining an application are out of date, permission should be granted unless the application of policies in the NPPF that protect areas or assets of particular importance provides a clear reason for refusing the development proposed or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF as a whole.

The NPPF aims to strengthen local decision making and reinforce the importance of up to date plans. Annex 1 paragraph 224 states that, except for applications involving housing where policy in paragraph 76 of the NPPF applies, the policies in the NPPF are material considerations to be taken into account when dealing with applications from the date of publication. The policy in paragraph 76 applies to applications made on, or after, 19 December 2023. Annex 1 paragraph 225 states that in determining planning applications, local planning authorities should give due weight to relevant policies in existing plans according to their degree of consistency with the NPPF (the closer the policies are to the policies in the Framework, the greater the weight they may be given).

Human Rights Act 1998
Guidance For Interpretation

The Human Rights Act 1998 does not incorporate the European Convention on Human Rights into English law. It does, however, impose an obligation on public authorities not to act incompatibly with those Convention rights specified in Schedule 1 of that Act. As such, those persons directly affected by the adverse effects of decisions of public authorities may be able to claim a breach of their human rights. Decision makers are required to weigh the adverse impact of the development against the benefits to the public at large.

The most commonly relied upon articles of the European Convention are Articles 6, 8 and Article 1 of Protocol 1. These are specified in Schedule 1 of the Act.

Article 6 provides the right to a fair and public hearing. Officers must be satisfied that the application has been subject to proper public consultation and that the public have had an opportunity to make representations in the normal way and that any representations received have been properly covered in the report.

Article 8 covers the right to respect for a private and family life. This has been interpreted as the right to live one's personal life without unjustified interference. Officers must judge whether the development proposed would constitute such an interference and thus engage Article 8.

Article 1 of Protocol 1 provides that a person is entitled to the peaceful enjoyment of his possessions and that no-one shall be deprived of his possessions except in the public interest. Possessions will include material possessions, such as property, and also planning permissions and possibly other rights. Officers will wish to consider whether the impact of the proposed development will affect the peaceful enjoyment of such possessions.

These are qualified rights, which means that interference with them may be justified if deemed necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Any interference with a Convention right must be proportionate to the intended objective. This means that such an interference should be carefully designed to meet the objective in question and not be arbitrary, unfair or overly severe.

European case law suggests that interference with the human rights described above will only be considered to engage those Articles and thereby cause a breach of human rights where that interference is significant. Officers will therefore consider the impacts of all applications for planning permission and will express a view as to whether an Article of the Convention may be engaged.

To: Planning and Regulatory Committee
By: Planning Development Manager
District(s) Woking

Date: December 2024

Electoral Division(s):
Woking South
Will Forster
Woking South East
Liz Bowes
Case Officer:
James Nolan

Purpose: For Decision

Grid Ref: 501466 157516

Title: Surrey County Council Proposal WO/PLAN/2024/0633

Summary Report

Land at St John the Baptist School, Elmbridge Lane, Woking, Surrey GU22 9AL

Erection and use of a new Special Educational Needs classroom building and associated parking area, with access from Coniston Road.

St John the Baptist School is located entirely within the Green Belt in the Kingfield area of Woking, with construction of the original school buildings understood to have begun in 1961. The school currently caters for children aged 11 to 18 years on a site which comprises the existing cluster of one- to three-storey school buildings and its adjacent vehicle parking and external hard play areas in the western half, as well as a large open field in the eastern half which is marked up for football and athletics uses. The site is surrounded by residential, educational and community uses and large areas of dense, established woodland.

The proposal the subject of this application is for the erection and use of a new Special Educational Needs (**SEN**) building for 30 pupils in the south-eastern corner of the site, an associated exclusive parking area with 37 spaces and access from Coniston Road, and perimeter landscaping and fencing.

Representations from a total of thirty five members of the public have been received by the County Planning Authority (**CPA**) in relation to this planning application. No technical objections have been received from the relevant consultees, subject to the application of suitably worded Conditions.

As the proposal lies within the Green Belt and is inappropriate development *very special circumstances* have to exist for planning permission to be granted, and those circumstances must outweigh all and any harm caused, including harm by virtue of inappropriateness. Officers consider that in this case the Applicant has demonstrated *very special circumstances* around the clear educational need for the proposal which, in accordance with the NPPF paragraph 99, should be given *great weight* in the planning balance.

The recommendation is to grant planning permission for application ref: **WO/PLAN/2024/0633** pursuant to Regulation 3 of The Town and Country Planning General Regulations 1992, subject to the recommended planning Conditions.

7

Application details

Applicant

SCC Property

Date application valid

27 August 2024

Period for Determination

22 October 2024 – extended to 3 January 2025 on agreement with Agent.

Amending Documents

- AFL120 LED Pole Mounted Luminaire data sheet – we-ef Fagerhult Lighting Ltd.
- Drawing No. PR-320-ATK-XX-XX-DR-E-60111 Rev P02 External Lighting Lux Level Assessment dated 12 September 2024.
- Email from Agent dated 25 October 2024 clarifying pitch layouts.
- Drawing No. PR-321-PEV-XX-XX-DR-A 00250 Rev D Proposed Site Plan – Athletics Track Layout dated 8 October 2024.
- Drawing No. PR-321-PEV-XX-XX-DR-A 00251 Rev D Proposed Site Plan – Proposed Reduced Rugby Union and Football pitches dated 9 October 2024.
- Drawing No. PR-321-PEV-XX-XX-DR-A 00252 Rev A Proposed Site Plan – Football and Rugby Pitch Layout dated 9 October 2024.
- Drawing No. PR-321-PEV-XX-XX-DR-A 00253 Rev A Proposed Site Plan – Football 11-a-side and mini soccer pitch layouts dated 9 October 2024.
- Drawing No. PR-321-PEV-XX-XX-DR-A 00254 Rev A Proposed Site Plan – 1 Football 11-a-side, 1 Reduced Rugby Union and 3 mini soccer pitch layouts dated 9 October 2024.
- Drawing No. PR-321-PEV-XX-00-DR-L-01200 Rev P5 Landscape Plan Works Stage Three dated 21 November 2024.
- Email from Agent dated 26 November 2024 containing the e3p document titled Biodiversity Metric Report version 5 dated 15 November 2024, the document titled The Statutory Biodiversity Metric version 4 dated 12 November 2024, and the e3p letter titled Ecology Response St John the Baptist School, Woking dated 15 November 2024.
- Email from Agent dated 3 December 2024 clarifying highway works on Woking Borough Council land.
- Email from Agent dated 4 December 2024 containing the Surrey County Archaeological Unit documents titled Written Scheme of Investigation for a Trial Trench Evaluation dated June 2024 and Archaeological Trial Trench Evaluation dated October 2024.

Summary of Planning Issues

This section identifies and summarises the main planning issues in the report. The full text should be considered before the meeting.

	Is this aspect of the proposal in accordance with the development plan?	Paragraphs in the report where this has been discussed
	Yes	38-58

Green Belt, Principle and Educational Need		
Impact on Playing Field Land	Yes	59-62
Design and Visual Amenity	Yes	63-78
Impact on Residential Amenity	Yes	79-107
Highways, Traffic and Access	Yes	108-133
Landscaping and Trees	Yes	134-151
Ecology and Biodiversity	Yes	152-166
Flood Risk and Drainage	Yes	167-182
Heritage	Yes	183-199
Waste Management Issues	Yes	200-206
Conclusions on Green Belt	Yes	207-212

Illustrative material

Site Plan

Plan 1 – Drawing No. PR-321-PEV-XX-XX-DR-A 00200 Rev G Proposed School Boundary Site Plan dated 28 May 2024.
Plan 2 – Drawing No. PR-321-PEV-XX-XX-DR-A 03000 Rev E Proposed External Elevations dated 28 May 2024.
Plan 3 – Drawing No. PR-321-PEV-XX-00-DR-L-01200 Rev P5 Landscape Works Plan Stage Three dated 21 November 2024.

Aerial Photographs

Aerial 1
Aerial 2

Background

Site Description

1. St John the Baptist School is located towards north-western Surrey, within the Green Belt on the edge of the urban Kingfield area of Woking. It is approximately 325 metres (**m**) north-east of the A247 between Woking and Send, and roughly 1.18 kilometres (**km**) south-east of Woking railway station on the South West Main Line railway, at its closest points.

2. The 6.3 hectare (**ha**) school site is surrounded by Public Footpath No. 55 to its north and east, beyond which is a large area of established dense woodland and the Hoe Stream; Coniston Road to the south-east, beyond which is Derrys Field Allotments and a large number of residential properties; Woking College, Cardinals Community Football Centre, and a further area of established, dense, woodland to the south, which is protected by a Tree Preservation Order (**TPO**); and Elmbridge Lane to the west, beyond which is a large number of residential properties.

3. All pedestrian and vehicular access to the school site is currently gained from Elmbridge Lane, although a gated access exists in the south-eastern corner of the school site from Coniston Road, with a tarmacked track leading roughly halfway along the southern boundary. It is understood that this access and track are not currently in use by the school, however a right of access does exist over it and the access road does currently facilitate vehicular and footpath access to the adjacent allotments.

4. The school site currently comprises the existing cluster of one- to three-storey school buildings and its adjacent vehicle parking and external hard play areas in the western half, and a large open field in the eastern half which is marked up for football and athletics uses. A majority of the school site, including the entirety of the application site, lies within Flood Zone 2, designated by the Environment Agency as having a medium probability of flooding. The western part of the site which contains most of the existing buildings is within Flood Zone 1 and the very north-eastern corner of the large open field is within Flood Zone 3. It is understood that the school site slopes upwards towards its southern end.

5. The entirety of the school site lies within the Metropolitan Green Belt, while the eastern two-thirds, which mostly comprises the large open field, is within the River Wey (plus tributaries) Biodiversity Opportunity Area. The Hoe Stream Site of Nature Conservation Interest (**SNCI**) encompasses the Hoe Stream itself, which runs between 40 to 80m to the north and north-east of the school site, with the White Rose Lane Local Nature Reserve (**LNR**) being located on its northern side.

6. The school does not lie within an Air Quality Management Area (**AQMA**), with the closest being along the section of Guildford Road, Woking between Constitution Hill and Ashdown Close, some 940m north-west at its closest point.

Planning History

7. It is understood that the main school buildings were originally constructed between 1961 and 1980 and consist of a curtain wall with blue infill panels at sill level and a feature white band of panelling. Planning permissions were granted by the CPA in November 2015 under ref: WO/2015/0945 and in April 2016 under ref: WO/2015/1431 for two-storey extensions to the existing sixth form block and adjacent humanities block respectively. The sports hall was completed in 2020 and the arts block was completed in 2022.

8. The school is a Roman Catholic mixed sex comprehensive Academy that currently caters for approximately 1,500 pupils aged 11 to 18 years old.

The Proposal

9. This application is submitted seeking planning permission for the erection and use of a new SEN building and associated parking area, with access from Coniston Road.

10. The application site covers an area of 0.47ha along the southern end of the wider school site, which currently comprises the tarmacked access road and part of the large open field used for outdoor recreation.

11. The application includes a new standalone, single-storey SEN building for 30 pupils, which would cover an area of 539 square metres adjacent to the existing arts block. The building would be timber clad with green/brown roof cladding and door surrounds, glazed aluminium windows and doors, and would include wall mounted lighting and roof mounted solar panels. External amenity spaces would be provided to the north, east and south of the building, with an aluminium privacy screen between the new building and the adjacent astroturf pitches at Woking College to the south.

12. This application also includes an associated parking area with 37 vehicle parking spaces and 10 bicycle parking spaces, with active and passive electric vehicle charging provision, a bin store, and floodlighting. Access would be gained from the existing, currently unused Coniston Road access, which would be for the sole use of the SEN building – the remainder of the school would continue to be accessed from Elmbridge Lane.

13. New tree and hedge planting would be undertaken, and both perimeter and internal fencing would be provided. This application does not include any works to the main school buildings.

Consultations and publicity

Woking Borough Council

14. Planning Control – No objection, subject to Conditions requiring the submission of details of the chosen units of air moving equipment, compressors, generators or plant and the submission of measures to acoustically insulate and ventilate the building for the containment of internally generated noise.

15. Environmental Health – No objection, subject to Conditions requiring the submission of a Dust Management Plan (**DMP**), detailing construction hours, and restricting the hours of use of the parking area.

Consultees (Statutory and Non-Statutory)

16. County air quality consultant – No objection.

17. County Arboriculturalist – No response received.

18. County Countryside Access Officer – No objection, subject to safe and unobstructed public access to the Public Footpath being provided at all times.

19. County Ecologist – No objection.

20. County Landscape Officer – No objection, subject to a Condition requiring the submission of a 30-year Landscape and Ecology Management Plan to secure the long-term maintenance and management of Biodiversity Net Gain.

21. County lighting consultant – No objection.

22. County noise consultant – No objection, subject to Conditions detailing construction hours and operational noise limits, and requiring the submission of a Construction Noise Management Plan (**CNMP**) and an Operational Noise Assessment.

23. Environment Agency – No comments to make.

24. Fairoaks Airport Safeguarding – No objection.

25. Lead Local Flood Authority – No objection.

26. Sport England – No objection.

27. Transport Development Planning – No objection, subject to Conditions.

28. UK Power Networks – No objection.

Parish/Town Council and Amenity Groups

29. None.

Summary of publicity undertaken and key issues raised by public

30. The application was publicised by the posting of two site notices and an advert was placed in the Woking News and Mail newspaper on 5 September 2024. A total of 44 owner/occupiers of neighbouring properties were directly notified by letter.

31. At the time of writing this report, thirty five letters of representation have been received by the CPA in relation to planning application ref: WO/PLAN/2024/0633, raising the following matters:

- Pleased to see SEN being taken seriously and improved. Desperate need for more SEN provision.
- Minimal impact on traffic, positives far outweigh the negatives. Low number of pupils and staff is minor compared to the amount of traffic that travels along Elmbridge Lane/Howards Rd/Sundridge Rd, which are similar residential roads.
- Currently many children have to travel long distances to access appropriate education, to the detriment of their wellbeing.
- Does not accord with the provisions of the development plan.
- Road layouts leading to Coniston Road are already busy with traffic and dangerous to all local road users now, without the extra traffic expected with parents using the proposed access road to drop-off and pick up their children from the new provision. Gloster Road gets so congested at school drop off and pick up times and usually takes around 20 minutes to get on to the main road; Rydens Way is very tight and has a number of turns with blind spots with only enough room for one car to pass at a time. How will this increased traffic be mitigated?
- The plans proposed access for large delivery vehicles, Coniston Road is below the width target outlined in policy for this type of access. Rydens Way is not suitable for buses, which further compounds the safety concerns. The impact of increased traffic on safety has not been adequately considered.
- Environmental impacts, being closely situated to the Hoe Stream, the Hoe Stream Site of Nature Conservation Interest, and the White Rose Lane Local Nature Reserve. Wildlife has already been impacted upon. Acceptance of the planning application as it stands would not be in line with Surrey CC [County Council] Environmental Policy. Development creates a barrier between the TPO woodland to the south and the White Rose Lane Nature Reserve to the north, breaking the link formed by the playing fields and fragmenting habitats by disrupting the passage of wildlife.
- The impact of biodiversity should be fully reviewed, including an identification of and assessment of the impact on any protected species.
- Query flood risk, as it is a flood area falling between the Hoe Stream and the Wey Navigation River. The more mature and semi-mature trees that are felled the greater the risk of flooding.
- The analysis of the floodplain does not appear consistent with recent examples of flooding in the nature reserve and should be challenged; the impact of the access road on drainage for properties and land to the south should be reviewed.
- Previous development has left a soil bund mounded around trees along eastern school boundary, which is already impacting their health.
- Parking and access to/from Derry's Field allotments will be adversely affected; turning is often very difficult. It is unclear if the correct pre-notification requirements and steps have been taken to acquire the length of the allotment access track and future adoption of the private road to public highway.
- The junction [of the car park and Coniston Road] does not provide suitable visibility along the remaining allotment access track and footpath 55, has poor visibility down Coniston Road, and removes 5-6 parking spaces for the allotment site which are regularly used. Further, the allotment access track width is not suitable for 2 way traffic.
- Adverse impacts from noise, heavy plant movements, and construction traffic movements will affect public confidence and safety.
- More traffic will increase noise having a negative effect on the local neighbourhood. The current level of tranquillity in the neighbourhood should be preserved.

- Heavy plant traffic during previous school development has left Coniston Road and the other access roads in a sad state of repair. The consequence of increased traffic also impacts on the quality of the road such as increase in pot holes/degradation of the road surface.
- Public footpath is well used, safety will be compromised by this development and access road. Its attraction as safe and enjoyable sustainable transport opportunity will be reduced.
- SJB [St John the Baptist School] already has an access that is sufficient, SJB has never had an entrance from Coniston Road, SEN building please go ahead but just use the entrance that already exists.
- The parking area associated with the new building is insufficient for the anticipated number of staff, visitors, and parents dropping off and picking up students. People will be encouraged to use Coniston Road as overflow parking and this is not acceptable – creates parking issues for people who live down these roads when we already have these issues on a daily basis; more vehicles dangerously parking along these roads will increase the risks to its users. In any case, parking availability is overstated and shown across established driveways.
- Parking/drop-off/pick-up at the new school via the Coniston Road access should have restrictions.
- There is concern that the proposed parking arrangements may not be suitable for buses or special transport vehicles often used for SEN students, causing additional traffic congestion.
- The increased traffic and speed of lorries and parents and staff will have a huge impact on the well being of residents.
- Access to the planned new building will not be used by SJB students – how will drop offs be managed/policed? How will the use of the parking and road be monitored going forward and how will this be communicated to our community?
- The site is also planning to be built on the Green Belt; how is this allowed?
- This area also suffers with light pollution and air quality already and this will have a big impact, especially the TPO protected woodland to the south. Particulate matter generated by demolition, earthworks and construction activities as well as exhaust emissions from HGVs and construction worker vehicles will be spread across the allotments by the prevailing winds contaminating crops, water tanks and reducing air quality.
- Post construction, the anticipated generation of extra vehicle movements plus engines idling will continue to have an impact on people tending to their allotments or using the footpaths as well as the residents of properties enroute. Proposed mitigation of spraying water to reduce dust levels could affect the water pressure available for both the allotments and surrounding residences at a critical point in the growing season.
- The current sewage infrastructure can't cope and there's risks of flooding. For the last 2 years we have had sewage tankers at the exact position of the proposed new access, they have at times stayed pumping night and day for several days.
- The woods and allotments are opposite the proposed access to SJB, vehicle access here will increase pollution within these areas.
- There has been insufficient consultation with the local community regarding this development.
- Alternative solutions have not been adequately explored/assessed. There are considerable opportunities elsewhere within the SJB site to provide the additional proposed floorspace and parking with a reduced impact; further as effectively proposed as a satellite site there must be significantly better served sites elsewhere within the NW quadrant.
- According to the SJB website, the school already provides SEN support for 275 students without requiring a separate building, car park and access.
- Data supplied in Need statement is contradictory – need for additional ASD-designated specialist units is higher in Runnymede and Surrey Heath than in Woking and proportion of Woking students having to travel for education is lower than in Surrey overall, so concentrating provision in Woking results in a higher quantity of ACI students being

disadvantaged by having to travel for education. Further, anticipated growth of Woking pupils requiring specialist school placement by 2028/29 is also lower.

- The educational need should be more strongly demonstrated for the specific use case proposed to support review against the detrimental impact of the development. Weak statement casts doubt on all 30 spaces being required.
- Concerned over there being alternate intentions behind the development beyond SEND usage as the site is regularly used for other purposes.
- How do we know going forward more buildings won't be added to the unit, and more parking?
- Impact of the design and visual amenity of the existing site and the surrounding area – loss of openness changing the character of the landscape and reducing its amenity value.
- Loss of playing field space – amount being sacrificed is disproportionate and extends the built form of the school into open areas of the site.
- Impact on residential amenity.
- Contamination of agricultural land.
- Does not deliver SCC's [Surrey County Council's] strategic priority for all children to attend a school local to them.
- There will be access between the main school and the new SEN unit via a pathway between the Multi Use Games Area and the Art Block – it is difficult to see how this is justified.
- The application does not consider the BOA [Biodiversity Opportunity Area].
- The location of the SEND unit is very close to the existing football pitch at Woking College with the noise a potential difficulty for noise sensitive students.
- The unit is segregated functionally from the main school, this is unaligned to SCC proposals on inclusivity by limiting visibility of SEND students and separating them from their peers. The proposed segregation reduces the benefit of a dedicated unit within a mainstream school.
- The bin store is in an area with poor access and close to residential properties.
- Split site access for emergency vehicles increases the risk of vehicles being sent to the wrong location in the event of an emergency.

Planning considerations

32. The guidance on the determination of planning applications contained in the Preamble/Agenda frontsheet is expressly incorporated into this report and must be read in conjunction with the following paragraphs.

33. In this case the statutory development plan for consideration of the application consists of the Woking Core Strategy 2012 (**WCS2012**) and the Woking Development Management Policies Development Plan Document 2016 (**WDM2016**), as well as the Surrey Waste Local Plan Part 1 – Policies and Part 2 – Sites, which together form the Surrey Waste Local Plan 2019 to 2033 (**SWLP**).

34. The WCS2012 sets out the overall approach and a clear vision to managing development and change in the borough of Woking up until 2027, and the means to achieve that. It responds to the key issues that residents, businesses and visitors have said they want to be addressed and sets out a robust defence for the protection of the physical and natural environment and the heritage assets of the borough.

35. The WDMP2016 contains detailed policies to help determine day-to-day planning applications and is designed to help achieve the comprehensive delivery of the WCS2012 in a sustainable and expeditious manner.

36. Further, Hoe Valley Neighbourhood Forum covers the areas of Kingfield, Old Woking and Westfield and is in the process of creating the Hoe Valley Neighbourhood Plan. It is

understood that this Plan is currently at the early stages of being drafted, with consultations being conducted and evidence being gathered, and Officers therefore do not consider it is sufficiently advanced for any weight to be attached to it for the purposes of determining this planning application.

37. In considering this application the acceptability of the proposed development will be assessed against relevant development plan policies and material considerations. In this case the main planning considerations are Green Belt, principle and educational need; impact on playing field land; design and visual amenity; impact on residential amenity; highways, traffic and access; landscaping and trees; ecology and biodiversity; flood risk and drainage; heritage; and waste management issues.

GREEN BELT, PRINCIPLE AND EDUCATIONAL NEED

Woking Core Strategy 2012
Policy CS6 – Green Belt
Policy CS16 – Infrastructure delivery

Woking Development Management Policies Development Plan Document 2016
Policy DM13 – Buildings in and adjacent to the Green Belt
Policy DM21 – Education facilities

Green Belt

38. National Planning Policy Framework December 2023 (**NPPF**) paragraph 142 states the great importance of Green Belts in preventing urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.

39. NPPF paragraph 143 states that Green Belt serves five purposes:

    a) To check the unrestricted sprawl of large built-up areas.
    b) To prevent neighbouring towns merging into one another.
    c) To assist in safeguarding the countryside from encroachment.
    d) To preserve the setting and special character of historic towns; and
    e) To assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

40. NPPF paragraph 152 states that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

41. NPPF paragraph 153 states that when considering any planning application, planning authorities should ensure that substantial weight is given to any harm to the Green Belt. *Very special circumstances* will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

42. NPPF paragraph 154 states that a planning authority should regard the construction of new buildings as inappropriate in the Green Belt. An exception to this is limited infilling or the partial or complete redevelopment of previously developed land (**PDL**), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt than the existing development.

43. Annex 2 of the NPPF defines PDL as land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure.

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Inappropriate Development

44. The application site is located in the Green Belt where there is a general presumption against inappropriate development.

45. The proposed development would not contribute to the unrestricted sprawl of a large built-up area, the merging of neighbouring towns, or encroachment into the countryside, and would not affect the setting and special character of a historic town.

46. However, the proposed development involves the construction of a new building, and the application site does not constitute PDL as it is not currently, and has not previously been, occupied by a permanent structure. The proposed development is therefore inappropriate, and the Applicant has recognised this.

47. Inappropriate development may only be permitted where very special circumstances are judged to clearly outweigh the harm caused by inappropriateness, and any other harm. Where there is harm to the Green Belt, the Applicant will need to demonstrate that *very special circumstances* exist in order to justify the grant of planning permission. *These very special circumstances* will need to outweigh the harm caused by virtue of the proposal's inappropriateness as well as any other harm which will be identified and discussed throughout the following report and summarised in the final section CONCLUSIONS ON GREEN BELT.

Educational Need

48. NPPF paragraph 99 states that it is important that a sufficient choice of school places is available to meet the needs of existing communities. Planning authorities should take a proactive, positive and collaborative approach to meeting this requirement, and to development that will widen choice in education. They should give great weight to the need to create, expand or alter schools through decisions on applications.

49. NPPF paragraphs 123 and 124 state that planning decisions should promote an effective use of land in meeting the need for other uses, while safeguarding and improving the environment and ensuring safe and healthy living conditions. Planning decisions should:

    a) Encourage multiple benefits from urban land, including through taking opportunities to achieve net environmental gains – such as developments that would enable new habitat creation.
    b) Recognise that some undeveloped land can perform many functions, such as for wildlife, recreation, flood risk mitigation, cooling/shading, carbon storage or food production; and
    d) Promote and support the development of under-utilised land and buildings.

50. NPPF paragraph 128 states that planning decisions should support development that makes efficient use of land, taking into account:

    a) The identified need for other forms of development, and the availability of land suitable for accommodating it.
    b) Local market conditions and viability.
    c) The availability and capacity of infrastructure and services – both existing and proposed – as well as their potential for further improvement and the scope to promote sustainable travel modes that limit future car use.
    d) The desirability of maintaining an area's prevailing character and setting, or of promoting regeneration and change; and
    e) The importance of securing well-designed and beautiful, attractive and healthy places.

51. Surrey County Council as the Education Authority has a legal duty to manage its state-maintained specialist education estate efficiently to avoid detriment to schools' educational offers, creating disadvantage to children and young people who have distinct types of additional needs and disabilities in different geographical areas, or the local authority's financial position.

52. The Applicant has submitted a detailed Education Justification Statement and Needs Analysis in support of this proposal which highlights issues that already exist for autistic pupils and pupils with communication and interaction needs resident in Woking who need a specialist school placement.

53. Surrey has seen significant growth in the number of autistic children and young people aged 4-19 years with additional needs and disabilities, with an identified long-term sufficiency gap in additional specialist school places for this cohort in Woking and north-west Surrey. This means that a high proportion of children with additional needs and disabilities who live in Woking and the surrounding areas currently have to travel long distances outside of the district and north-west quadrant of the county in order to attend specialist provision that can successfully meet their needs.

54. Further, forecasts of pupil numbers indicate that these issues will continue to apply for the near future and are likely to worsen unless action is taken, with demand increasing in the next five years and beyond. It is anticipated that by 2027/28, there will be around 247 additional pupils with these needs living in the north-west quadrant, of which around 94 will be resident in Woking.

55. The Applicant has stated that the proposed development would allow for the provision of education to 30 students aged 11-16 with special educational needs in a bespoke and suitable building, within the grounds of an existing school. This would provide residents within the local and surrounding area who have autistic children with closer access to high quality, specialist school provision which dramatically reduces school journey times.

56. In response to a consultation request, Woking Borough Council (**WBC**) raised no objection in relation to the principle of the proposed development.

57. Taking all of the above into account, Officers consider that the Applicant has demonstrated a clear need for the proposed SEN building to meet both the current and anticipated future needs of the local community and recognise that great weight should be placed on the need to expand existing schools.

58. Officers conclude that great weight can be given to the educational need for the proposed development, and this can be considered in the planning balance as part of the *very special circumstances* which need to exist and which override all and any harm to the Green Belt. The following sections of the report will discuss any other areas of harm, and the final section of the report sets out the conclusions of Officers in this regard.

IMPACT ON PLAYING FIELD LAND

Woking Core Strategy 2012

Policy CS17 – Open space, green infrastructure, sport and recreation

59. NPPF paragraph 103 states that existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements.

60. The proposed SEN building would be positioned on land which currently comprises part of the large open field used by the wider school for outdoor recreation. However, the Applicant has submitted drawings to demonstrate that this field could still be used as at present by moving existing pitch layouts slightly further northwards.

61. Sport England raise no objection to the proposal as the Applicant has satisfactorily demonstrated that it could be accommodated without compromising the ability of the fields to be used as at present.

62. Officers therefore conclude that the proposal is acceptable in this regard.

DESIGN AND VISUAL AMENITY

Woking Core Strategy 2012

Policy CS21 – Design

Policy CS22 – Sustainable construction

Policy CS24 – Woking's landscape and townscape

63. NPPF paragraph 135 states that planning decisions should ensure that developments:

a) Will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development.
b) Are visually attractive as a result of good architecture, layout and appropriate and effective landscaping.
c) Are sympathetic to local character and history, including the surrounding built environment and landscape setting, while not preventing or discouraging appropriate innovation or change.
d) Establish or maintain a strong sense of place, using the arrangement of spaces, building types and materials to create attractive, welcoming and distinctive places to work and visit.
e) Optimise the potential of the site to accommodate and sustain an appropriate amount and mix of development (including green and other public space) and support local facilities and transport networks; and
f) Create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users; and where crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion and resilience.

64. NPPF paragraph 139 states that development that is not well designed should be refused, especially where it fails to reflect local design policies and government guidance on design, taking into account any local design guidance and supplementary planning documents such as design guides and codes. Conversely, significant weight should be given to:

a) Development which reflects local design policies and government guidance on design, taking into account any local design guidance and supplementary planning documents such as design guides and codes; and/or
b) Outstanding or innovative designs which promote high levels of sustainability, or help raise the standard of design more generally in an area, so long as they fit in with the overall form and layout of their surroundings.

65. NPPF paragraph 162 states that in determining planning applications, planning authorities should expect new development to take account of landform, layout, building orientation, massing and landscaping to minimise energy consumption.

66. The proposed SEN building would measure approximately 27.32m by 20.972m, reaching a height of 3.685m to the roof level, and would accommodate three classrooms as well as

separate learning spaces, staff and amenity areas, and toilets, in accordance with Building Bulletin 104 requirements. It would also feature three circular skylights at its centre to allow abundant natural daylight into the interior, while the aforementioned roof mounted solar panels would generate over 110% of the energy use of the proposed building.

67. As previously stated, the proposed building would be timber clad, which would aid in visually merging it with the adjacent wooded context of protected trees and help soften its appearance.

68. The proposed building would be immediately surrounded on its northern, western and southern sides by private hard informal social spaces, while a semi-private hard informal space to the east would provide an external reception area for parents and visitors. All of these spaces would be partially covered with canopies, pergolas and other structures to provide shading for pupils.

69. The aforementioned bin store would measure 2.3m by 3m, reaching a height of less than 3m, would be timber clad with a dark grey bitumen roof, and would be positioned at the entrance to the proposed development from Coniston Road for ease of access. Cycle parking would comprise covered ‘Sheffield’ style stands, which would be positioned adjacent to the proposed SEN building entrance. The associated car park and pavements would be tarmacked.

70. Internal and perimeter fencing would comprise largely 1.5m, 2m and 3m high weld-mesh fencing, although there would be a small amount of 1.5m and 2m solid timber fencing in the immediate vicinity of the proposed SEN building to separate the eastern and southern private hard informal social spaces. Decorative aluminium panel fencing is also proposed along the southern boundary of the southern informal space to provide privacy from the adjacent football centre.

71. Further, the positioning of the proposed building adjacent to the aforementioned, recently completed, single-storey arts block, which measures some 4.7m in height, would mean it would be well-related to both its neighbouring development and the existing cluster of school buildings immediately beyond.

72. In response to a consultation request, WBC raised no objection in relation to the design of the proposed development or visual amenity.

Officer Assessment

73. Officers recognise that the proposed development would bring the built form associated with the wider school closer to the residential properties along Coniston Road, and that visual amenity impacts would arise from such positioning.

74. However, Officers also recognise that the proposed development would be situated within the existing school grounds, in close proximity to the existing cluster of school buildings, and that views of the building from the surrounding area would be limited by the established area of dense woodland to its south and south-east.

75. Further, Officers consider that the scale, heights, proportions and materials of the proposed development would be respectful and sympathetic to the character of the surrounding educational, residential and natural environments, while being appropriately designed for its intended purpose.

76. In any case, Officers recognise that these factors are dictated to a certain extent by both the constraints of the wider school site and educational requirements, and are important to the efficient functioning of the proposed development. Officers also recognise that the proposed

development would incorporate provision for the storage and collection of waste and for the generation of renewable energy.

77. Officers consider that Conditions should be applied to any permission granted to ensure complimentary materials would be used on the proposed SEN building and that the proposed solar panels are installed.

78. Subject to the application of these Conditions, Officers consider development plan policy requirements in relation to design and visual amenity are satisfied.

IMPACT ON RESIDENTIAL AMENITY

Woking Development Management Policies Development Plan Document 2016

Policy DM5 – Environmental pollution

Policy DM6 – Air and water quality

Policy DM7 – Noise and light pollution

Policy DM21 – Education facilities

79. NPPF paragraph 180 states that planning decisions should contribute to and enhance the natural and local environment by preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution or land instability. Development should, wherever possible, help to improve local environmental conditions such as air quality, taking into account relevant information.

80. NPPF paragraph 191 states that planning decisions should ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development. In doing so they should:

    a) Mitigate and reduce to a minimum potential adverse impacts resulting from noise from new development – and avoid noise giving rise to significant adverse impacts on health and the quality of life; and
    c) Limit the impact of light pollution from artificial light on local amenity and nature conservation.

81. NPPF paragraph 193 states that planning decisions should ensure that new development can be integrated effectively with existing businesses and community facilities. Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development in its vicinity, the Applicant should be required to provide suitable mitigation before the development has been completed.

82. NPPF paragraph 194 states that the focus of planning decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.

Overlooking/loss of outlook

83. The proposed new building will not have any impact on existing residential dwellings as it is sited some distance away.

Air Quality and Dust

84. Paragraphs 005, 006, 007 and 008 of the Planning Practice Guidance (**PPG**) titled Air quality respectively state the relevance of air quality to a planning decision, considerations in determining planning applications, the contents of proportionate air quality assessments, and proportionate mitigation options.

85. The Applicant has recognised air quality impacts would arise from the construction phase of the proposed development, including potential increases in concentrations of NO_2, PM_{10} and $PM_{2.5}$, and has therefore undertaken an air quality assessment in this regard.

86. This assessment begins by identifying the existing air quality conditions in the vicinity of the application site and the construction activities likely to generate dust and particulate matter, including the removal of the old concrete access road, earthworks, construction of the proposed SEN building, HGV trackout, and exhaust emissions from construction vehicles and plant.

87. The assessment continues that emissions from these activities are likely to be small and would present low risk to human health through good practice and mitigation such as implementing a DMP and wheel cleaning regime, erecting screens/barriers around dust emitting activities, using a dust sweeper on local roads, daily on- and off-site inspections, and a complaints log.

88. In response to a consultation request, WBC Environmental Health raised no objection, recommending a Condition requiring the submission of the above-mentioned DMP.

89. The County air quality and dust consultant similarly raised no objection.

Noise and disturbance

90. Paragraphs 003, 004 and 006 of the PPG titled Noise respectively state the importance of considering the acoustic environment, detail the observed noise effect levels, and detail factors to consider when assessing noise impacts.

91. With regards to operational noise, the Applicant has recognised that the proposed development would result in noise emissions from plant, including from a proposed mechanical ventilation system, and has therefore undertaken a noise assessment.

92. This assessment includes a baseline survey to measure typical day- and night-time background noise levels in the vicinity of the proposed SEN building and identifies the need to implement mitigation as part of the proposed development, including controlling noise emissions from the aforementioned ventilation plant and using internal fittings and materials with a high level of acoustic absorption.

93. In response to a consultation request, the County noise consultant (**CNC**) recognised that measured noise levels are low and any adverse effects could be avoided through typical mitigation measures, therefore stating that they have no major concerns in terms of noise.

94. However, the CNC thereafter recommended Conditions be applied to any permission granted, including restrictions on construction hours and operational noise, and requiring the submission of a CNMP and an operational noise assessment.

95. WBC raised no objection but recommended Conditions requiring the submission of details of fixed plant and equipment associated with air movement, such as compressors, generators and other similar plant and equipment, prior to their installation; and the submission of

measures to acoustically insulate and ventilate the proposed SEN building for the containment of internally generated noise.

96. The WBC Environmental Health team recommended Conditions restricting construction hours and the hours of use of the parking area.

97. The introduction of vehicle movements on this part of the school site will have implications in respect of noise disturbance to dwellings in Coniston Road and particularly No 47 which has a side boundary adjacent to the proposed internal access and parking area. However, any disturbance which does occur will be confined to very short periods during the morning and the afternoon and would be similar to many existing locations adjacent to traffic generating uses. Conditions relating to the hours of use of the parking as suggested by the WBC Environmental Health team above are considered to be reasonable and necessary to control this harm to an acceptable level. A further Condition requested by the County Highway Authority will restrict the use of the car park to the SEN unit only.

Lighting

98. Paragraphs 001, 003, 004, 005 and 006 of the PPG titled Light pollution respectively state the importance of considering artificial lighting, how to avoid light spill, how to minimise light pollution, how to assess lighting needs and reduce glare, and how to reduce lighting impacts on wildlife.

99. Lighting incorporated within the proposed development would include nine luminaires attached to 6m-high columns within the vehicle parking area and one attached to a 4m-high column adjacent to the bin store.

100. These luminaires would be controlled by photo electric sensors and an override clock to ensure illumination is used only when required. They would be angled down, and the Applicant has stated they would also consider the use of shields, baffles and louvres to further reduce obtrusive light and glare emissions to surrounding areas.

101. Other proposed lighting includes wall mounted lighting around the SEN building to provide general access and emergency lighting requirements, and low-level uplighters at the parking area entrance to illuminate signage.

102. In response to a consultation request, the County lighting consultant raised no objection.

Officer Assessment

103. With regards to air quality and dust, Officers recognise that the application site is not within an AQMA and note the proposed mitigation measures. Officers consider a Condition should be applied to any permission granted to ensure these measures are implemented as appropriate, including the submission of the proposed DMP.

104. With regards to noise, Officers recognise that construction-related emissions would be temporary and short-lived but consider there is still a need to ensure no significantly adverse impacts on residential amenity would arise during this time. Therefore, Officers agree with the CNC and WBC Environmental Health team that Conditions should be applied to any permission granted to restrict construction hours and require the submission of a CNMP.

105. Similarly, there is a need to ensure no significantly adverse impacts once the proposed SEN building is operational, and Officers therefore agree that the other CNC recommended Conditions, as well as the Conditions recommended by WBC and the WBC Environmental Health team, should be applied.

106. With regards to lighting, Officers note the proposed mitigation measures and consider that a Condition should be applied to any permission granted to ensure these measures are implemented as appropriate.

107. Therefore, subject to the application of the above-mentioned Conditions, Officers consider development plan policy requirements in relation to impact on residential amenity are fulfilled and the proposal will not give rise to harm to residential amenity subject to planning conditions.

HIGHWAYS, TRAFFIC AND ACCESS

Woking Core Strategy 2012
Policy CS18 – Transport and accessibility

Woking Development Management Policies Development Plan Document 2016
Policy DM21 – Education facilities

108. NPPF paragraph 108 states that transport issues should be considered from the earliest stages of development proposals, so that:

a) The potential impacts of development on transport networks can be addressed.
b) Opportunities from existing transport infrastructure, and changing transport technology and usage, are realised – for example, in relation to the scale, location or density of development that can be accommodated.
c) Opportunities to promote walking, cycling and public transport use are identified and pursued.
d) The environmental impacts of traffic and transport infrastructure can be identified, assessed and taken into account – including appropriate opportunities for avoiding and mitigating any adverse effects, and for net environmental gains; and
e) Patterns of movement, streets, parking and other transport considerations are integral to the design of schemes, and contribute to making high quality places.

109. NPPF paragraph 114 states that in assessing specific applications for development, it should be ensured that:

a) Appropriate opportunities to promote sustainable transport modes can be – or have been – taken up, given the type of development and its location.
b) Safe and suitable access to the site can be achieved for all users.
c) The design of streets, parking areas, and other transport elements reflects current national guidance, including the National Design Guide and the National Model Design Code; and
d) Any significant impacts from the development on the transport network (in terms of capacity and congestion), or on highway safety, can be cost effectively mitigated to an acceptable degree.

110. NPPF paragraphs 115 and 116 state that development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe. Within this context, applications for development should:

a) Give priority first to pedestrian and cycle movements, both within the scheme and with neighbouring areas; and second – so far as possible – to facilitating access to high quality public transport, with layouts that maximise the catchment area for bus or other public transport services, and appropriate facilities that encourage public transport use.
b) Address the needs of people with disabilities and reduced mobility in relation to all modes of transport.

c) Create places that are safe, secure and attractive – which minimise the scope for conflicts between pedestrians, cyclists and vehicles, avoid unnecessary street clutter, and respond to local character and design standards.
d) Allow for the efficient delivery of goods, and access by service and emergency vehicles; and
e) Be designed to enable charging of plug-in and other ultra-low emission vehicles in safe, accessible and convenient locations.

111. NPPF paragraph 117 states that all developments that will generate significant amounts of movement should be required to provide a travel plan, and the application should be supported by a transport statement or transport assessment so that the likely impacts of the proposal can be assessed.

Construction

112. The Applicant has submitted a draft Construction Traffic Management Plan (**CTMP**) as part of this application, which details that construction of the proposed development is anticipated to take around 31 weeks in total.

113. Construction vehicles would approach from and leave towards the south, using the A247, Gloster Road, Rydens Way and Coniston Road, entering the application site via the existing south-eastern gates. All vehicles would enter and leave in forward gear and parking on the public highway would not be permitted.

114. Construction would take place between 8am and 6pm Mondays to Fridays and 8am and 1pm on Saturdays, with no construction taking place on Sundays. No construction vehicle movements would be permitted during the morning and afternoon peaks.

115. Average daily construction movements would total 1-2 and would operate in accordance with a delivery schedule and traffic marshall. Parking for construction staff vehicles would be provided on-site, with no parking allowed on the public highway. A wheel wash would also be provided and lorries removing materials from the application site would be fully sheeted.

116. The Applicant has carried out a pre-development highway condition survey along the proposed construction vehicle route as part of the submitted CTMP and has committed to also undertaking a post-construction survey.

Operation

117. The proposed development includes formalising the currently unused access in the south-eastern corner of the school site from Coniston Road, by creating a new bellmouth across the existing pavement. This new access would provide both a vehicular roadway and pedestrian footpath, linking the proposed development to both Coniston Road and Public Footpath No. 55.

118. The access would be exclusively for the proposed SEN building, with all other school-related traffic continuing to use the Elmbridge Lane entrance as at present. This arrangement would be controlled via secure gates linked to the SEN building's reception.

119. On-site parking would include 20 staff spaces, 14 pupil drop-off bays, and 3 disabled spaces, with 50% of the staff spaces being provided with active electric charging provision and the remaining 50% being provided with passive facilities. Provision is deemed sufficient for the average number of staff expected to be present at any time, and the Applicant has stated there is adequate capacity for parking on surrounding roads should the need arise, with no restrictions being in place on Coniston Road.

120. The parking area would also include a mini-bus pick-up and drop-off area and would have sufficient space for delivery and service vehicles. It would not be used to accommodate any community or other use outside of school operational hours, and the Applicant has stated they would accept a Condition limiting the hours of use in order to enforce this.

121. At full occupation, it is anticipated that there would be a maximum of 130 one-way vehicle movements in an average day, comprising 38 staff and 92 pupil trips. Pupil movements would be evenly split between the morning and afternoon peaks, with staff movements being staggered respectively before and after these peaks.

122. The Applicant has provided survey data to demonstrate that the application site has good accessibility for walking, cycling and public transport, and that local roads from which the proposed development would be accessed have capacity for the associated additional traffic.

123. Due to the nature of the proposal, it has been assumed that all pupils would arrive by private transport. However, 10 covered cycles spaces would be provided adjacent to the entrance to the proposed SEN building, including 2 spaces for adapted cycles.

124. In response to a consultation request, the County Transport Development Planning (**TDP**) team raised no objection, subject to several Conditions relating to the creation of an appropriate access with sightlines, vehicle and bicycle parking including EV charging, restriction on use of car park for the SEN unit only, CTMP, parking management plan and travel plan.

125. The County Countryside Access Officers also raised no objection, reminding the Applicant that safe and unobstructed public access to Public Footpath No. 55 is to be maintained at all times.

Officer Assessment

126. The Applicant has assessed the impact of the proposed development on the highway network during both the construction and operation phases.

127. However, the submitted CTMP is draft and an updated document will be required to finalise some of the arrangements indicated within it. Officers therefore agree with the recommendation of the TDP team that a Condition should be applied to any permission granted requiring the submission of a finalised CTMP, to ensure the impact of construction is fully assessed and to sufficiently demonstrate that safe and suitable access would be possible during this phase.

128. The Applicant has also proposed measures to mitigate significant impacts on the public highway, including the use of a wheel wash, traffic marshall, and delivery schedule during construction.

129. Officers consider the aforementioned Condition controlling the hours of construction would further aid in mitigating significant impacts, although it should include the aforementioned restriction on movements during peak times. The aforementioned Condition controlling the hours of use of the vehicle parking area once operational would also aid in this respect, as would a Condition requiring a post-condition highway survey.

130. Conditions recommended by the TDP team requiring that construction of the new access and the laying out of parking, drop-off and turning space are completed prior to the first occupation of the SEN building, and limiting the use of the vehicle parking area only to users of the building once it is operational, should also be applied.

131. While details of on-site vehicle parking with provision for disabled users and service, emergency and electric vehicles have been submitted, Officers agree that the Conditions recommended by the TDP team requiring an updated CPMP and the submission and implementation of a scheme to provide electric vehicle charging infrastructure should be applied to any permission granted to ensure that finalised parking management details are provided and to ensure the delivery of charging infrastructure.

132. Finally, taking the nature of the proposal into account, Officers consider the Applicant has proposed an appropriate amount of cycle parking for the proposed development. The Condition recommended by the TDP team requiring the submission and implementation of a scheme to provide such parking prior to the first occupation of the development should be applied to any permission granted.

133. Taking all of the above into account, Officers consider that subject to the application of all of these Conditions, development plan policy requirements in relation to highways, traffic and access are fulfilled.

LANDSCAPING AND TREES

Woking Core Strategy 2012

Policy CS24 – Woking's landscape and townscape

Woking Development Management Policies Development Plan Document 2016

Policy DM1 – Green Infrastructure Opportunities

Policy DM2 – Trees and landscaping

134. NPPF paragraph 136 states that trees make an important contribution to the character and quality of urban environments, and can also help mitigate and adapt to climate change. Planning decisions should ensure that new streets are tree-lined, that opportunities are taken to incorporate trees elsewhere in developments, that appropriate measures are in place to secure the long-term maintenance of newly-planted trees, and that existing trees are retained wherever possible.

135. NPPF paragraph 180 states that planning decisions should contribute to and enhance the natural and local environment by recognising the wider benefits from natural capital and ecosystems services – including the economic and other benefits of trees and woodland.

136. Paragraphs 001 and 137 of the PPG titled Tree Preservation Orders and trees in conservation areas respectively state the prohibitions of and offences in relation to trees covered by a TPO.

137. Surrey Landscape Character Assessment: Woking Borough dated April 2015 identifies the application site as lying within Landscape Character Area (**LCA**) RF7 Lower Wey River Floodplain, which is defined as encompassing flat, low lying, largely pastoral floodplain land, which is dominated by the River Wey with very sparse settlement and little road access overall. LCA RF7 covers a large area stretching on either side of the River Wey from north Guildford to north-west Weybridge via the urban areas of Old Woking, Pyrford, Wisley, Byfleet, the Brooklands industrial estate and Addlestone. As well as the application site, the LCA covers the entirety of the St John the Baptist School playing fields, the Cardinals Community Football Centre to the south, and Derrys Field Allotments to the east, and is surrounded by urban residential, educational and community development at this point.

138. Officers consider that given the proposed development is within an existing school site and is for the same use, it does not contradict the strategy of this designation which is to conserve the rural, secluded areas of landscape with its river channels, pastures, wetlands and woodland, along with historic infrastructure and buildings associated with the Wey

Navigation and the Wey and Arun Canal, and resist further development within the Thames and Blackwater floodplains.

139. The dense wooded area to the south of the application site comprises mostly category A trees, although there is one category B tree in the far south-eastern corner closest to the existing access point. This area provides a barrier to Cardinals Community Football Centre to the south and the residential properties to the south-east. There is a further category A tree immediately to the north of the existing access point.

140. The Applicant has stated that some work to facilitate the new access and parking area would be required within the root protection area (**RPA**) of these trees, but that these RPAs are already covered with hardstanding and in any case the work could be completed without causing significant impact through the adoption of appropriate working practices. Access facilitation pruning of the canopies of the trees to the south which overhang the application site would also be required.

141. Details of these working practices have been submitted by the Applicant within an Arboricultural Method Statement (**AMS**), which include a commitment to site meetings prior to each phase of the proposed development, installation of protective barriers around retained trees and their roots, use of temporary ground protection measures during construction, and compliance with British Standard recommendations.

142. Extensive new planting has been included within the proposed development to provide screening from the playing fields and soften the visual impact of vehicle parking. This includes shrub and herbaceous planting, mixed native buffer planting, and trees to the north and east of the proposed SEN building, as well as 1.5m and 2m high evergreen hedges to its east between the building and vehicle parking area.

143. There would be several trees and mixed native buffer planting along the northern length of the vehicle parking area, including around the proposed bin store, with an area of wildflower/grass meadow grass alongside a majority of this length. There would also be mixed native buffer planting along the entire southern length of the vehicle parking area, with two trees and a small amount of shrub and herbaceous planting adjacent to the entrance to the facility from Coniston Road.

144. The Applicant has stated that all planting and hedgerows have been designed to fully integrate the proposed SEN building and associated parking area into the landscape and neighbouring cluster of TPO trees that feature to the south.

145. Details for the implementation and general maintenance of the proposed new planting has also been submitted by the Applicant, with a proposed maintenance period of 20 years.

146. In response to a consultation request, the County Landscape Officer (**CLO**) raised no objection, recommending that a Condition should be applied to any permission granted requiring adherence to the submitted AMS and that the planting maintenance period should be extended to 30 years.

147. The County Arboriculturalist was also consulted, but no response was received.

Officer Assessment

148. Officers recognise that all existing trees and landscape features would be retained as part of the proposed development and that subject to the application of a Condition requiring adherence to the submitted AMS, appropriate measures would be put in place to ensure their protection during construction.

149. Further, Officers recognise that new tree, hedgerow and native planting would be incorporated as part of the proposed development, with an appropriate maintenance schedule presented by the Applicant. Officers consider that a Condition should be applied to any permission granted to ensure the implementation of this schedule.

150. Although no consultation response was received from the County Arboriculturalist, the CLO is satisfied with the information submitted.

151. Taking all of the above into account and subject to the application of the above-mentioned Conditions, Officers consider development plan policy requirements in relation to landscaping and trees are fulfilled.

ECOLOGY AND BIODIVERSITY

Woking Core Strategy 2012

Policy CS7 – Biodiversity and nature conservation

Policy CS22 – Sustainable construction

152. NPPF paragraph 180 states that planning decisions should contribute to and enhance the natural and local environment by:

a) Protecting and enhancing sites of biodiversity (in a manner commensurate with their statutory status or identified quality in the development plan).
d) Minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures.

153. NPPF paragraph 186 states that when determining planning applications, planning authorities should apply the following principles:

a) If significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.
d) Opportunities to improve biodiversity in and around developments should be integrated as part of their design, especially where this can secure measurable net gains for biodiversity.

154. Paragraph 001 of the PPG titled Biodiversity Net Gain states that Biodiversity Net Gain (**BNG**) is a way of creating and improving biodiversity by requiring development to have a positioned impact on biodiversity. In England, BNG is required under a statutory framework introduced by Schedule 7A of the Town and Country Planning Act 1990 (inserted by the Environment Act 2021 and amended by the Levelling Up and Regeneration Act 2023) under which, subject to some exceptions, every grant of planning permission is deemed to have been granted subject to the Condition that the biodiversity gain objective is met. This objective is for development to deliver at least a 10% increase in biodiversity value relative to the pre-development value of the on-site habitat. This increase can be achieved through on-site gains, registered off-site gains or statutory biodiversity credits.

The biodiversity gain Condition is a pre-commencement Condition: once planning permission has been granted, a Biodiversity Gain Plan must be submitted and approved by the planning authority before commencement of the development.

Ecology

155. The Applicant has stated that the application site and wider school grounds comprise predominantly buildings, hardstanding, amenity grassland, and poor semi-improved grassland, and therefore hold little ecological value.

156. However, the application site and wider school grounds also comprise areas of dense scrub, tall ruderal, trees, hedgerows and broadleaved woodland, with large areas of dense woodland being located beyond the school site to the north, north-east and south. There is also the nearby Hoe Steam SNCI and White Rose Lane LNR.

157. The Applicant has therefore submitted a Preliminary Ecological Appraisal, detailing a walkover survey in which searches of the wider school site were made for uncommon, rare and statutorily protected plant species; species which are indicators of important or uncommon plant communities; invasive species; and signs of badgers, and the suitability of the site to support amphibians, reptiles, water vole and otter, bats, bird species and invertebrates was assessed.

158. On-site buildings were found to have potential for the roosting of bats and for hosting common and notable bird species, while amenity grassland, tall ruderal, poor semi-improved grassland, dense scrub, broadleaved woodland, trees, hedgerow, and introduced shrub were found to provide some value for foraging and commuting bats, foraging badgers, foraging and hibernating hedgehogs, reptiles and invertebrates.

159. No further bat surveys were recommended as the proposed development does not involve the buildings where bat roosting potential was identified. However, an updated site walkover was recommended prior to the commencement of development to identify any new badger setts.

160. Other mitigation proposed during construction includes turning off plant when not in use, no lighting to face the designated sites, any amphibians encountered to be moved by hand, and careful vegetation clearance. Post-construction, the installation of bird and bat boxes and bug hotels is recommended.

161. In response to a consultation request, the County Ecologist is satisfied with the Applicant's assessment of on-site species and conclusion that no further surveys would be required, and recommended a Condition be applied to any permission granted to secure the proposed mitigation measures in the form of a Construction Environmental Management Plan (**CEMP**).

Biodiversity

162. The Applicant has stated that subject to the full implementation of the previously mentioned landscaping, the proposed development would result in a gain of more than 10% thereby meeting the statutory requirement.

163. In response, the County Ecologist is satisfied that the required BNG is achievable, though noted that the classification of the site within the BNG Metric is inaccurate albeit this does not have an impact on the overall gain achieved.

Officer Assessment

164. Officers agree that the Condition for a CEMP should be applied to any permission granted in order to secure precautionary measures in respect of protected and other species.

165. While every grant of planning permission is deemed to have been granted subject to the Statutory Condition that the biodiversity gain objective is met, officers recommend that other Conditions are attached to ensure that the applicant meets all the requirements of BNG. These conditions relate to providing a Habitats Maintenance and Management Plan (**HMMP**), confirmation of HMMP implementation, HMMP monitoring reports, and a Biodiversity Gain Plan.

166. Subject to the application of the above-mentioned Conditions, Officers consider that the proposal meets development plan policy and statutory requirements in this regard.

FLOOD RISK AND DRAINAGE

Woking Core Strategy 2012
Policy CS9 – Flooding and water management

167. NPPF paragraph 165 states that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere.

168. NPPF paragraph 173 states that when determining any planning applications, planning authorities should ensure that flood risk is not increased elsewhere. Where appropriate, applications should be supported by a site-specific flood-risk assessment. Development should only be allowed in areas at risk of flooding where, in the light of this assessment (and the sequential and exception tests, as applicable) it can be demonstrated that:

a) Within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location.
b) The development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment.
c) It incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate.
d) Any residual risk can be safely managed; and
e) Safe access and escape routes are included where appropriate, as part of an agreed emergency plan.

169. NPPF paragraph 174 states that applications for some minor development should not be subject to the sequential or exception tests but should still meet the requirements for site-specific flood risk assessments.

A site-specific flood risk assessment should be provided for all development in Flood Zones 2 and 3.

170. Annex 3 of the NPPF details flood risk vulnerability classifications, with non-residential uses for educational establishments being “more vulnerable”.

171. Paragraphs 004, 005, 020, 021, 023, 027, 031, 035, 037, 041, 042, 056 and 059 of the PPG titled Flood risk and coastal change respectively state the process used in decision-making where flood risk is a consideration, how to determine whether a proposed development will be safe for its lifetime, what a site-specific flood risk assessment is and the level of detail required, what the Sequential and Exceptions Tests are and how to apply them, how to demonstrate a development would reduce flood risk, what residual risk is and how to address it, and what information to consider and submit regarding sustainable drainage systems.

172. Due to the location of the application site within Flood Zone 2, the Applicant has carried out a Flood Risk Assessment, which indicates there would be a low risk to the proposed development from surface water and pluvial flooding and a low to moderate risk from groundwater and fluvial flooding.

173. In order to attenuate such risk, the Applicant has presented a Drainage Strategy which includes the use of channel drains, yard and road gullies, porous pavement within the

vehicle parking area, and a geocellular attenuation tank beneath the vehicle parking area to capture surface water runoff and storm water, which would then be discharged into the existing Thames Water network. The porous pavement within the vehicle parking area would also feature a separator to trap oils and other pollutants.

174. The proposed development would also connect to the schools' existing wastewater drainage infrastructure to dispose of foul water, with the Applicant receiving confirmation from Thames Water that there is sufficient sewerage capacity.

175. During construction, runoff control measures should be implemented, and gullies and piped systems should be capped to prevent contamination. Maintenance measures for the operational system are also presented, including regular litter and debris removal.

176. In response to a consultation request, the Lead Local Flood Authority (**LLFA**) stated they were satisfied that the sequential test had been followed and that the proposed drainage scheme was well-considered and designed.

177. The Environment Agency were also consulted but had no comments to make.

Officer Assessment

178. Alongside the application site, the entirety of the school playing fields and some of the existing school buildings, including the sports hall, part of the performing arts and drama wing, and the recently constructed arts block, are all within Flood Zone 2.

179. There is therefore no opportunity for the proposed development to be situated in a location with lower flood risk within the wider school site, and as the proposed development is classified as "more vulnerable", the Exception Test does not need to be applied.

180. However, a site-specific flood and surface water risk assessment is still required. Officers consider the Applicant has carried out an appropriate and proportionate assessment and are satisfied that through the incorporation of the proposed sustainable drainage system, the proposed development would not increase flood or surface water risk either within the school site or the surrounding areas.

181. Although no Conditions were proposed by the LLFA, Officers consider that a Condition should be applied to any permission granted to ensure the proposed drainage system is implemented as proposed and that mitigation measures are put in place.

182. Subject to the application of such Conditions, Officers consider that development plan policies in relation to flood risk and drainage would be fulfilled.

HERITAGE

Woking Core Strategy 2012

Policy CS20 – Heritage and conservation

183. NPPF paragraph 200 states that in determining applications, planning authorities should require an Applicant to describe the significance of any heritage assets affected, including any contribution made by their setting. The level of detail should be proportionate to the assets' importance and no more than is sufficient to understand the potential impact of the proposal on their significance. As a minimum the relevant historic environment record should have been consulted and the assets assessed using appropriate expertise where necessary.

184. NPPF paragraph 201 states that planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by

development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this into account when considering the impact of a proposal on a heritage asset, to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal.

185. NPPF paragraph 203 states that in determining applications, planning authorities should take account of:

a) The desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation.
b) The positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
c) The desirability of new development making a positive contribution to local character and distinctiveness.

186. NPPF paragraph 205 states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.

187. NPPF paragraph 206 states that any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of grade II listed buildings should be exceptional.

188. NPPF paragraph 207 states that where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

a) The nature of the heritage asset prevents all reasonable uses of the site; and
b) No viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
c) Conservation by grant-funding or some form of not for profit, charitable or public ownership is demonstrably not possible; and
d) The harm or loss is outweighed by the benefit of bringing the site back into use.

189. NPPF paragraph 208 states that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.

190. NPPF paragraph 209 states that the effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset.

191. Paragraphs 009, 013 and 018 of the PPG titled Historic environment respectively state how to assess the significance of heritage assets, how settings should be taken into account, and how to assess harm to heritage assets

192. As the application site is over 0.4ha, an archaeological assessment and investigation may be required.

193. Surrey Historic Environment Record (**HER**) has confirmed there are no known heritage assets within 100m of the boundary of the site, but stated the site has moderate archaeological potential due to a number of archaeological discoveries within 1km and should be subject to a trial trench evaluation.

194. The Applicant therefore undertook an Archaeological Assessment, which details that evidence of Mesolithic to Neolithic struck flint; worked and burnt flint of probable Neolithic date, located close to three postholes containing wooden posts; a Late Bronze Age urn; an Iron Age and Romano-British occupation site, including pottery, loom weights, pot boilers and a glass bead; Early Iron Age pottery; fragments of a large 1st Century Romano-British urn and another small vessel, alongside small sherds of pottery; an abraded sherd of Romano-British pottery, alongside a narrow gully and small pit; 12th Century pottery; a small quantity of Early Medieval pottery sherds; and a large assemblage of Post-Medieval pottery and ceramic building material ranging in date from the 15th to 19th Centuries, has been found nearby.

195. As the proposed development would involve groundworks that may impact any potential archaeological deposits, the Assessment concludes in agreement with Surrey HER that archaeological trial trench evaluation should be undertaken, with the form and character of this work being defined within a Written Scheme of Investigation.

196. The Applicant therefore prepared a Written Scheme of Investigation and undertook an archaeological trial trench excavation within the application site in line with this scheme. It is understood that a total of 71 archaeological features of probable post-medieval date were revealed within two of the five trenches, including fragments of peg tiles, roof tiles, brick, stoneware, pottery, glassware and heavily corroded iron. No archaeological features were identified at the western end of the site where the new SEN building would be sited, and no further work was therefore recommended.

Officers Assessment

197. Officers recognise that there are no heritage assets within the vicinity of the application site, with the closest being the Grade II listed farmhouse, barn and granary at White Rose Farm, some 360m to the north at their closest points. These are beyond the remainder of the school playing fields, the large area of established dense woodland on either side of the Hoe Stream, and the Hoe Stream itself, so the proposed development is not considered to affect their character.

198. Officers are satisfied that the Applicant has undertaken an appropriate evaluation of archaeological features within the application site and are satisfied with the conclusion that no further work is required.

199. Therefore, Officers consider that development plan policies in relation to heritage are satisfied.

WASTE MANAGEMENT ISSUES

Surrey Waste Local Plan 2019-2033

Policy 4 – Sustainable Construction and Waste Management in New Development

200. The Applicant has recognised the potential for the proposed development to aid in reducing the impact of waste generated and the associated carbon for transport of materials and waste to and from the application site, stating that construction waste would be minimised through use of pre-fabricated off-site components, modern methods of construction, use of cement replacements, material specifications with high recycled content,

use of renewable and bio-based materials, evaluation of products with environmental products declarations, consideration of life cycle impacts, and prioritising locally sources materials where possible.

201. During the operational phase, refuse storage would be provided with clear signage to encourage separation of solid waste for recycling and residual waste. Waste would be segregated at source into multiple streams and would be collected in colour coded bags to reduce contamination risk.

202. There would also be targets for construction waste in line with best practice and requirements to minimise waste and provide adequate storage for waste and recycling during operation.

203. The Applicant has stated that a Resource Management Plan (**RMP**) should be developed, to outline key objectives to achieve efficient use of material resources and set out strategies to reuse, recycle or recover at least 90% of construction and demolition waste produced on site.

Officer Assessment

204. Taking the nature of the existing application site and proposed development into account, Officers recognise that there would be limited opportunities to re-use and recycling of construction and demolition residues.

205. However, Officers also recognise that waste generated during both the construction and operational phases would be limited through a variety of measures, and consider that such should be incorporated into an RMP which should be required by Condition on any permission granted.

206. Subject to the application of such a Condition, Officers consider that development plan policies in relation to waste management issues would be fulfilled.

CONCLUSIONS ON GREEN BELT

Harm

207. The proposed development is inappropriate and therefore harm would be caused to the Green Belt by reason of such inappropriateness. Further, harm to the openness of the Green Belt would result. In the preceding sections of the report, other harm has been identified and assessed, comprising visual, air quality, noise and lighting impacts and additional vehicular movements along Coniston Road, but these would be mitigated by appropriate planning Conditions.

208. The Applicant recognises that harm to openness would result. However, they have stated that the application site already comprises extensive hardstanding and is subject to an urban influence due to the surrounding educational, residential and community uses. Further, the proposed SEN building would fulfil a clear educational need and would be located adjacent to the existing cluster of school buildings, with the wooded area to the south providing visual screening.

209. The Applicant has therefore concluded that the visual and spatial harm to openness caused by the proposed development would not be significant. Officers agree with this assessment.

Very Special Circumstances

210. Officers recognise that the entirety of the existing school grounds, including all existing buildings, as well as the adjacent Woking College and Cardinals Community Football Centre, are all within the Green Belt, and that there is therefore no alternative to positioning the proposed development within this designation.

211. Alongside its location within the existing school grounds, in close proximity to the existing school buildings, and within the wider urban area, Officers have already concluded that the complimentary materials to be used for the proposed development, the screening provided by existing surrounding woodland, and the application of the aforementioned proposed Conditions would reduce harm to a minimum. Against this is the clear educational need for the development which can be given great weight in the planning balance. Officers conclude that the need for this facility outweighs the harm caused to the Green Belt, including the harm to openness and the other harm identified in the previous sections of the report which would be minimised and controlled by planning Conditions.

212. Taking this into account, Officers consider that development plan policies in relation to Green Belt would be satisfied.

Human Rights Implications

213. The Human Rights Act Guidance for Interpretation, contained in the Preamble to the Agenda is expressly incorporated into this report and must be read in conjunction with the following paragraph.

214. In this case, it is the Officers view that the scale of any impacts is not considered sufficient to engage Article 6 or Article 1 of Protocol 1 and, taking into account the representations made in relation to the impact of the proposed development on residential amenity, impacts can be mitigated by Condition. As such, this proposal is not considered to interfere with any Convention right.

215. The CPA is required by section 149 of the Equality Act 2010 to have due regard to the need to eliminate conduct prohibited by the Act, advance equality of opportunity, and foster good relations between people with protected characteristics and people who do not. The level of ‘due regard’ considered sufficient in any particular context depends on the facts.

216. In this case, the CPA has considered its duty under the Equality Act 2010 and concludes that this application does not give rise to any considerations on equality.

Conclusion

217. This application is submitted seeking planning permission for the erection and use of a new SEN building and associated parking area, with access from Coniston Road.

218. This new SEN building would provide for 30 pupils and would feature a vehicle parking area and access from Coniston Road which would be exclusive to the proposed development.

219. Officers are satisfied that the Applicant has demonstrated a clear need for the proposed development, and that subject to the application of Conditions on any permission granted, no significantly adverse impacts would result.

220. While Officers recognise that the application site is located within the Metropolitan Green Belt, and that the proposal constitutes inappropriate development, Officers are satisfied that very special circumstances exist and clearly outweigh the harm caused to the Green Belt by reason of inappropriateness, and other harm. Therefore, Officers conclude that planning permission should be granted subject to the imposition of Conditions.

7

Recommendation

The recommendation is to **GRANT** planning application ref: WO/PLAN/2024/0633 subject to the following Conditions:

Conditions:

IMPORTANT – CONDITION NO(S) 3, 5, 8, 19, 21 AND 24 MUST BE DISCHARGED PRIOR TO THE COMMENCEMENT OF THE DEVELOPMENT.

Approved Plans

1. The development hereby permitted shall be carried out in all respects in accordance with the following plans/drawings:

   Drawing No. 5219373-ATK-XX-00-DR-C-00002 Rev P01 Proposed Surface and Foul Water Drainage Layout Sheet 1 of 2 dated 6 June 2024
   Drawing No. 5219373-ATK-XX-00-DR-C-00003 Rev P01 Proposed Surface and Foul Water Drainage Layout Sheet 2 of 2 dated 6 June 2024
   Drawing No. 5219373-ATK-XX-00-DR-C-70001 Rev P01 Drainage Schedule dated 6 June 2024
   Drawing No. 5219373-ATK-XX-00-DR-C-71001 Rev P01 Proposed Utilities Master Plan dated 6 June 2024
   Drawing No. PR-320-ATK-XX-XX-DR-E-60111 Rev P02 External Lighting Lux Level Assessment dated 12 September 2024
   Drawing No. PR-321-PEV-XX-00-DR-L-01200 Rev P5 Landscape Plan Works Stage Three dated 21 November 2024
   Drawing No. PR-321-PEV-XX-00-DR-L-01201 Rev P4 Planting Plan dated 9 April 2024
   Drawing No. PR-321-PEV-XX-00-DR-L-01203-P1-Tree Pit Typical Tree Pit Detail dated 25 January 2024
   Drawing No. PR-321-PEV-XX-R1-DR-A 01210 Rev E Proposed Roof Plan dated 28 May 2024
   Drawing No. PR-321-PEV-XX-XX-DR-A-00050 Rev D Location Plan dated 28 May 2024
   Drawing No. PR-321-PEV-XX-XX-DR-A-00200 Rev G Proposed School Boundary Site Plan dated 28 May 2024
   Drawing No. PR-321-PEV-XX-XX-DR-A-00210 Rev H Proposed SEND Unit Site Plan dated 28 May 2024
   Drawing No. PR-321-PEV-XX-XX-DR-A-01410 Rev C Proposed Fire Strategy - Site Plan dated 28 May 2024
   Drawing No. PR-321-PEV-XX-XX-DR-A 03000 Rev E Proposed External Elevations dated 28 May 2024
   Drawing No. PR-321-PEV-XX-XX-DR-A 07000 Rev D Proposed Bin Store Plan and Elevations dated 28 May 2024

Details of Buildings

2. The materials used on the exterior of the development hereby permitted shall be in accordance with the details contained within sections 4.9 and 4.10 of the Design and Access Statement dated May 2024.

Dust

3. Prior to the commencement of the development hereby permitted, a Dust Management Plan (DMP) shall be submitted to and approved in writing by the County Planning Authority.

   The DMP shall include, but not be limited to, the Dust Mitigation Measures detailed under the "South Site" column of Tables 9, 10, 11 and 12 within Section 7.1, and the Air Quality

Mitigation Measures within Section 7.2, of the Air Quality Screening and Dust Risk Assessment dated 23 September 2023.

The approved DMP shall thereafter be implemented during the construction and operation of the development hereby permitted.

Noise

4. All operations and activities related to the construction of the development hereby permitted shall only be carried out between the hours of 0800 and 1800 Mondays to Fridays and 0700 to 1300 on Saturdays.

   Notwithstanding the above, there shall be no movements to or from the application site related to the construction of the development hereby permitted, and no HGVs associated with the construction of the development laid up waiting on the public highway in the vicinity of the application site, between the hours of 0800 and 0915 and between 1500 and 1700 Mondays to Fridays.

   No operations and activities related to the construction of the development hereby permitted shall be carried out at any time on Sundays or any Public, Bank, or National Holiday.

5. Prior to the commencement of the development hereby permitted, a Construction Noise Management Plan (CNMP) shall be submitted to and approved in writing by the County Planning Authority.

   The CNMP shall include, but not be limited to:

   a) Noise limits at noise sensitive receptors
   b) Noise impact assessments
   c) Mitigation measures (if required)
   d) Monitoring procedure, and
   e) Complaints procedure

   The approved CNMP shall thereafter be implemented during the construction of the development hereby permitted.

6. The Rating Level, LAr,Tr, of the noise emitted from all plant, equipment and machinery (including any kitchen extract etc) associated with the application site shall not exceed the existing representative LA90 background sound level at any time by more than +5dB(A) at the nearest noise sensitive receptors (residential or noise sensitive building). The assessment shall be conducted in accordance with the current version of British Standard (BS) 4142:2014+A1:2019 ‘Methods for rating and assessing industrial and commercial sound’.

   The existing representative LA90 background sound level shall be determined by measurement that shall be sufficient to characterise the environment. The representative level should be justified following guidance contained within the current version of BS 4142:2014:A1+2019 and agreed with the County Planning Authority.

Lighting

7. External lighting to be installed in connection with the development hereby permitted, as shown on Drawing No. PR-320-ATK-XX-XX-DR-E-60111 Rev P02 External Lighting Lux Level Assessment dated 12 September 2024, shall be operated in accordance with the mitigation measures detailed within section 6.30 of the Supporting Planning Report dated July 2024 and sections 4.2 and 4.4.2 of the Preliminary Ecological Appraisal Report dated August 2023.

No other external lighting shall be installed at the application site.

Highways, Traffic and Access

8. Prior to the commencement of the development hereby permitted, a final Construction Transport Management Plan (CTMP) shall be submitted to and approved in writing by the County Planning Authority.

   The CTMP shall include, but not be limited to:

   a) Details of parking for vehicles of site personnel, operatives and visitors.
   b) Details of loading and unloading of plant and materials.
   c) Details of storage of plant and materials.
   d) Programme of works (including measures for traffic management).
   e) Details of boundary hoarding provision behind any visibility zones.
   f) Details of HGV deliveries and hours of operation.
   g) Details of vehicle routing.
   h) Measures to prevent the deposit of materials on the highway.
   i) Before and after construction condition surveys of the highway and a commitment to fund the repair of any damage caused.
   j) Details of on-site turning for construction vehicles.

   The approved CTMP shall thereafter be implemented during the construction of the development hereby permitted.

9. The development hereby permitted shall not be first occupied unless and until the proposed access to Coniston Road, including the proposed change in priority, has been constructed and provided with visibility zones in accordance with a scheme to be submitted to and approved in writing by the County Planning Authority. The scheme shall provide a continuous pedestrian footway across the site access junction and will be subject to the County Highway Authority's detailed design review and Road Safety Audit process. The visibility zones shall thereafter be kept permanently clear of any obstruction over 0.6m high.

10. The development hereby permitted shall not be first occupied unless and until space has been laid out within the application site in accordance with Drawings Nos. PR-321-PEV-XX-XX-DR-A-00200 Rev G Proposed School Boundary Site Plan dated 28 May 2024 and PR-321-PEV-XX-XX-DR-A-00210 Rev H Proposed SEND Unit Site Plan dated 28 May 2024 for vehicles to be parked, pupils to be dropped off and collected, and for vehicles to turn so that they may enter and leave the application site in forward gear. Thereafter, the parking, drop-off and collection and turning areas shall be retained and maintained for their designated purposes.

11. The development hereby permitted shall not be first occupied unless and until a final Car Parking Management Plan (CPMP) has been submitted to and approved in writing by the County Planning Authority.

    The CPMP shall include, but not be limited to:

    a) The types of service vehicles to be used and hours of their operation.
    b) The design of delivery areas within the application site.
    c) The dimensions and layout of lorry parking area(s) and turning space.
    d) The management of on-site parking arrangements, including the policing of each dedicated parking use and the process for allowing the double parking of staff vehicles during periods of high demand.
    e) The management of pupil transport to and from the school, including use of the most appropriate type of vehicle in order to minimise the overall number of vehicle trips to/from the school.

The approved CPMP shall thereafter be implemented during the operation of the development hereby permitted.

12. The development hereby permitted shall not be first occupied unless and until at least 50% of the proposed staff parking spaces (10 of the proposed 20 total staff spaces) have been provided with a fast-charge Electric Vehicle charging point (current minimum requirements - 7kW Mode 3 with Type 2 connector - 230v AC 32 Amp single phase dedicated supply) and the remainder of staff parking spaces have been provided with cabling for the future provision of charging points, all in accordance with a scheme to be submitted to and approved in writing by the County Planning Authority. The approved charging points and cabling shall thereafter be retained and maintained for their designated purposes.

13. The development hereby permitted shall not be first occupied unless and until facilities for the secure, lit and covered parking of bicycles and a charging point with timer for e-bikes by said facilities have been provided in accordance with a scheme to be submitted to and approved in writing by the County Planning Authority. The bicycle parking provision shall include capacity for at least 10 bicycles, no less than two of which are to be of sufficient size and accessibility to accommodate adapted cycles. The approved facilities and charging point shall thereafter be retained and maintained for their designated purposes.

14. The development hereby permitted shall not be first occupied unless and until a Travel Plan for the SEN building hereby permitted has been submitted to and approved in writing by the County Planning Authority. The submitted Travel Plan shall include details of measures to promote sustainable modes of transport and provisions for the maintenance, monitoring and review of the impact of the Plan and its further development. The approved Plan shall thereafter be implemented as approved during the operation of the development hereby permitted.

15. The means of vehicular access to the development hereby permitted shall be solely from Coniston Road, and only vehicles associated with the development hereby permitted shall use this access.

16. From the first use of the vehicle parking area hereby permitted, the hours of use shall be:

    0700 – 1800 Mondays to Fridays

    And at no time no Saturdays, Sundays, or Public, Bank or National Holidays.

Landscaping

17. The development hereby permitted shall be carried out in accordance with section 3 of the Arboricultural Method Statement dated January 2024.

18. Landscaping of the development hereby permitted, as shown on Drawings Nos. PR-321-PEV-XX-00-DR-L-01200 Rev P5 Landscape Plan Works Stage Three dated 21 November 2024, PR-321-PEV-XX-00-DR-L-01201 Rev P4 Planting Plan dated 9 April 2024, and PR-321-PEV-XX-00-DR-L-01203-P1-Tree Pit Typical Tree Pit Detail dated 25 January 2024 all approved as part of the application, shall be implemented in full within the first available planting season following the commencement of construction of the development hereby permitted and retained thereafter as such.

Ecology and Biodiversity

19. Prior to the commencement of the development hereby permitted, a Construction Environmental Management Plan (CEMP) shall be submitted to and approved in writing by the County Planning Authority.

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The CEMP shall include, but not be limited to, the mitigation measures detailed within section 4.4 of the Preliminary Ecological Appraisal Report dated August 2023.

The approved CEMP shall thereafter be implemented during the construction of the development hereby permitted.

20. The Biodiversity Gain Plan shall be prepared in accordance with the Preliminary Ecological Appraisal Report version 1 dated August 2023, the Biodiversity Metric Report version 5 dated November 2024, and the Draft Biodiversity Gain Plan dated August 2024.

21. Prior to the commencement of the development hereby permitted, a Habitats Maintenance and Management Plan (HMMP) shall be submitted to and approved in writing by the County Planning Authority.

    The HMMP shall include, but not be limited to:

    a) Details of on-site enhancements to be included in the development hereby permitted.
    b) Details of how the on-site enhancements shall be managed.
    c) Details and schedule of monitoring of habitats on the site, including how and when monitoring will take place and how and when management proposals will be reviewed, and the frequency of monitoring reports.
    d) Any changes to the management of the habitat to achieve the habitats or wider outcomes.

    The approved HMMP shall thereafter be implemented for a minimum period of 30 years, which shall begin on completion of the development hereby permitted.

22. Notice shall be given to the County Planning Authority in writing when all habitat implementation works are completed in accordance with the approved Habitats Maintenance and Management Plan.

Flood Risk and Surface Water Drainage

23. The development hereby permitted shall not be first occupied unless and until the drainage scheme as detailed within section 4.2 of the Drainage Strategy Report dated 24 May 2024 and Drawings Nos. 5219373-ATK-XX-00-DR-C-00002 Rev P01 Proposed Surface and Foul Water Drainage Layout Sheet 1 of 2 dated 6 June 2024, 5219373-ATK-XX-00-DR-C-00003 Rev P01 Proposed Surface and Foul Water Drainage Layout Sheet 2 of 2 dated 6 June 2024 and 5219373-ATK-XX-00-DR-C-70001 Rev P01 Drainage Schedule dated 6 June 2024 all approved as part of the application has been implemented in full. The drainage scheme shall thereafter be maintained in accordance with the approved details for its designated purpose.

Waste Management

24. Prior to the commencement of the development hereby permitted, a Resource Management Plan (RMP) shall be submitted to and approved in writing by the County Planning Authority.

    The RMP shall include, but not be limited, measures to achieve the Construction Waste Management key objectives, strategies and targets detailed within section 3.5 the Sustainability Design and Construction Statement Rev 1.1 dated 3 June 2024.

    The approved RMP shall thereafter be implemented during the construction of the development hereby permitted.

Reasons:

1. For the avoidance of doubt and in the interests of proper planning.

2. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraphs 128 and 135, Woking Core Strategy 2012 Policies CS21 and CS24, and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

3. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraphs 108 and 180; Woking Core Strategy 2012 Policy CS21; and Woking Development Management Policies Development Plan Document 2016 Policies DM5, DM6 and DM21.

   Compliance with this Condition is required prior to the commencement of the development hereby permitted to ensure effective dust control throughout the construction and operation phases.

4. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard the environment and local amenity during the construction of the development, in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114, 116, 180 and 191; and Woking Development Management Policies Development Plan Document 2016 Policies DM5, DM7 and DM21.

5. To enable the County Planning Authority to exercise planning control and to safeguard the environment and local amenity during the construction of the development in accordance with National Planning Policy Framework December 2023 paragraphs 180 and 191; and Woking Development Management Policies Development Plan Document 2016 Policies DM5, DM7 and DM21.

   Compliance with this Condition is required prior to the commencement of the development hereby permitted to ensure effective noise control throughout the construction phase.

6. To enable the County Planning Authority to exercise planning control and to safeguard the environment and local amenity during the operation of the development in accordance with National Planning Policy Framework December 2023 paragraphs 180 and 191; and Woking Development Management Policies Development Plan Document 2016 Policies DM5, DM7 and DM21.

7. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraphs 180, 186 and 191; Woking Core Strategy 2012 Policies CS7 and CS21; and Woking Development Management Policies Development Plan Document 2016 Policies DM5, DM7 and DM21.

8. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

   Compliance with this Condition is required prior to the commencement of the development hereby permitted to ensure effective public highway protection throughout the construction phase.

9. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; Woking Core Strategy 2012 Policy CS18; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

10. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

11. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

12. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; Surrey Healthy Streets Guidance; Woking Core Strategy 2012 Policies CS16 and CS18; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

13. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114, 116, 128 and 135; Surrey Local Transport Plan 4 2022; Surrey Healthy Streets Guidance; Woking Core Strategy 2012 Policies CS16 and CS18; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

14. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114, 116, 117 and 128; Surrey Local Transport Plan 4 2022; Woking Core Strategy 2012 Policies CS18; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

15. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; Woking Core Strategy 2012 Policy CS18; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

16. In order that the development should not prejudice highway safety nor cause inconvenience to other highway users in accordance with National Planning Policy Framework December 2023 paragraphs 108, 114 and 116; Surrey Local Transport Plan 4 2022; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

17. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraphs 136 and 180; Woking Core Strategy 2012 Policies CS21 and CS24; and Woking Development Management Policies Development Plan Document 2016 Policies DM1, DM2 and DM21.

18. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraphs 135, 136 and 180; Woking Core Strategy 2012 Policies CS21 and CS24; and Woking Development Management Policies Development Plan Document 2016 Policies DM1, DM2 and DM21.

19. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraph 124; Woking Core Strategy 2012 Policies CS16, CS21 and CS22; and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

Compliance with this Condition is required prior to the commencement of the development hereby permitted to ensure effective ecological protection throughout the construction phase.

20. To ensure the development delivers a biodiversity net gain and promotes nature conservation and management, and to secure biodiversity enhancement in accordance with Schedule 7A of the Town and Country Planning Act 1990, National Planning Policy Framework December 2023 paragraphs 180 and 186, and Woking Core Strategy 2012 Policies CS7 and CS22.

21. To ensure the development delivers a biodiversity net gain and promotes nature conservation and management, and to secure biodiversity enhancement in accordance with Schedule 7A of the Town and Country Planning Act 1990, National Planning Policy Framework December 2023 paragraphs 180 and 186, and Woking Core Strategy 2012 Policies CS7 and CS22.

    Compliance with this Condition is required prior to the commencement of the development hereby permitted as it relates to statutory biodiversity net gain.

22. To ensure the development delivers a biodiversity net gain and promotes nature conservation and management, and to secure biodiversity enhancement in accordance with Schedule 7A of the Town and Country Planning Act 1990, National Planning Policy Framework December 2023 paragraphs 180 and 186, and Woking Core Strategy 2012 Policies CS7 and CS22.

23. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with National Planning Policy Framework December 2023 paragraphs 165, 173 and 180; Woking Core Strategy 2012 Policies CS9, CS16 and CS21;and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

24. To comply with the terms of the application, enable the County Planning Authority to exercise planning control, and to safeguard local amenity, in accordance with Surrey Waste Local Plan 2019-2033 Policy 4, Woking Core Strategy 2012 Policies CS21 and CS22, and Woking Development Management Policies Development Plan Document 2016 Policy DM21.

    Compliance with this Condition is required prior to the commencement of the development hereby permitted to ensure efficient use of material resources and the reduction of waste throughout the construction phase.

Informatives:

1. Biosecurity is very important to minimise the risks of pests and diseases being imported into the UK and introduced into the environment. It is recommended that all trees grown abroad, but purchased for transplanting, shall spend at least one full growing season on a UK nursery and be subjected to a pest and disease control programme. Evidence of this control programme, together with an audit trail of when imported trees entered the UK, their origin and the length of time they have been in the nursery should be requested before the commencement of any tree planting. If this information is not available, alternative trees sources should be used. You are advised to consult the relevant UK Government agencies such as the Animal and Plant Health Agency (APHA) and the Forestry Commission for current guidance, Plant Passport requirements and plant movement restrictions. Quality Assurance Schemes followed by nurseries should also be investigated when researching suppliers. For larger planting schemes, you may wish to consider engaging a suitably qualified professional to oversee tree/plant specification and planting.

2. The developer is advised that as part of the detailed design of the highway works required by the above condition(s), the County Highway Authority may require necessary accommodation works to streetlights, road signs, road markings, highway drainage, surface covers, street trees, highway verges, highway surfaces, surface edge restraints and any other street furniture/equipment.

3. It is the responsibility of the developer to ensure that the electricity supply is sufficient to meet future demands, and that any power balancing technology is in place if required. Electric Vehicle Charging Points shall be provided in accordance with the Surrey County Council Vehicular, Cycle and Electric Vehicle Parking Guidance for New Development 2023.

4. It is the responsibility of the developer to provide e-bike charging points with socket timers to prevent them constantly drawing a current overnight or for longer than required. Signage should be considered regarding damaged, or shock impacted batteries, indicating that these should not be used/charged. The design of communal bike areas should consider fire spread and there should be detection in areas where charging takes place.

5. The permission hereby granted shall not be construed as authority to carry out any works on the highway. The Applicant is advised that prior approval must be obtained from the Highway Authority before any works are carried out on the public highway https://www.surreycc.gov.uk/land-planning-and-development/planning/transport-development/alterations-to-existing-roads

6. The attention of the Applicant is drawn to the requirements of Sections 7 and 8 of the Chronically Sick and Disabled Persons Act 1970 and to Department for Children, Schools and Families Building Bulletin 102 'Designing for disabled children and children with Special Educational Needs' published in 2008 and Department of Education Building Bulletin 104 'Area guidelines for SEND and alternative provision' December 2015, or any prescribed document replacing these notes.

7. This approval relates only to the provisions of the Town and Country Planning Act 1990 and must not be taken to imply or be construed as an approval under the Building Regulations 2000 or for the purposes of any other statutory provision whatsoever.

8. In determining this application the County Planning Authority has worked positively and proactively with the Applicant by entering into pre-application discussions and assessing the proposals against relevant Development Plan policies and the National Planning Policy Framework, including its associated planning practice guidance and European Regulations, providing feedback to the Applicant where appropriate. Further, the County Planning Authority has identified all material considerations, forwarded consultation responses to the Applicant, considered representations from interested parties, liaised with consultees and the Applicant to resolve identified issues, and determined the application within the timeframe agreed with the Applicant. The Applicant has also been given advance sight of the draft planning conditions. This approach has been in accordance with the requirements of paragraph 38 of the National Planning Policy Framework December 2023.

Contact James Nolan
Email james.nolan@surreycc.gov.uk

Background papers

The deposited application documents and plans, including those amending or clarifying the proposal, and responses to consultations and representations received, as referred to in the report and included in the application file.

For this application, the deposited application documents and plans, are available to view on our online register. The representations received are publicly available to view on the district/borough planning register.

The Woking Borough Council planning register entry for this application can be found under application reference WO/PLAN/2024/0633.

Other documents

The following were also referred to in the preparation of this report:

Government Guidance

National Planning Policy Framework December 2023
Planning Practice Guidance – Air quality updated November 2019
Planning Practice Guidance – Biodiversity net gain updated May 2024
Planning Practice Guidance – Flood risk and coastal change updated August 2022
Planning Practice Guidance – Historic environment updated July 2019
Planning Practice Guidance – Light pollution updated November 2019
Planning Practice Guidance – Noise updated July 2019
Planning Practice Guidance – Tree Preservation Orders and trees in conservation areas published March 2014

The Development Plan

Surrey Waste Local Plan 2019 to 2033
Woking Core Strategy October 2012
Woking Development Management Policies Development Plan Document October 2016

Other Documents

Surrey Landscape Character Assessment: Woking Borough dated April 2015

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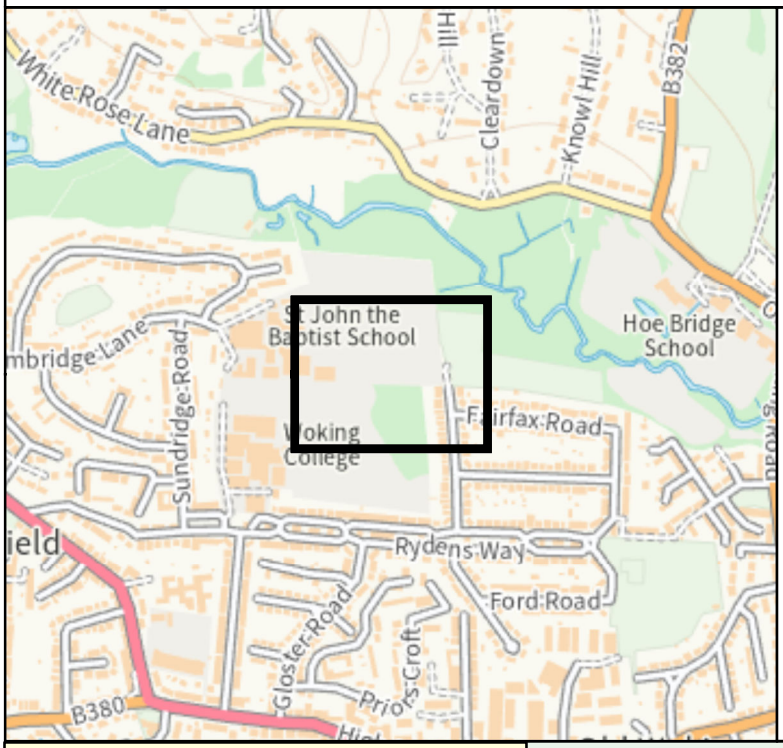
Location: Land at St John the Baptist School, Elmbridge Lane, Woking, Surrey GU22 9AL

Ref No: SCC_Ref_2024-0136



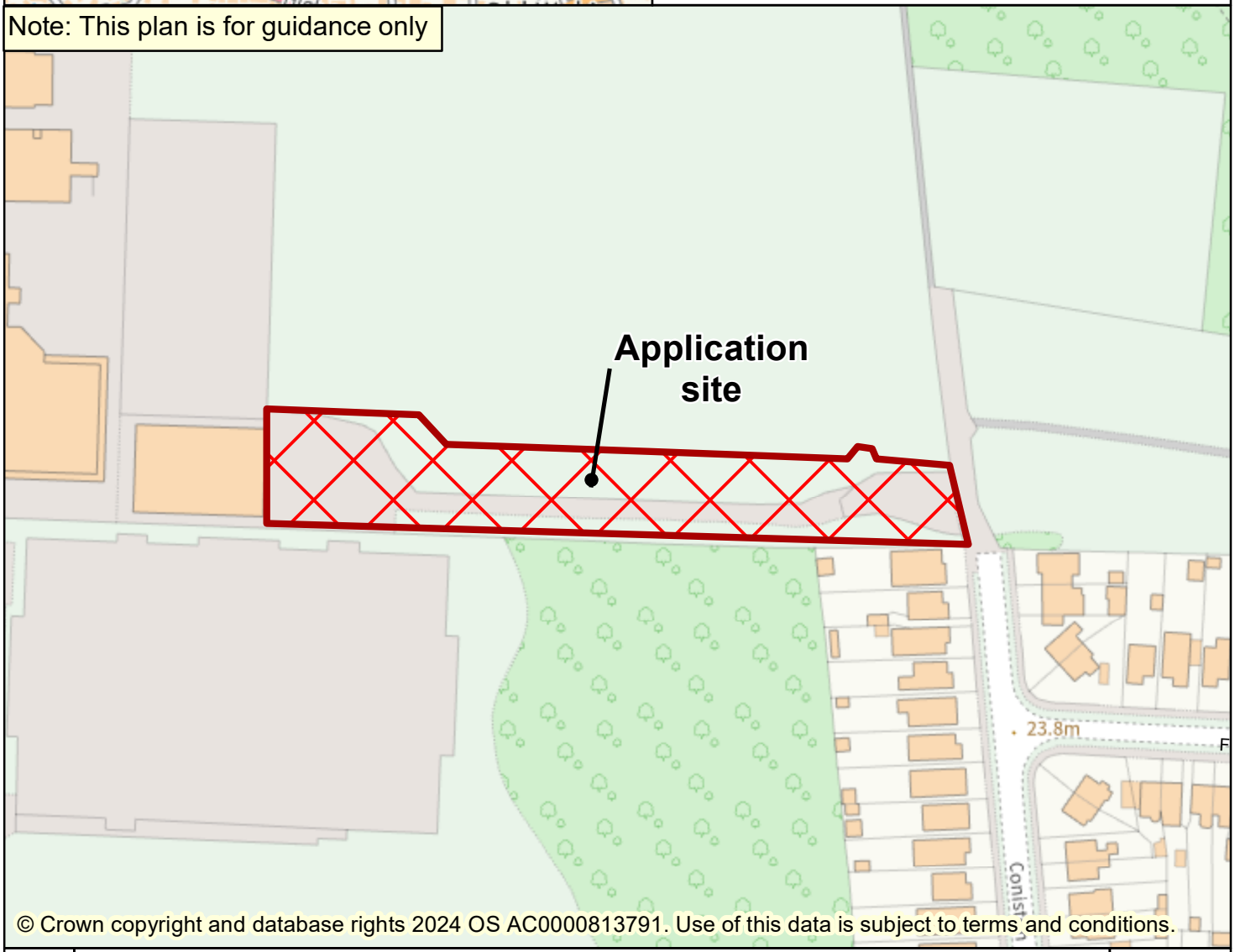
Proposal

Erection and use of a new Special Educational Needs classroom building and associated parking area, with access from Coniston Road.

Application ref:
WO/PLAN/2024/0633

Electoral divisions:
Woking South
Woking South East

Note: This plan is for guidance only



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0 550 1,100 Metres

Scale: 1:1,610

Created: 29/11/2024

SURREY COUNTY COUNCIL

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Application Number : WO/PLAN/2024/0633

2024 Aerial Photos

Aerial 1: Surrounding area

SURREY COUNTY COUNCIL

2024 Aerial Photos

SURREY COUNTY COUNCIL

Aerial 2: Application site

Application Number : WO/PLAN/2024/0633

2024 Aerial Photos

Aerial 3: Application site/School boundary

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TO: PLANNING & REGULATORY COMMITTEE **DATE: 18 DECEMBER 2024**

BY: COUNTRYSIDE ACCESS OFFICER

DISTRICT (S): MOLE VALLEY

ELECTORAL DIVISION:
LEATHERHEAD AND FETCHAM EAST
Tim Hall

PURPOSE: FOR DECISION

TITLE: APPLICATION FOR VILLAGE GREEN STATUS.
LAND AT LEACH GROVE WOOD, LEATHERHEAD

SUMMARY REPORT

The committee is asked to consider whether or not to register the land the subject of this application as a Village Green.

Application for Village Green status by Philippa Cargill dated 22 March 2013 relating to land at Leach Grove Wood, Leatherhead.

The County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the 2006 Act the County Council is able to register new land as a Town or Village Green on application.

The Council registered the land in the above application as a Town or Village Green on 5 October 2015 following the decision of the Commons Registration Authority on 23 September 2015.

By order of the Supreme Court, the above decision and registration was quashed, and it was ordered that the application for registration be re-determined by the Commons Registration Authority in accordance with the judgment of the Supreme Court.

The recommendation is to REJECT the application.

APPLICATION DETAILS

Applicant
Philippa Cargill and subsequently Timothy Jones

Site
Land at Leach Grove Wood, Leatherhead

Date of Application
№ 1869: 22 March 2013.

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ILLUSTRATIVE MATERIAL

Annex A	Application Plan
Annex B	2015 Committee Report
Annex C	2016 High Court Judgment
Annex D	2018 Court of Appeal Judgment
Annex E	2018 Update Report to Committee
Annex F	2019 Supreme Court Judgment
Annex G	Supreme Court Order 11.12.2019

BACKGROUND

1. On 25 March 2013 Surrey County Council received an application for a new village green for the land of Leach Grove Wood, Leatherhead. The application was made on the basis that a significant number of 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. The application was accompanied by 116 evidence questionnaires. The plan at Annex A indicates the land claimed.

2. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 sets out the process to be followed by any applicant seeking to register a new town or village green ("TVG") and the process to be followed by the Commons Registration Authority.

3. The required consultation and publicity was undertaken and an objection to the application was received from NHS Property Services Ltd ("NHSPS") in its capacity as freehold owner of the application land (the Objector). An independent investigation was conducted in the form of a non-statutory public inquiry held in April 2015. The Inspector's report formed a background paper to the report from the Commons Registration Officer to this committee on 23 September 2015 (Annex B).

4. In his report, the Inspector advised that, because the applicant had not satisfied the neighbourhood test, the application should be rejected. In his opinion there was not sufficient cohesion to form a neighbourhood. The view of this committee was that there was sufficient cohesion to form a neighbourhood and the committee decided to accept the application and register the land as a new TVG.

5. The NHSPS applied to judicially review the decision of this committee and the case was heard in the High Court in June 2016 before Mr Justice Gilbart. The judge found that there was an absence of any consideration or reasoning relating to the question of 'statutory incompatibility'. This means that where land is held by a statutory undertaker or public body for statutory purposes this may be incompatible with the land being registered as a TVG. The argument was that the land was held by NHSPS for health purposes which was incompatible with the land being used for recreational purposes as a TVG. There was statutory incompatibility and for this reason the judicial review was allowed and the decision of this committee was overturned.

6. The original applicant had by now moved out of the area and her application was taken over by Mr Timothy Jones. Mr Jones appealed the decision of the High Court to the Court of Appeal. The appeal was heard in October 2017 and the judgment was published on the 12 April 2018. The Court of Appeal overturned the decision of the High Court judge on the grounds of statutory incompatibility on the basis that the land

was not being used for any “defined statutory purposes” with which registration would be incompatible and confirmed that the land was a TVG.

7. The NHSPS appealed this decision to the Supreme Court. The appeal was heard in July 2019. The majority view was that there was an incompatibility between the statutory purposes for which the land was held by NHSPS and use of that land as a town or village green. As a result, the provisions of the Commons Act 2006 were not applicable in relation to it. The Supreme Court ordered that both the decision to register and the registration of Leach Grove Wood as a town/village green be quashed and the application be re-determined by the Registration Authority in accordance with the judgment of the Supreme Court.

8. In accordance with the Supreme Court Order, Leach Grove Wood was removed from the register of Town and Village Greens and the Countryside Access Officer is now placing this matter before members for re-determination.

CONSULTATIONS AND PUBLICITY

9. Consultation and publicity was undertaken for the application as set out in the Committee Report of 23 September 2015 at Annex B.

HUMAN RIGHTS IMPLICATIONS

10. Public Authorities are required to act, as far as possible, compatibly with the European Convention on Human Rights, enforceable in English Courts by way of the Human Rights Act 1998. The procedure followed and report recommendation are compatible with the provisions of the Human Rights Act 1998.

FINANCIAL IMPLICATIONS

11. If the officer recommendation to reject the application is not followed, the Council is likely to face another application for judicial review. If the Council attempted to re-argue the case, the Council could be penalised heavily in terms of costs.

ENVIRONMENTAL IMPLICATIONS

12. If the land is registered as a village green it will be subject to the same statutory protection as other village greens and local people will have a guaranteed legal right to indulge in sports and pastimes over it on a permanent basis. On registration as a village green, the land must be kept free from development or other encroachments.

ANALYSIS AND COMMENTARY

13. Surrey County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Before the Commons Registration Authority is an application made by Mrs Cargill, under the Commons Act 2006 (APP1869), to have land at Leach Grove Wood, Leatherhead (the land), registered as a town or village green (TVG). The land is identified on the plan appended to the application (Annex A).

14. NHS Property Services Ltd, as the freehold owner, opposes the application.

15. To succeed, the Applicant has to prove on the balance of probabilities (*i.e.*, more than a 50% probability) that:

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i. a significant number
ii. of the inhabitants of any locality, or of any neighbourhood within a locality,
iii. indulged as of right
iv. in lawful sports and pastimes (LSP) on the land
v. for a period of at least 20 years.

16. The facts were thoroughly tested with evidence at a public inquiry. The report to this committee of 23 September 2015 summarised the Inspector's findings. The Inspector concluded that the Applicant proved that a significant number of inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. However, he did not accept that the locality or neighbourhood within a locality relied upon by the Applicant met the criteria required by the Commons Act 2006 to allow registration of the land as a TVG. The Applicant's claimed neighbourhood was outlined in red on the plan at Appendix 1 to the Inspector's Report, falling within the locality of Leatherhead South ward.

17. The view of this committee was that there was sufficient cohesion to form a neighbourhood and the committee decided to accept the application and register the land as a new TVG.

18. In the Judicial Review proceedings at the High Court (Annex C), the Judge, Gilbart J, agreed that it is a matter of impression whether there is sufficient cohesion for a neighbourhood to exist and decided that there was no criticism of the committee's approach to the issue of neighbourhood. It was an issue on which elected members could have just as much expertise as the Inspector and the finding that there was a neighbourhood was undoubtedly a decision which the committee could reasonably make.

Statutory Incompatibility

19. The Judicial Review claim in the High Court[1] succeeded, however, on the ground that the committee did not consider the question of statutory incompatibility and gave no reasons in respect of this issue. Gilbart J disagreed with the Inspector's conclusion that the doctrine of statutory incompatibility had no application in the case. He set out the relevant test from the Newhaven[2] case:

> *'…The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of land for those statutory purposes…'*

Gilbart J stressed the need to consider statutory incompatibility on a case by case basis and went on to consider the relevant statutory powers in this case:

[1] R (NHS Property Services Limited) v Surrey County Council and Jones [2016] EWHC 1715 (Admin)
[2] Newhaven Port and Properties Ltd v East Sussex CC [2015] [para 93]

> *"…It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use."*
>
> *"Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic would require buildings or hard standing in some form over a significant part of the area used…"*
>
> *"It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there are any plans that it should be, but only whether there is incompatibility as a matter of statutory construction…."*

He concluded that there was a conflict between the statutory powers in this case and registration of the land as a TVG and ordered that the registration of Leach Grove Wood as a town or village green on 5 October 2015 be quashed and the application re-determined in accordance with the judgment of the High Court.

20. The Applicant appealed the decision of the High Court to the Court of Appeal. In the judgment handed down by the Court of Appeal (Annex D)[3], Lord Justice Lindblom said:

> *"The statutory functions on which NHS Property Services relied, and the statutory purposes underlying them, were … general in character and content: the general functions of a clinical commissioning group to provide medical services to the public, and under section 3(1) of the National Health Service Act 2006, the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities. The registration of the land as a green under section 15 of the 2006 Act would not, in itself, have any material effect on NHS Property Services' function under section 223(1) of the National Health Service Act 2006, to hold land for the NHS Surrey Downs Clinical Commissioning Group. Nor would it prevent the performance by the clinical commissioning group, or any other NHS body, of any of statutory function relating specifically to the land in question. Beyond their general application to land and property held by NHS Property Services, none of those statutory functions could be said to attach in some specific way to this particular land. Parliament had not conferred on NHS Property Services or on the clinical commissioning group, any specific power, or imposed any specific duty, in respect of the land whose registration was sought. There was, for example, no statutory duty to provide a hospital or any other healthcare service or facility on the land."*

[3] R (Lancashire County Council) v v Secretary of State for Environment, Food and Rural Affairs and R (NHS Property Services Ltd) v Jones [2018] EWCA Civ 721 paras 45 & 46

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"…the circumstances did not correspond to those of Newhaven Port and Properties. The land was not being used for any "defined statutory purposes" with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a "statutory incompatibility". The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land…".

He concluded that the committee was right to accept and adopt the Inspector's conclusion on statutory incompatibility. The Applicant's appeal was allowed and registration of Leach Grove Wood as a TVG was reinstated.

21. The NHSPS appealed to the Supreme Court (Annex F)[4]. The Supreme Court analysed the reasoning in the *Newhaven* case and applied it to the cases before them. In the key passage from the Newhaven case, the principle was set out in the following terms:

> "*…The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time being so held..*"

22. The Supreme Court held that it was not necessary to show that the land was being used for such purposes only that they are held for statutory purposes. In the case of Leach Grove Wood, they agreed with the assessment of Gilbart J in the High Court and considered that:

> *"The issue of statutory incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purpose for which the land is held, not by reference to how it is being used at any particular point in time…"*

23. The majority judgment of the Supreme Court was that there was an incompatibility between the statutory purposes for which the land was held and use of the land as a town or village green. The provisions of the Commons Act 2006 were not therefore applicable. The appeal was allowed and the registration of the TVG was overturned.

24. By order of the Supreme Court (Annex G) the registration of Leach Grove Wood as a town or village green was quashed and the decision of 23 September 2015 by this committee to register that land as a town or village green was similarly quashed. The

[4] R V (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs and R (NHS Property Services Ltd) v Surrey [2019] UKSC 58

application is to be redetermined by this committee in accordance with the judgment of the Supreme Court.

CONCLUSIONS

25. The Inspector's conclusions were set out in paragraph 19 of the 2015 committee report[5] but in summary the Inspector:

    i. rejected the landowner's arguments about statutory incompatibility;

    ii. accepted the applicant's case that a significant number of the local inhabitants of the claimed neighbourhood falling within the locality of the Leatherhead South ward indulged as of right in lawful sports and pastimes on the whole of the land for the period of at least 20 years ending on or about 9 January 2013; but

    iii. did not consider that the claimed neighbourhood was a neighbourhood for the purposes of s15 of the Commons Act 2006; and

    concluded that the application to register should be rejected because the applicant had failed to satisfy all the elements necessary to justify the registration of land as a town or village green.

26. It was accepted in the High Court that this committee could form an alternative view on whether there was sufficient cohesion for a neighbourhood to exist.

27. However, the Supreme Court's judgment was that the land should not be registered as a town or village green under the Commons Act 2006 as there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green.

RECOMMENDATION

Officers recommend that the application is **REJECTED**
on the grounds that the application should not be registered as a town or village green under s15 of the Commons Act 2006 for reasons of statutory incompatibility in accordance with the judgment of the Supreme Court.

[5] Annex B

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CONTACT
CATHERINE VALIANT, COUNTRYSIDE ACCESS OFFICER (COMMONS).
TEL. NO. 07976 394660

BACKGROUND PAPERS
The documents relating to Application No.1869:

i. The application and supporting documentation
ii. The documents referred to in the report

PLANNING AND REGULATORY COMMITTEE
DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

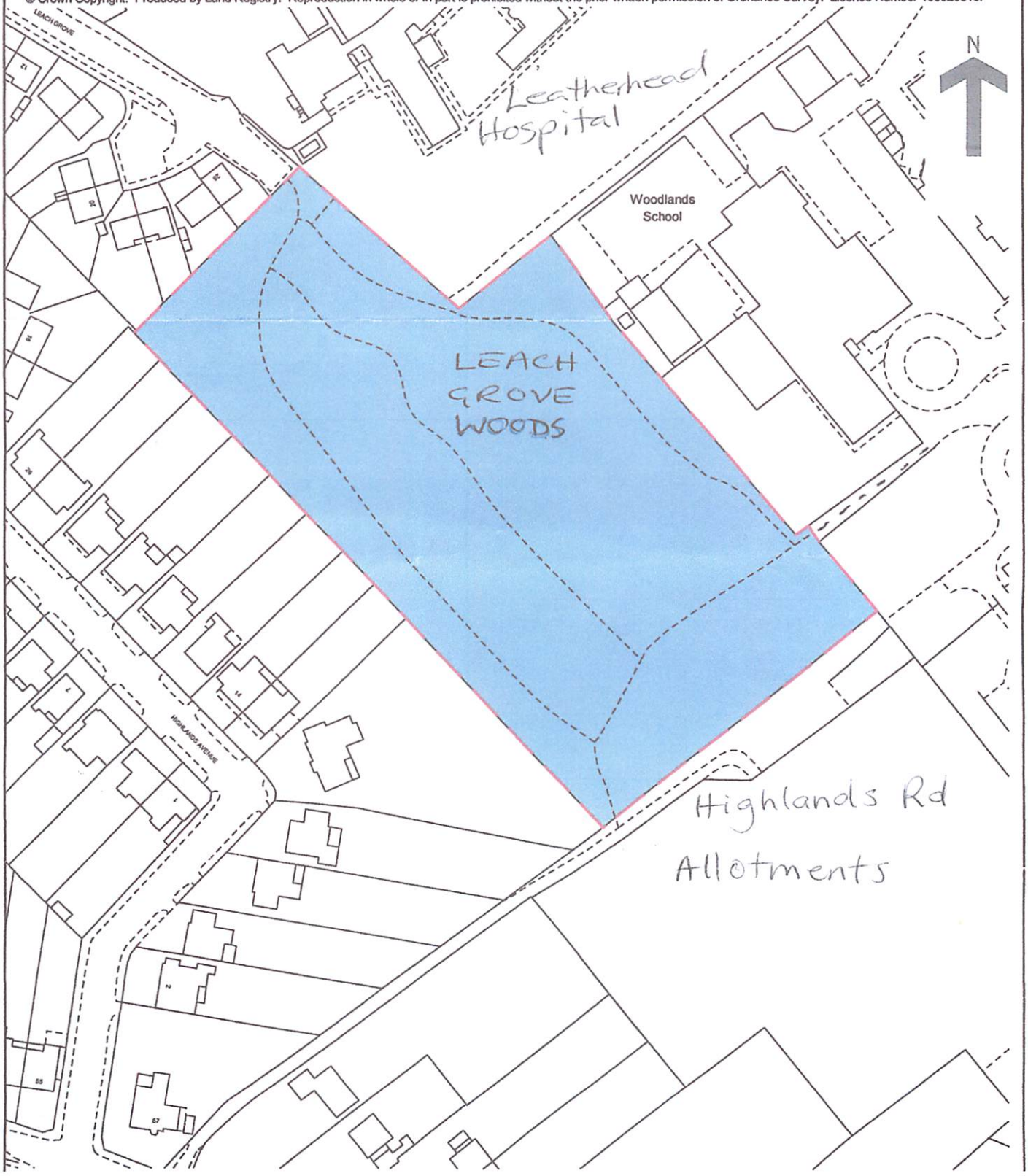
ANNEX A APPLICATION PLAN

APPENDIX 2, MAP 2

8

Land Registry
Index map plan

Ordnance Survey map reference **TQ1756SW**
Scale **1:1250**
Plan prepared on **24/06/2009** at **00:00:01**



This is the exhibit referred to in Section 7: Justification for application to register the land as a town or village green.

before me E Moore EMMA MOORE
SOLICITOR

PLANNING AND REGULATORY COMMITTEE
DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX B 2015 COMMITEE REPORT

ITEM NO.

8

TO: PLANNING & REGULATORY COMMITTEE **DATE:** 23 September 2015

BY: HEAD OF LEGAL & DEMOCRATIC SERVICES

DISTRICT (S): MOLE VALLEY **ELECTORAL DIVISION:** LEATHERHEAD AND FETCHAM EAST Tim Hall

PURPOSE: FOR DECISION

TITLE: APPLICATION FOR VILLAGE GREEN STATUS. LAND AT LEACH GROVE WOOD, LEATHERHEAD

SUMMARY REPORT

The committee is asked to consider whether or not to register the land the subject of this application as a Village Green.

Application for Village Green status by Philippa Cargill (the Applicant) dated 22 March 2013 relating to land at Leach Grove Wood, Leatherhead.

The County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the 2006 Act the County Council is able to register new land as a Town or Village Green on application.

The recommendation is to REJECT the application.

APPLICATION DETAILS

Applicant
Philippa Cargill

Site
Land at Leach Grove Wood, Leatherhead

Date of Application
№ 1869: 22 March 2013.

ILLUSTRATIVE MATERIAL

Annexe A: Plan of application site
Annexe B: Inspector's report dated 9 June 2015
Annexe C: Neighbourhood/Locality Plan

BACKGROUND

1. On 25 March 2013 Surrey County Council received an application for a new village green for the land of Leach Grove Wood, Leatherhead. The application was made on the basis that *a significant number of 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.* The application was accompanied by 116 evidence questionnaires.

2. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 sets out the process to be followed by any applicant seeking to register a new town or village green and the process to be followed by the Commons Registration Authority.

3. A public notice was placed in the local press on 12 July 2013 with an objection period running from 12 July 2013 until 30 August 2013. The application was placed on public deposit at Mole Valley District Council (MVDC) offices and Leatherhead Library.

4. An objection to the application was received from NHS Property Services Ltd in its capacity as freehold owner of the application land (the Objector). It was not clear from the evidence provided with the application whether the land met the criteria for registration. Legal opinion was sought and a view was taken that an independent investigation be conducted in the form of a non-statutory public inquiry. This was to enable the County Council, as Commons Registration Authority, to discharge its statutory duty.

5. A non-statutory public inquiry was held on 13th to 16th April 2015 with closing submissions on 27th May 2015. The Inspector submitted his report to the Commons Registration Officer on 9th June 2015.

6. The Commons Registration Officer is therefore now placing this matter before members for consideration.

CONSULTATIONS AND PUBLICITY

Borough/District Council

Mole Valley District Council	No views received

Consultees (Statutory and Non Statutory)

The Open Spaces Society:	No views received
Local Residents – adjoining properties:	No views received
Rights of Way	No objection
Estates Planning & Management	No views received
County Highways Authority – Highways Information Team	No views received

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Summary of publicity undertaken

7. Documents placed on public deposit at local council offices and local library.

FINANCIAL IMPLICATIONS

8. The cost of advertising has already been incurred.

ENVIRONMENTAL IMPLICATIONS

9. If the land is registered as a village green it will be subject to the same statutory protection as other village greens and local people will have a guaranteed legal right to indulge in sports and pastimes over it on a permanent basis. Registration is irrevocable and so the land must be kept free from development or other encroachments.

HUMAN RIGHTS IMPLICATIONS

10. Public Authorities are required to act, as far as possible, compatibly with the European Convention on Human Rights, now enforceable in English Courts by way of the Human Rights Act 1998. The officer's view is that this proposal will have no adverse impact on public amenity and has no human rights implications.

ANALYSIS AND COMMENTARY

11. Surrey County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Before the Commons Registration Authority is an application made by Mrs Cargill, under the Commons Act 2006 (№ 1869), to have land at Leach Grove Wood, Leatherhead (the land), registered as a town or village green (TVG). The land is identified on the plan appended to the application.

12. NHS Property Services Ltd, as the freehold owner, opposes the application.

13. To succeed, the Applicant has to prove on the balance of probabilities (*i.e.*, more than a 50% probability) that a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes (LSP) on the land for a period of at least 20 years.

14. The facts were thoroughly tested with evidence at a public inquiry. At the inquiry the Applicant applied to amend her application on the issue of locality/neighbourhood. The Applicant claims a locality comprising the polling district known as XB falling within the Leatherhead South ward of MVDC (shown by the blue dashed line on plan at Annexe C) or a neighbourhood comprised within the red line shown on plan at Annexe C. The Objector raised no objection to the way in which the Applicant chose to reformulate her case on this point and the Inspector recommends that the Applicant be permitted to amend the application.

15. The Inspector concluded that the Applicant proved that a significant number of inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. However, he did not accept that the locality or neighbourhood within a locality relied upon by the Applicant met the criteria required by the Commons Act 2006 to allow registration of the land as a TVG.

16. The term 'locality' is taken to mean a single administrative district or an area within legally significant boundaries. A 'neighbourhood' need not be a recognised administrative unit. However, it must have a degree of cohesiveness and must be capable of meaningful description. The Inspector's view is that a claimed neighbourhood must be an area which is cohesive, identifiable and recognisable as a community in its own right.

17. On the question of locality the Inspector states in his report:

"..... a polling district is not a qualifying locality within the meaning of this term where it is first used in section 15(3). I accept that a polling district is an area with legally significant boundaries but it has nothing to do with any community of interest on the part of its inhabitants. It is concerned entirely with the practicalities of administering the electoral process within a given area.....

Whilst I accept that polling districts may well be chosen for the convenience of its inhabitants, it seems to me that this is not a description of a community falling within the meaning of the term locality where used in section15(3). If it did then the term 'locality' would, in my view, be devoid of any coherent meaning at all and could feasibly embrace legally significant boundaries of more or less any description without having any credible relationship at all with the claimed TVG, and, in my view, this cannot have been the statutory intention."

18. On the question of neighbourhood the Inspector states:

"In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression, and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is not a neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

The residential properties comprised a mix of styles and ages and there is nothing in the way of facilities (that is, with the exception of the land itself) serving predominately the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve ..... a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such as a small parade of shops with a post office, licensed premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of these features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses ..... considered that their neighbourhood was simply the area in their own vicinity or where their friends mainly lived."

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CONCLUSIONS AND RECOMMENDATION

19. The Inspector's report contained the following conclusions: -

- I find that a significant number of the local inhabitants of the claimed locality shown within the blue dashed lines on App/1(*Annexe C attached to this report*) (being the polling district XB within the Leatherhead South ward of MVDC) indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

- I find that a significant number of the local inhabitants of the claimed neighbourhood shown within the red lines on App/1 and falling within the locality of Leatherhead South ward also indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

- I find that the objection advanced by the Objector that the land was not registrable on the ground of statutory incompatibility was not made out.

- I find that the claimed locality is not a locality within the meaning of section 15 of the 2006 Act.

- I find that the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act.

- Because the Applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG, my recommendation to the registration authority is that the application to register (under application number 1869) should be REJECTED.

20. Village Green status is acquired over land where 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. The evidence provided with this application, and the subsequent investigations, show that this criteria has not been met.

21. Therefore, Officers recommend that the application be REJECTED.

CONTACT
HELEN GILBERT, COMMONS REGISTRATION OFFICER.
TEL. NO.
020 8541 8935

BACKGROUND PAPERS
All documents quoted in the report.

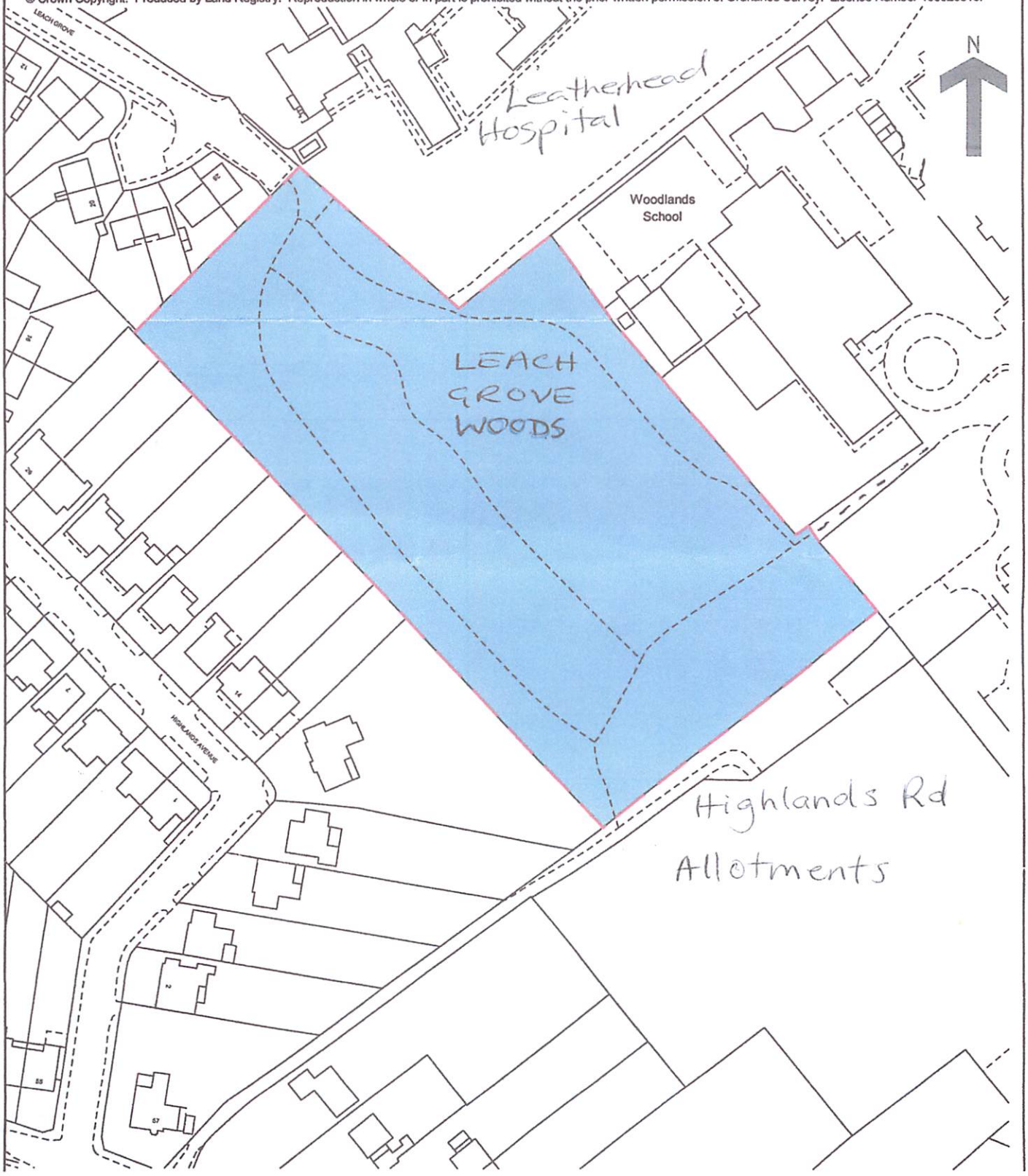
ANNEX A

APPENDIX 2, MAP 2

8

Land Registry
Index map plan

Ordnance Survey map reference **TQ1756SW**
Scale **1:1250**
Plan prepared on **24/06/2009** at **00:00:01**



This is the exhibit referred to in Section 7: Justification for application to register the land as a town or village green.

before me E Moore EMMA MOORE SOLICITOR

ANNEX B

8

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A NEW TOWN OR VILLAGE GREEN DESCRIBED IN THE APPLICATION AS 'LEACH GROVE WOOD' AT LEATHERHEAD, SURREY

– APPLICATION NUMBER 1869 –

INSPECTOR'S REPORT AND RECOMMENDATION TO THE COMMONS REGISTRATION AUTHORITY – SURREY COUNTY COUNCIL

Introduction

1. I am instructed by Surrey County Council ('SCC') in its capacity as the commons registration authority ('the registration authority') to advise on an application to register as a new town or village green ('TVG') a small parcel of woodland (referred to in this report either as 'the land' or 'the wood') which is approximately 2.90 acres in size and is located at the southern end of Leach Grove in Leatherhead. The land is coloured green and marked LGW on the plan at Appendix/1 ('App/1'). The application is made pursuant to the provisions of section 15(3) of the Commons Act 2006 ('the 2006 Act') on the basis that qualifying user ceased with the erection of permissory signage on 9/01/2013.

2. The application in Form 44 is dated 22/03/2013 (A1/tabA) and was made by Philippa Cargill who lives at 54 Windfield ('the applicant'). The registration authority acknowledged receipt of the application and accompanying documents on 25/03/2013. These included the original neighbourhood plan in which the neighbourhood was described as *'South Leatherhead'* and comprised polling districts 1 and 2 within the locality of the South Leatherhead ward of Mole Valley District Council ('MVDC') (RA/B12). Put shortly, the grounds on which the application was made were that local inhabitants had used the land for informal recreation for a period of at least 20 years ending in January 2013. The application was supported by the evidence of those who completed Evidence Questionnaires ('EQs'). It was also accompanied by 116 EQs

(RA/G44).The overall tally of EQs has now risen to some 362 which demonstrates very clearly that this is a well supported application to register.

3. The application was duly publicised by the registration authority in accordance with the regulations (The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007). The publicity notice invited objections and a single objection was received from NHS Property Services Ltd ('the objector') to whom the application land had been transferred under arrangements contained in the Health and Social Care Act 2012. All land assets held by the former Strategic Health Authorities and Primary Care Trusts ('PCTs') which did not pass to Clinical Commissioning Groups vested in the objector which now manages, maintains and develops such assets on behalf of the Department of Health. In fact, I think that Surrey PCT may still be the registered proprietor of the land which is held under title number SY637083. I shall deal with the history of ownership of the application land in more detail below.

4. After being instructed by the registration authority I gave directions on 26/02/2015 dealing with the procedure at a public inquiry which took place over 5 days at a venue in Leatherhead on 13-16th April with closing submissions at County Hall on 27th May 2015. Representation at the public inquiry was as follows: Dr Ashley Bowes acted for the applicant and Jonathan Clay acted for the objector. I heard submissions (written and oral) from both counsel. Oral evidence was taken from 22 witnesses (including the applicant) who supported the application whereas the objector called only 2 witnesses. I will deal with this later. I am, however, indebted to both counsel for their assistance and helpful submissions. I am also grateful for the administrative support provided by Helen Gilbert of the registration authority.

5. I should mention at this stage that the applicant applied to amend her application on the issue of locality/neighbourhood. The claim under this head is now put in two ways. The applicant claims a locality comprising the polling district known as XB falling within the Leatherhead South ward of MVDC (this is the blue dashed line on App/1). Further or alternatively, she claims a neighbourhood comprised within the red line shown on App/1, again within the same locality. Very sensibly, Mr Clay raised no objection to the

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way in which the applicant chose to reformulate her case under this head and I recommend to the registration that she should be permitted to do this.

The earlier application

6. A2 contains an earlier application to register the same land as a new TVG. The applicant's Form 44 was dated 25/01/2012 and the application was made under section 15(2) of the CA 2006. This is because it was being asserted by the applicant that qualifying user was continuing at the date of the application (there was no permissory signage in place at this stage).

7. The earlier application was withdrawn. When she gave oral evidence about this application the applicant said that she had wanted to pursue it but had been told by a resident of Highlands Avenue that the land could not be developed in view of its protected designation which she was told was *'Strategy Open Plan'*. She was unsure what this meant so she spoke to an officer at MVBC who again told her that the land's planning designation was *'Strategic Open Plan'*. When questioned by me about this, the applicant said that the officer might have told her that it was *'Strategic Open Land'* rather than *'Strategic Open Plan'*, although she could not be sure which it was.

8. The upshot to this was that the applicant rang the Open Spaces Society (OSS) for advice (she is a member) and she spoke to a Ms Nicola Hodgson who is evidently a solicitor. The gist of what she was told was that the planning designation was a *'knock-out blow'* to her application in that it meant that the land was being used with permission. The applicant said that she then rang the registration officer (Helen Gilbert) and, having relayed what she had been told, was advised to write to the registration authority formally withdrawing her application which is exactly what she did. It is plain, in my view, that she took this step as a direct result of the advice which she had been given by Ms Hodgson at the OSS, advice which was, of course, erroneous as the land's planning designation could have had no effect on its registrability as a new TVG.

9. There is documentation within the registration authority's bundle dealing with these matters. On 20/08/2012 Ms Gilbert wrote to the applicant to inform her that she had received an objection to the application to register from solicitors (Capsticks) acting for

the Surrey PCT (RA/G39). On 11/12/2012 Ms Gilbert wrote to the applicant and to Abigail Condry at Capsticks stating that as she had:

'been advised that, as the land has been designated as Strategic Open Land in the Mole Valley Local Development Framework Proposals Map (2009), any use of the land for lawful sports and pastimes within the period of such designation has been "by right" and not "as of right". As such, any such use would not meet the requirements of section 15 Commons Act 2006.

The Senior Property Solicitor asks if Mrs Cargill wishes to continue with her application. By this email I am therefore asking you, Mrs Cargill, if you wish to take the positive step of withdrawing your application. Surrey Primary Care Trust may however object to that and I would need to know their view. The decision to accept a withdrawal lies with this council.

I should appreciate views from both of you by Monday 7 January 2013.

Your responses will then be put to this council's Senior Property Solicitor for her to make a recommendation to this council.

Regards

Helen Gilbert'

10. On 19/12/2012 another solicitor at Capsticks (Rachel Strong) wrote to Ms Gilbert (but not to the applicant) stating that the objector did not object to the withdrawal by the applicant of her application to register (RA/G40). On 4/01/2013 the applicant wrote to Ms Gilbert stating*:*

'Yes, I hereby withdraw my application, but understand SPCT may object, and SCC will make the final decision' (RA/G42).

It is clear from this email that the applicant was still very concerned about the future of the land. On 15/01/2013 Ms Gilbert wrote to the applicant notifying her (in effect) that the objector was not objecting to her withdrawal of the application (RA/G42). It was put to the applicant that a report would now be made *'to the Head of legal Services for her to consider the withdrawal of the application'*. It is known to me that the Head of Legal

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& Democratic Services at SCC has a delegated power to deal with unopposed applications to register land as a new TVG.

11. Ms Gilbert's report to Ann Charlton (as SCC's Head of Legal & Democratic Services) is dated 13/02/2013 (RA/G44). It contained a recommendation that the withdrawal of the application be accepted. The material parts of the report, for present purposes, read as follows:

'4. An objection was received from Capsticks Solicitors, on behalf of the owners of the land Surrey Primary care Trust.

5. Upon further investigation by the applicant it was discovered that the application land has been designated as Strategic Open Land in the Mole Valley Local Development Framework Proposals Map (2009). Any use of the land for lawful sports and pastimes within such designation has been "by right" and not "as of right" and would not meet the requirements of Section 15 of the Commons Act 2006.

6. In Oxford County Council v Oxford City Council [2006], the Court of Appeal held that an applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow the withdrawal. DEFRA's Guidance Notes for the completion of an application to register land as a village green states "the registration authority has discretion either to take no further action on your application, or to go ahead and determine the application you made, based on the evidence available".

7. In the Oxfordshire case the Inspector considered that it would be a waste of resources for a registration authority to process an application that the applicant did not wish to pursue unless there was some good reason to do so. There is no good reason as the Objector has consented to the withdrawal of the application.

8. The Commons Registration Officer is therefore placing this matter before the Head of Legal and Democratic Services for decision to accept the withdrawal of the application.

9. The Head of Legal and Democratic Services has the authority to take this decision under the Council's Scheme of Delegation as there is no dispute between the parties on the issue for decision.

CONCLUSIONS AND RECOMMENDATION

The evidence provided with this application, and the subsequent investigations, suggest that the criteria for registration has not been met. All parties are in agreement to withdraw the application. Therefore, Officers recommend that the withdrawal be accepted.'

SCC's Head of Legal and Democratic Services duly acted on this recommendation and, on 19/03/2013, Ms Gilbert duly notified the applicant that her withdrawal of the application had been accepted by the registration authority and accordingly she returned the application and supporting documentation (RA/G46).

12. Continuing with her oral evidence, the applicant spoke of a meeting of the Leatherhead Residents Association where, on informing members that she had withdrawn her application to register, she was told by another member (Tim Hall, who was also a county councillor) that the advice which she had been given *'wasn't right'*. Mr Hall gave her the name of Dr Ashley Bowes whom she later retained to act for her in these proceedings. Dr Bowes is an expert in this area of the law. The upshot was that she tried to reinstate her earlier application but it was too late as, by January 2013, permissive signage had already been erected which meant, of course, that any fresh application needed to be made under section 15(3). The applicant thought that the interval between the withdrawal of her earlier application and the time when she attempted to reinstate it was short.

13. When questioned by me about the withdrawal of the earlier application, the applicant said that in agreeing to withdraw she had relied on the advice which she had received from the OSS. She said that no one else gave her advice which was instrumental in her decision to withdraw

14. It seems that the trigger for the withdrawal was the erroneous advice received by the applicant from the OSS. The objector was no doubt pleased with this turn of events and Ms Gilbert clearly referred the matter for decision by the Head of Legal &

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Democratic Services on the basis that there was no dispute between the parties that the application should be withdrawn. If there had been any dispute (such as if the objector was insisting on the application being determined on its merits as a duly made application to register) it would have been referred for decision by the relevant regulatory body which, in this instance, was (and still is) SCC's Planning and Regulatory Committee, which would have been provided with a comprehensive report on the merits of the application by the registration officer. It is even quite possible that counsel's advice may have been obtained seeing as this was a well-supported application by a committed applicant and it is possible that the regulatory committee might have sought reassurance that the OSS were correct in the advice which they gave to the applicant which had, of course, only been given orally. The view of the objector's solicitors on the correctness of such advice would no doubt also have been canvassed by the registration authority. In short, the application to register would, in all probability, have been processed and determined by the registration authority as if it had in fact been a substantive, opposed application on the basis of the contents of the application form and the accompanying documents and written submissions on both sides.

15. It is undoubtedly true that an applicant has no absolute right to withdraw an application. It is clearly important that the registration authority has the power to insist on determining a duly made application so that the status of the land is clarified in the public interest. This was the view of Vivian Chapman QC in his capacity as the inspector in the *Oxford* case (also known as the *Trap Grounds* case), a view with which Carnwath L.J concurred at [2006] Ch 74 at [104]. Mr Chapman also considered that a registration authority did not have to proceed with an application which the applicant did not wish to pursue where it was reasonable that it should not be pursued. For instance, the landowner may reasonably wish to have the status of the application land determined. Without such determination there is always a risk that the status of the land would remain in limbo and at risk of a repeat application.

16. In this case the objector might well have alleged that the status of the application land had already been determined by the withdrawal of the earlier application and that this precluded the applicant from proceeding with the present application (presumably by reliance on a *res judicata* estoppel). This was not in fact alleged prior to or at the

outset of the public inquiry and, indeed, in his closing submissions Mr Clay made it clear that he was not alleging this.

17. In order to complete the narrative under this head (should it be necessary), on 16/03/2015 Capsticks wrote to Ms Gilbert asking for disclosure of the registration authority's Decision Notice and a copy of the legal advice obtained by the registration authority. In her email dated 18/03/2015, Ms Gilbert said, firstly, that she did not understand what was meant with regard to a 'Decision Notice and, secondly, that any legal advice obtained by the registration authority was subject to legal professional privilege and, if held, is (as she put it) *'exempt from disclosure'*.

18. On 27/03/2015 (which was less than 3 weeks before the start of the public inquiry) Capsticks wrote in these terms to the registration officer:

'The "Decision Notice" referred to in our letter dated 16 March 2015 is the notification to the parties confirming the Registration Authority's decision to consider the application at a Public Inquiry, and the reasons for that decision. We should be grateful if you would provide us with a copy of this document so that we may establish why the County Council has decided that this matter is to be referred to a Public Inquiry, having previously concluded on the basis of legal advice that the previous application did not meet the requirements of section 15 of the Commons Act 2006 because the land has been designated as Strategic Open land.

Your comments regarding the legal advice obtained by the Registration Authority are noted. However, we do not agree that the legal advice obtained by the Registration Authority is subject to legal professional privilege, and we therefore consider that it falls to be disclosed. If we are not provided with copies of any legal advice obtain (sic) in advance of the Public Inquiry, Counsel instructed by NHS PS will consider making an application to the Inspector at the start of the Inquiry for disclosure of the same.

We look forward to hearing from you.'

19. This then was the first time in which the objector's solicitors appeared to be placing in question the soundness of the current application and the decision of the registration authority to hold a non-statutory inquiry.

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20. The inquiry bundles were duly lodged on or about 30/03/2015 and in light of the documents contained in the registration authority's bundle at RA/G39-46, the objector would have been able to see how matters had unfolded between 20/08/2012, when the applicant was notified of the objection by Surrey PCT to her earlier application, and 19/03/2013, when the applicant was notified by the registration authority that her withdrawal had been accepted.

21. At the start of the public inquiry the objector's counsel renewed these requests for disclosure. After discussion on the matter, I indicated that I would be making the following recommendations to the registration authority:

(a) that they need not disclose to the objector any legal advice which had been given to officers in relation to the earlier application to register since it was subject to legal professional privilege; and

(b) that the current application to register could be determined as a free-standing application since the earlier application had been withdrawn and not determined on its merits and was accordingly not subject to a *res judicata* estoppel.

22. I also pointed out to Mr Clay that if he was going to claim that the withdrawal of the earlier application precluded the registration authority from proceeding to deal with the current application then he should indicate as much but, as previously indicated, no such contention was made.

23. There was one further matter raised by Mr Clay and that concerned his request that I hear evidence on oath. I informed Mr Clay that as a non-statutory public inquiry the registration authority had no power to insist that oral evidence be taken on oath.

The relevant statutory requirements

24. Section 15(3) of the 2006 Act enables any person to apply to register land as a TVG in a case where subsections 2, 3 or 4 applies.

25. Section 15(3) applies where -

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

(b) they ceased to do so before the time of the application but after the commencement of the section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).'

26. It is not in dispute that user *'as of right'* ceased before the application was made and that the application to register was made within two years (now only one year in light of recent reform) from the cessation of such use.

27. One then looks at the various elements of the statute.

'a significant number'

28. *'Significant'* does not mean considerable or substantial. What matters is that the number of people using the application land 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 (see *R (McAlpine) Staffordshire CC [2002] EWHC 76 at [71] (Admin).*

'of the inhabitants of any locality'

29. Where first used in section 15(3)(a) of the 2006 Act the term *'locality'* is taken to mean a single administrative district or an area within legally significant boundaries. This emerges very clearly from what Vos J (as he then was) said at [97(i)/(ii)] in *Paddico (267) Ltd v Kirklees Metropolitan Council [2011] EWHC 1606 (Ch)* whose findings on locality were affirmed on appeal at [2012] EWCA Civ 262. In short, village green rights require to be asserted by reference to a particular locality.

30. Because of the later debate on locality, it is worth mentioning that in *Paddico* at first instance (see [106] at [2011] EWHC 1606 (Ch)) Vos J thought that a Conservation Area could be regarded as a locality since it had legally significant boundaries.

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However, he rejected this outcome on the facts of the case as (a) the area had not been designated as such for the whole of the relevant 20 year period, and (b) users had not been predominantly from such area. Sullivan L.J rejected this finding on appeal at [2012] EWCA Civ 262 at [29]. He said this:

"I would respectfully disagree with the judge's view that the Edgerton Conservation Area could be regarded as a locality for the purpose of section 22(1) of the 1965 Act. It is true that its boundaries are legally significant, but they are legally significant for a particular statutory purpose, and those boundaries would have been defined by reference to its characteristics as an area of 'special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance' (see section 69(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990) – rather than by reference to any community of interest on the part of its inhabitants.'

At [62] Carnwath L.J (as he then was) also rejected the notion that a Conservation Area could be an original locality. He said that this:

'seems wholly impractical, since it is not a description of a community'.

31. I have mentioned this as the claimed locality in this instance comprises the polling district known as XB which is shown by the blue dashed line on App/1. Although the polling district is clearly an administrative district in one sense the question begs as to whether it is, in truth, a locality within the meaning of section 15(3) of the 2006 Act. I should perhaps also add that Carnwath LJ noted at [62] that where local government boundaries change, provided one has an historic district to which rights have become long attached, it may not matter if, subsequently, the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. The position would, however, be different if the relevant locality did not even exist at the start of the 20 year period.

32. I might also add under this head that although at [69] in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council [2010] EWHC 530 Admin* (known as the *'Warneford Meadow'* case) HH Judge Waksman QC appeared to accept that a ward

might well be a locality (since like a town or parish, it was a form of administrative unit) this was, however, founded upon a concession.

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33. I shall return to the locality issue later when I come to the parties' closing submissions as there was keen debate over whether a polling district is even capable of being a locality in law for the purposes of the 2006 Act.

'or of any neighbourhood within a locality'

34. A neighbourhood is a more fluid concept. The expression *'neighbourhood within a locality'* need not be a recognised administrative unit. A housing estate can be a neighbourhood (*McAlpine*). However, a neighbourhood cannot be any area drawn on a map: it must have a degree of (pre-existing) cohesiveness (*R (Cheltenham Builders Ltd) v South Glos DC [2003] EWHC 2803 para 85*). In the *Warneford Meadow* case at [79] HH Judge Waksman QC said that the area *'must be capable of meaningful description in some way'*.

35. The statutory test is fulfilled if a significant number of the users come from any area which can reasonably be called a neighbourhood even if significant numbers also come from other neighbourhoods. The view I take is that the claimed neighbourhood must be an area which is cohesive, identifiable and recognisable as a community in its own right. There must, I think, be something about the claimed neighbourhood (or at least its core area) which distinguishes it from the surrounding areas. Only the inhabitants of the relevant neighbourhood have recreational rights over the land.

36. It is also clear that the expression neighbourhood can mean either a neighbourhood or neighbourhoods and the neighbourhoods concerned do not have to be located within a single locality (*Leeds Group PLC v Leeds City Council [2010] EWCA Civ 1438* at [26] and [56-7] and *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* at [27]).

'have indulged as of right'

37. The traditional formulation of the requirement that user must be *'as of right'* is that the user must be without force, secrecy or permission. The rationale behind *'as of right'* is acquiescence. The landowner must be in a position to know that a right is being

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asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit the use.

38. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use had passed the threshold of being of sufficient quantity and suitable quality, to assess whether any of the vitiating elements of the tripartite test applied, judging the questions objectively from how the use would have appeared to the landowner. In short, the use must be to a sufficient extent since use which is *'so trivial and sporadic as not to carry the outward appearance of user as of right'* should be ignored (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335, 375D-E*).

39. The issue of *'force'* does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Nothing of the kind arises in this instance.

40. Use that is secret or by stealth will not be use *'as of right'* because it would not come to the attention of the landowner.

41. *'Permission'* can be express e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can also be implied but not by inaction (*R (Beresford) v Sunderland City Council [2004] 1 AC 889 at* [5]).

42. It is not alleged in this instance that use of the land was by virtue of an implied licence because of the way in which the land was managed over the years.

43. It is worthy of note in this case that between 30/01/1969 until 21/07/1993 (i.e. for around 7 months at the start of the qualifying period which began on 9/01/1993) the application land was vested in SCC following which title passed to the Secretary of State for Health. It is not, however, suggested in this case that the land had, at any time, been held by a public body for purposes which entitled the public to use it for informal recreation such as would preclude user as of right following *R (oao Barkas) v North Yorkshire CC [2014] UKSC 31*.

44. Although not an issue on as of right, Mr Clay raises the issue of statutory incompatibility (arising from *R (Newhaven Port and Properties Ltd) v East Sussex County Council [2015] UKSC 7*) to which I will return later.

'in lawful sports and pastimes'

45. The expression 'lawful sports and pastimes' ('LSP') form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user 'as of right' (see *Sunningwell at p.356F-357E*).

46. It is becomes necessary in some cases (and this is one of them) to distinguish between the use of paths or tracks as putative public rights of way rather than as qualifying LSP.

47. The law under this head was addressed by Lightman J in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [102/3] and in *R (oao Laing Homes Ltd) v Buckingham County Council* [2004] 1 P&CR 36 at [102-110] and in the *Oxfordshire* case at [2006] 2 AC 674 at [68]. There is also a very helpful analysis in the TVG report of Vivian Chapman QC in *Radley Lakes* (13/10/2007) at [304-305] who said that the main issue in such cases is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to the lesser right, i.e. a right of way.

48. Mr Clay specifically invited me to consider those passages within *Laing Homes* [102-105] which require me to discount user which would suggest to a reasonable landowner that users believed they were exercising a public right of way which would include situations (a) where a dog off the lead roams freely outside the footpath whilst its owner remains on the footpath; (b) where owners are forced to retrieve their dogs which have run away from the footpath; or (c) where walkers casually or accidentally stray from the paths without any intention of going onto other parts of the application land.

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49. The factual issues under this head which operate to preclude qualifying use are, as I see it, these: (a) whether any proven use of the land was in the nature of transit over defined routes, and/or (b) whether any use outside these defined routes would have been only occasional and/or ancillary to the exercise of putative rights of way over the land. I should also mention *Dyfed CC v Secretary of State for Wales* [1989] 59 P&CR 275 at 279 where it was said that there is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way.

'on the land'

50. The expression *'on the land'* does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period. The registration authority also retains a discretion to register part only of the application land if it is established that part but not all of the land has become a new TVG.

'for at least 20 years'

51. The relevant period in this case is 9th January 1993 – 9th January 2013. No one is suggestion interruption in this case.

Procedural issues

52. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

53. In *Regina (Whitmey) v Commons Commissioners [2004] EWCA Civ 951* Waller L.J suggested at [62] that where there is a serious dispute, the procedure of *'conducting a non-statutory public inquiry through an independent expert'* should be followed *'almost invariably'.* However, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by judicial process. There

is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However the registration authority must act impartially and fairly and with an open mind.

54. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area.

55. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

56. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007 Regulations follow closely the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under section 13 of the 1965 Act. In a small number of pioneer authorities The Commons Registration (England) Regulations 2008 apply.

57. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not *'duly made'*, it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

58. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be *'properly and strictly proved'* (*R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111* per Pill LJ, and approved by Lord Bingham in *R (Beresford) v Sunderland City Council [2004] 1 AC 889, at para 2*).

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Consequences of registration

59. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land.

60. Upon registration the land becomes subject to (a) section 12 of the Inclosure Act 1857, and (b) section 29 of the Commons Act 1876.

61. Under section 12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede *'the use or enjoyment thereof as a place for exercise and recreation'*.

62. Under section 29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any *'disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green'*.

63. Under both Acts development is therefore prevented and the land is effectively blighted.

Description of the application land

64. I visited the application land unaccompanied on 31/03/2015. I made a longer accompanied visit on 16/04/2015.

65. We are concerned with a 2.90 acre parcel of woodland containing a range of species of both deciduous and evergreen trees. The land is largely unkempt and run down and it is obvious that there has been very limited management over the years. Despite this, the main tracks are free of obstruction and are easy to walk on which is indicative of prolonged heavy use.

66. A number of fallen trees remain in situ on the ground and in some cases have done so for many years. It seems probable (and there was evidence about this) that there were more trees at one time than exist today. There are, for instance, a large number of much younger, self-seeded, trees scattered around the wood in places where other,

much larger, trees have fallen. Some trees have even been felled recently by the objector as they presented a risk to health and safety.

67. There are, as I say, a mix of trees, some quite mature, others less so. Most of the mature standing trees are extensively covered by ivy which are certain to contain wildlife habitats, as will the fallen trees. Further away from the tracks the undergrowth is fairly dense and, in one or two places, is largely impenetrable. It is, however, possible to leave the tracks in order to wander generally over most of the land although there is little evidence that people have done this in those areas where the undergrowth is dense which is the case on the eastern margins of the wood where it adjoins the hospital and school sites.

68. The application land is criss-crossed by tracks. At the time of my visits the land was dry and, being well-used, the compacted earth made use of the main tracks (of which there are two, if not three) a relatively simple affair. There is a single track leading into the wood at the southern end of Leach Grove which continues on the eastern side until it joins the public footpath (FP 138 – see O1/tab/2/39) running east-west between Highlands Road at its western end to Fortyfoot Road at its eastern end. Other subsidiary tracks leave the main track at various points and it is obvious that, over time, the routes of the various paths chop and change as and when trees fall down blocking paths. There are three openings onto the public footpath beyond which there are the allotments. It is also evident that there are openings or gates into the rear gardens of some, or indeed even all, of those houses in Highlands Avenue which back on to the wood.

69. In my view, it is probable that around 60-70% of the application land is reasonably accessible for informal recreation of varying kinds. Upon reflection, I think my estimate (given during closing submissions) of around 75% was too high. In his closing submissions Mr Clay said that he was *'genuinely astonished'* that I should arrive at such a high percentage. He thought that only *'less than 10%'* of the wood was accessible for walks, with or without dogs. I disagree. If one is looking only at the extent of the paths themselves then Mr Clay may be right, but it seems to me that one thing is indisputably clear and that is that there is ample space to walk around within the wood outside the tracks. Whereas in the case of the major and other tracks and/or

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in the open or less overgrown areas away from the tracks, this would be relatively straight-forward, in my view, even the more densely vegetated areas elsewhere would, to a lesser or greater degree, be available for use to the hardy walker/explorer. However, it was certainly not my impression from what I was able to observe that the wood is being used mainly as a place of transit as there is clear evidence of use outside the tracks. The question whether the evidence proves that recreational use within the wood has been sufficiently general or widespread to amount to recreational use of the land as a whole is something which I will address later.

70. A total of 72 colour photos taken by the applicant accompanies her written evidence at A1/tab/D6. These photos were taken between 2010-14 and the applicant provided a very helpful index which follows her EQ at A1/D6.1a. The main tracks are clearly well-used but it is, as I say, still possible to venture off the tracks into a number of areas (some more open than others) where it would be relatively simple to wander around, with or without dogs, or for the purposes of children's play or watching wildlife. Indeed, someone has constructed earth humps on the south-west side close to the footpath although, having said that, I did not get the impression that they had been much used by children on bikes lately. These humps are said to have been constructed by local children whose use of the wood for these purposes seems to have been of short duration as it was objected to by local inhabitants.

71. The tracks running through the wood provide a convenient pedestrian link between Leach Grove and a number of locations to the south and south-east of the application land, including the allotments, the former St Mary's Church of England First School ('St Mary's Primary School'), Woodlands School, the Beeches care home, the Scout Hut, the Mencap building and the residential streets of Beech Holt and Tanners Dean. It is, I think, obvious that the wood is being used both as a place of transit and for informal recreation. It is certainly an attractive location for walks, with or without dogs, and for children's play and, as I say, the majority of the wood would accommodate this. It seems to me that the unused areas are integral to the enjoyment of the wood as a whole and form part of the function and attractiveness of the area.

72. There is no lighting or bins for dog faeces within the wood. Remarkably, fly tipping and the dumping of household and other wastes has always been minimal although there

was some evidence involving the dumping of garden waste and rubbish, particularly at the rear of the properties in Highlands Avenue some or all whom, as I say, have access directly into the wood. I suspect that this is more because local people have been enthusiastic about keeping the area clean and tidy rather than because of any plan of action on the part of the landowners from time to time to manage the land and thereby facilitate its use by local inhabitants for informal recreation.

73. On or about 9/01/2013 the objector (in the name of 'NHS Surrey') erected the below-mentioned permissive signage at each point of access/egress into the application land:

Leach Wood

This land is privately owned.

The public have permission to

enter this land on foot for recreation but this

permission may be withdrawn at any time.

Estates Management 01932 723180

74. I should add finally that I have been assisted by a number of photos some of which were taken after the end of the qualifying period. Those taken by John Hindson were taken in 2012, evidently as a result of the first TVG application.

History of ownership of the application land (including planning history)

75. Abigail Condry of Capsticks put in a very helpful statement setting out the relevant conveyancing, legislative and planning history of the land which I am content to adopt. This will be found at O1/43. Further information about the history (including the planning history) of the area emerged during the public inquiry and the accompanied view included a visit to the area of land to the east of the wood and since this area falls within the perimeter of the claimed neighbourhood I think it would be sensible if I dealt with this first.

76. The Leatherhead Hospital site (which included the application land) was transferred by the Trustees of Leatherhead Hospital to the Minister of Health in 1948 under the

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National Health Service Act 1946. By virtue of the Secretary of State for Social Services Order 1968 SI No.1699 of 1968, title to the land along with other land vested in the Secretary of State for Social Services.

77. Under a conveyance dated 30/01/1969 the Secretary of State for Social Services sold a parcel of land (which included the application land) on the Leatherhead Hospital site to SCC. This is the land coloured pink and hatched red (which was approximately 7 acres) shown on Appendix/2 ('App/2'). Recital (d) to this conveyance shows that the land was surplus to the requirements of the Secretary of State. Mr Clay pointed out to me that this conveyance contained a term whereby the Secretary of State agreed to indemnify SCC in the event that owners/occupiers of those premises in Highlands Avenue had acquired rights of way over the land.

78. The north-west corner of the land conveyed (i.e. the land hatched red on App/2, which comprises a portion of the wood nearest Leach Grove) was subject to a restrictive covenant for the benefit of the adjoining hospital land which limited the height of any development on the pink parcel to no more than a single storey.

79 An extract from SCC's Property Register (which will be found at O1/AZC/11) discloses that the land was acquired under general powers but that on 2/02/1971 it was appropriated *'from Finance to Education, Health & Social Services'*. The same document also discloses that the land was required for the purposes of a *'Proposed Hostel for Confused Elderly & Proposed Junior Training Centre'*. In accordance with the provisions of section 24 of the Town and Country Planning Act 1959, the Property Register also shows that adjustments were made in the internal accounts of the authority in order to reflect the attribution of departmental responsibility for the incoming land asset for which SCC had paid £100,000 (vis: Education - £11,500; Health - £37,500 and Social Services - £51,000). It is though plain that the written records do not show that the pink land, or any part of it, was being acquired for or had otherwise been later appropriated by SCC as recreational open space.

80. Further researches at the Surrey History Centre in Woking have resulted in a note from Matthew Piggott (an officer at the Centre) of the minutes of the Finance Committee dated 9/02/1971 which stated that land at Fortyfoot Road in Leatherhead had been acquired for £100,000 *'on behalf of Education, Health and Welfare and*

Police Committees' (although the Police Committee had withdrawn its interest). It was said that the land required for the School was 0.80 acres and that the Home for the Confused Elderly and Special Training School extended to 3.55 acres which, since the entire holding amounted to some 7.10 acres, meant that the remainder extended to 2.75 acres on which the Health Committee were proposing to build a Health Centre. The minutes say that the *'appropriations approved by the Estates Committee include the whole 2.75 acres (£37,500) as a site for a Health Centre'.* This material will be found at O1/AZC/11/1.2.

81. The land acquired by SCC in 1971 was, of course, only partially developed. No Health Centre was ever built (this proposal was evidently abandoned in or prior to 1983) and the 2.90 acre parcel, which now comprises the land, remained as open space.

82. Under the National Health Service Reorganisation Act 1973 the services provided by hospitals and local authorities were brought together under the umbrella of Regional Health Authorities with services at a local level being run by Area Health Authorities.

83. Under section 16(1)(a) of the 1973 Act, all property held by local authorities wholly or mainly for the purposes of their *'health functions'* was vested in the Secretary of State. This would have included the land.

84. In 1993 the application land was duly transferred by SCC to the Secretary of State for Health. The conveyancing documentation comprised a Memorandum of Vesting dated 21/07/1993 and a plan dated 20/05/1992 on which the application land is coloured green. This plan will be found at Appendix/3 ('App/3').

85. App/3 is useful in that it shows that as at the date of the plan in May 1992 there was a circular path or paths running around the wood (with access into Leach Grove and the public footpath) and a complex of public and other buildings on the western side of Fortyfoot Road. This development currently comprises:

(a) on the northern side (separated by amenity green space):

(i) Woodlands School (which I understand to be a school for children with special needs);

(ii) a publicly-run care home known as The Beeches;

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(b) on the southern side:

(iii) St Mary's Primary School (which has recently closed down and its premises taken over by Woodlands School);

(iv) a building housing the 1st Leatherhead Scout Group;

(v) Fortyfoot Hall which are used by a playgroup and the local Mencap group;

(vi) residential development in the gap between the Scout building and Woodlands School comprising the streets Tanners Dean and Beech Holt.

86. On the east side of Fortyfoot Road we have Fortyfoot Recreation Ground on which there are children's play facilities and a laid out football pitch with woodland on its south-east side. I should also mention that we were told by John Hindson that the reference on App/3 to *'Plan (um)'* signifies that the path or paths are *'unmaintained'*. Mr Hindson is also right when he says that the path marked on App/3 which traverses the wood from east to west is no longer evident on the ground

87. The 1993 Memorandum expressly stated that the land had been transferred to the Secretary of State for Health under the 1993 Act and the Transfer of Functions (Health and Social Security) Order 1988 with effect from 1/04/1974.

88. Under the National Health Service Act 1977 the Secretary of State would have held the land under section 87 which then provided that the Secretary of State could acquire any land, either by agreement or compulsorily, and any other land required by him for the purposes of the 1977 Act.

89. Section 1 of the 1977 Act imposed a duty on the Secretary of State:

'to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement – (i) in the physical and mental health of the people of those countries, and (ii) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act.'

90. By section 8 of the National Health Service Community Care Act 1990, the Secretary of State was empowered to transfer property owned by him to an NHS Trust for the purpose of enabling it to carry out its functions.

91. By section 5(1) of the 1990 Act, NHS Trusts were established for the purpose of assuming responsibility for the ownership and management of hospitals and to provide and manage hospitals or other establishments or facilities which had previously been managed or provided by Regional, District or Special Health Authorities.

92. Ms Condry's statement tells us that on 20/09/1993 the Secretary of State transferred the Leatherhead Hospital Site (including the application land) to Epsom Health Care NHS Trust by way of a transfer order of the same date. The area of land transferred is shown edged red on the plan at Appendix/4 ('App/4').

93. The Epsom Health Care NHS Trust had been established on 21/12/1990 pursuant to the Epsom Health Care National Health Service Trust (Establishment) Order 1990/2414.

94. From 1/04/1991, the Epsom Health Care NHS Trust's functions were to: (a) own and manage hospital accommodation and services at Epsom District Hospital and associated hospitals; and (b) to manage community health services provided from Epsom District Hospital and to own the premises there from which those services were to be provided along with any associated premises.

95. Epsom Healthcare Trust NHS Trust was dissolved on 1/04/1999, and a new trust, the Epsom and St Helier National Health Service Trust, was established with effect from the same date and to whom the former Trust's land assets were transferred.

96. The Epsom and St Helier National Health Service Trust was established in 1999 by the Epsom and St Helier National Health Service Trust (Establishment) Order 1999/848.

97. Leatherhead Hospital (including the land) was, on 1/04/2002, transferred to the East Elmbridge and Mid Surrey PCT to whom the former Trust's land assets were again transferred.

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98. PCTs had been established by the Secretary of State under section 16A of the National Health Service Act 1977 for the purposes of providing and commissioning primary healthcare services. Pursuant to Schedule 5A, para/12(1), PCTs were empowered to do anything which appeared to them to be necessary or expedient for the purposes of, or in connection with, the exercise of its functions, including acquiring and disposing of land or other property. The National Health Service Act 2006 updated the provisions relating to the functions and exercise of those functions by PCTs.

99. Pursuant to the Primary Care Trusts (Establishment and Dissolution) (England) Order 2006 (SI No.2006/2072), the East Elmbridge and Mid Surrey PCT merged with a number of other local PCTs to form the new Surrey PCT to whom the former Trust's land assets were, as before, transferred.

100. With the abolition of PCTs, Leatherhead Hospital (including the application land) was, on 1/04/2013, transferred to the objector under arrangements contained in the Health and Social Care Act 2012 and in the Surrey PCT Property Transfer Scheme 2013.

101. In light of the foregoing, after 1974 the land was, with other land, held by bodies discharging NHS functions and for these and no other purposes.

102. It is then plain (as Mr Clay correctly says in his closing submissions) that:

(a) after July 1993 the land was comprised within a single freehold title which included the hospital site (see App/4);

(b) in the discharge of their statutory health functions after July 1993, none of the foregoing NHS bodies had power to permit land to be used by the public for the purposes of LSP;

(c) throughout the relevant qualifying period, both the land and the hospital site would have been held for (as Mr Clay puts it in his closing submissions at [62]) *'health related purposes'* which, for the sake of convenience, I will refer to as the 'NHS functions' of the various NHS bodies identified above.

103. At [64-68] of his closing submissions, Mr Clay provides a very helpful summary of the NHS functions of the Secretary of State for Health and of the NHS Trusts and PCTs. In the case of the Secretary of State, his powers, duties and functions are defined in a

series of NHS Acts commencing with the National Health Services Act 1946. His functions included the provision of hospitals and a whole range of specialist services. Under section 211 of the National Health Services Act 2006, the Secretary of State can acquire land and other property required by him for the purposes of the Act and, under section 211(3), use such land for the purposes of any of the functions conferred on him by virtue of the Act.

104. NHS Trusts were established initially under the National Health Service and Community Care Act 1990 to create an internal market within the NHS for the provision and commissioning of health services. Between September 1993 and October 2006, the land was, as has been indicated, held by a series of NHS Trusts which managed and operated the hospital site in accordance with its NHS functions.

105. After 2006, the land and hospital site was owned by PCTs which were, as I say, established by the Secretary of State as administrative bodies, with responsibility for commissioning primary, community and secondary health services from providers. They had the power to acquire and dispose of property and were authorised to do anything which they considered necessary or expedient for the purposes of their functions (Schedule 3, Part 3, paragraphs 15(1)&(2) to the NHS Act 2006). The powers and functions of PCTs under the 2006 Act included the provision of health and pharmaceutical services, the provision of premises for those purposes and for the use of persons providing those services and the preparation of plans to improve health and health care. PCTs were abolished in April 2013 by the Health and Social Care Act 2012.

106. I have dealt with the conveyancing history of the land and the fact that it has been held for NHS functions in some detail in light of the case advanced by Mr Clay on statutory incompatibility arising out of the recent decision of the Supreme Court in the *Newhaven* case to which I will return once I have dealt with the evidence.

107. I turn next to the relevant planning history which Ms Condry has also very helpfully identified in her statement.

108. At some point in the early 1980s a revision of the Local Plan for the area allocated the land as a site for housing. However, as a result of the efforts of a local action group

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(*'The Leach Grove Wood Protection Group'*) this policy was amended by MVDC in that Policy EV3 of the Leatherhead Local Plan, adopted in 1983, provided that the land was, along with other land shown on the Proposals Map, allocated *'for community and recreation uses'* and that MVDC would *'resist proposals which would disturb or displace any of the existing activities in this area'* (O1/tab/3/72-73).

109. The removal of the land for potential housing supply was objected to by SCC but the Inspector dealing with objections to the Local Plan nonetheless supported the decision of MVDC (O1/tab/3/75-76). The Inspector noted in 3.18 of his report that:

'such a fine area of woodland must be almost unique in its survival amidst development, and what is even more surprising, considering that access is not restricted, and the footpaths are well used, is the apparent lack of vandalism, litter or dumping so commonly found in urban open spaces'.

Much the same can be said today, such is the importance of the wood to local people.

110. Under the Mole Valley Local Plan (2000) (parts of which still remain in force), the land is currently designated as *'Strategic Open Land within Built-up Areas'* (policy ENV20). This means that development *'will not normally be permitted other than for purposes ancillary to the use of the land for outdoor recreation appropriate to the character of the area'*.

111. Since adopting the 2000 plan, MVDC adopted the Mole Valley Core Strategy in 2009. Policy CS 16 of the Core Strategy seeks to safeguard open space, sports recreational facilities from development. Any proposal for development will need to be assessed against Planning Policy Guidance Note 17 which is restrictive of development. A New Local Plan is evidently in preparation.

112. Before leaving Ms Condry's evidence, I should mention that, when the applicant's locality claim relied on the polling districts of Leatherhead South 1 and 2 within the South Leatherhead ward of MVDC, she produced a very helpful plan (which she has since modified) showing not only the boundaries of these polling districts but also an outline of the claimed neighbourhood (O1/tab/3/86A).

113. On this plan Ms Condry has also plotted the addresses of those who support the case for registration. I was sent a key to this plan by way of an email dated 20/04/2015 which I have added to the objector's bundle at O1/tab/3/86B. The red line on the modified plan represents the claimed neighbourhood. The blue and orange (numbered) dots are those who provided evidence questionnaires. The green dots are the addresses of those who provided evidence questionnaires but who have since moved out of the area. The red circles around the dots are the addresses of those who provided an EQ, a witness statement and who also gave oral evidence to the public inquiry. Those dots, which have been initialled, identify those witnesses who gave both oral evidence and provided a witness statement but who did not provide an EQ. I consider this to be a very helpful document which must have involved a good deal of work. What it does show, at a glance, is that if the claimed neighbourhood is a qualifying neighbourhood in law then the users of the land are widely distributed throughout such area.

The claimed neighbourhood

114. I have been around the claimed neighbourhood and the surrounding areas, partly on foot as well as in the car. I have also revisited the area as a desk top exercise on *Google earth* street view which is now an indispensable tool in these cases. I am confident that I have, for present purposes, seen enough of the claimed neighbourhood and the surrounding areas.

115. If one refers to App/1 one can see that we are dealing with a roughly triangular shaped area bounded by (running anti-clockwise) (a) Epsom Road (B2122) where it leaves the roundabout on the Leatherhead bypass; (b) The Crescent; (c) Church Street; and (d) Church Road until the road forks onto Highlands Road (B2033); and (e) thence into Headley Road until it meets the bypass. Dr Bowes clarified that the red line boundary is intended to be a mid-point in the affected carriageways.

116. Within the neighbourhood there are a number of community buildings/facilities which I have already identified in paragraph/85, in addition to the recreation ground at Fortyfoot Road and the Church Hall on the north side of Church Road, all of which are used by individuals from a much wider area.

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117. For reasons which I do not understand, whereas the Church Hall lies within the claimed neighbourhood, the Parish Church of St Nicholas & St Mary, which is just across the road, falls just outside it. Nor are there any shops or convenience stores or the like within the claimed neighbourhood other than, within The Crescent, where one finds two takeaways, an opticians, a dental practice and a health shop of some description, all of which are bound to be frequented by people living within the town as a whole. The same applies in the case of the estate agents located on the corner of Church Street and Church Road. There is, for instance, no parade of shops which could be said to mainly serve the needs of an identifiable local community within the town of Leatherhead.

118. The land lies roughly in the middle of the claimed neighbourhood and is, I think, a cohesive feature, but possibly the only one within the claimed neighbourhood. I suspect that most people using the land, either as a place of transit or as a destination in itself for informal recreation, live in the nearby streets and would include many living in the streets to the south of Highlands Road which appear to me to comprise a number of separate developments of mainly detached dwellings, some of high value. The town of Leatherhead seems to be expanding in the gap between Highlands Roads and the bypass where there has been much residential development in recent years. One witness said that this was the *'posh area'* of town.

119. The major features in the gap between the north of the land and the railway line are St John's School and its extensive grounds, the two sports grounds on either side of Garlands Road, the Catholic Church of Our Lady and St Peter and Trinity Primary School. On the north-west side of the land we have the town centre which is, I think, mainly pedestrianised and, on the west side, we have, downslope, the River Mole (dominated by a heavily wooded weir area mid-stream) and the Bridge Street crossing. I have to say that without a much closer examination of the central area of Leatherhead (perhaps with the assistance of expert evidence) I have found it very difficult indeed to identify separate neighbourhoods within the town (in other words, where the characteristics of one area distinguish it from surrounding areas) as the area as a whole contains a good deal of residential and other development of varying ages and styles which are not specific to the claimed neighbourhood although, in light

of the evidence I heard, I do not doubt that within it, or at least in parts of it, there is a local community spirit.

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Objector's other evidence

120. Before I turn to the applicant's evidence, I should deal with the written and oral evidence of **John Hindson** who was the objector's only other witness. I should mention here that I am particularly grateful for Ms Condry's own typed-up note of Mr Hindson's oral evidence.

121. Mr Hindson said that the land only came under his *'jurisdiction'* in January 2012 (he could not speak for the condition of the land before his first visit in February 2012). In his statement at O1/tab/2/12, he describes himself as the *'FM Service Delivery Manager for NHS Property Services (South East Region)'*. My understanding is that this means that he oversees the management of the objector's land interests in this region following the abolition of the PCTs on 1/04/2013. Mr Hindson had previously been the Estates Manager for Surrey PCT.

122. It was Mr Hindson's evidence that he was responsible for managing the wood and he cited as examples of this dealing with encroachments and the removal of unsafe trees and cleaning up after fly-tipping had taken place. He said that if the main paths were overgrown the objector would cut them back although this is something which he or men working for him also did. He asserted, however, that, as a wood, it *'should be allowed to grow naturally'* and that the objector did not manage it as though it were *'like Kew Gardens'*. He said that the objector's management is reactive and that it would be more likely to receive complaints if it maintained the wood to a higher standard. He said that on other sites they might even fence off to prevent public access altogether but not so in the case of the wood which he had been told by the former PCT's solicitor, Sally Barham, the public had a right to walk through.

123. It seems that when he visited the wood if he saw anything which caused him concern he would mention it to his Environment Manager (Derek Bennett). If it was something small it would be dealt with in-house within their Landscape Department. If it was serious then they would engage outside contractors. He did mention seeing (as he put it) a tepee-like structure made of wood which he thought was an *'impressive structure'*

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- *'It was more of a hide than a den - It was about 8 feet tall, 3 feet wide and 2 feet in depth. It could have been something to sit in. Not a children's den. It looked like an adult had built it'.* Mr Hindson said that it was a *'bit of fun'*. Whatever it was, they dismantled it. I am not sure whether this occurred within the qualifying period.

124. Mr Hindson was, therefore, clearly aware that people were using the wood which was unfenced. He did say though that he had never actually seen any children playing in the wood although he accepted that this had happened but not on a regular basis. He mentioned what he described as evidence *'that children had been there'*, citing bike tracks on the main path (or paths) and bike ramps which he dismantled (a *'bike jump using planks of wood' - there was no evidence that the jumps were used - Others had been filled in'*). He accepted that there were now more open areas within the wood (i.e. where trees had come down) where children could play although this was not something which he had ever encouraged (*'After the holiday periods you get a number of things left on site'* which had to be removed - recently he had even removed a sofa and chairs). He says that he saw dog-walkers and others passing through the wood on the main track (with their dogs in the undergrowth) which, in his statement, he describes as merely walking on the paths as opposed to the use of the wood itself for LSP. Mr Hindson recorded that he made 13 visits to the wood before January 2013, although he thinks that he would have visited more frequently than this. Mr Hindson says that each of his visits would have involved a 5-10 minute walk around the wood (*'I usually do two full footpaths - I didn't do that big a walk - It tended to be early - about 6am to 10am'*). In his statement, he says that he observed the paths through the wood being used by local residents on their way *'to a number of local facilities adjoining the wood'*, namely the allotments, the recreation ground and St Mary's Primary School before it closed down. In his oral evidence, he said that he had seen *'dog-walkers and the occasional person going straight through'*. He said in his oral evidence that his visits were mainly to prevent squatters getting into the wood.

125. Although unsure of the date (but accepting that it might have been in late 2012/early 2013, i.e. following the first TVG application), Mr Hindson recalls being phoned by the applicant whom, he claimed, only spoke to him about the ivy on the trees. He says that this would have occurred before the felling of the three trees close to the rear boundary of a Mr Cuello who lived in Highlands Avenue and into whose garden a

branch had fallen. For her part, the applicant is sure that she spoke to Mr Hindson about trees being felled in the wood although she also remembers speaking to him about the ivy as well in the same call. Mr Hindson thinks that she would have spoken to Derrick Bennett about the trees being felled at the top end of the wood (they felled three trees and cut back another two - *'We try not to cut down a tree if it is not necessary'*). He could only recall speaking to the applicant about the ivy. In his statement, Mr Hindson has produced bills showing that contractors were involved in cutting up/felling/pruning back operations in the wood in 2013-14 after the end of the qualifying period.

126. When asked about the permissory signage which was erected in January 2013, Mr Hindson said that although he had been asked to erect signs saying that the public could access the wood, his concern was *'more about health and safety risks'* (as he also put it: *'I was concerned to ensure the people's safety was also considered'*) and that, as far as he was concerned, the signs did not restrict access and that the public were merely being allowed to use the wood at their own risk. He says that, as far as he was aware, the signs were nothing to do with the previous TVG application but with health and safety. This was a somewhat bizarre answer in light of the actual content of the January 2013 signage and the earlier withdrawn application. Exactly where health and safety came into it is anyone's guess. At any rate, Mr Hindson said that he was *'always made aware that it'* (i.e. the wood) *'was a public area - people could go through the woods. I never stopped anyone. If they did not have permission to do so, the wood would have been fenced off'*. When asked who had made him aware that people were allowed to go into the wood he said it was Sally Barham, the PCT's former solicitor, whom he said had told him that *'people could go through'*. All this is clearly strong evidence of acquiescence on the part of the landowner.

127. I do not attach a great deal of weight to Mr Hindson's evidence. Quite apart from his explanation for the signage, I am not convinced that he spent much time in the wood and I rather think that his periodic visits are unlikely to have been prolonged affairs. His diary at O1/tab/2/14 shows that he visited the wood on 13 occasions (no doubt during ordinary working hours – and his visits were usually once a month and sometimes twice a month) and his 5-10 minute walk around was, in my view, very probably insufficient time for him to draw firm conclusions about the general use of the

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wood by local inhabitants. However, I doubt whether any of this matters very much as I agree with Dr Bowes that it does not matter very much if he saw no one engaging in LSP in the wood on his visits as the law does not require land to be in constant use for LSP in order to justify registration.

The applicant's evidence

Oral evidence

128. Although I will endeavour to summarise the evidence that I heard, what follows is not intended as a verbatim account, or even necessarily a complete account, of the evidence given by the applicant's witnesses at the public inquiry. It is simply a summary of some of the more salient issues dealt with in the evidence, particularly those that form the basis of my findings of fact. The summary is simply intended to be a sufficient account of the evidence for the registration authority to understand the reasoning behind my conclusions.

129. **Mrs Cargill (the applicant)**

(a) The applicant, lives at 54 Windfield. She claims to have used the land for informal recreation since 1991. Her EQ is at A/D.6.1a, along with the 72 photos which she has put in evidence to which reference has already been made. Mrs Cargill also produced a number of additional documents during the course of the public inquiry. I marked these documents A-H which are behind her evidence within A1. The documents A/B/C/D and F were utilised by her in the course of obtaining written evidence for use at the public inquiry as well as advising potential witnesses what to expect if they gave oral evidence. Document A is not quite the same as Document B since it advertises what is described as a pre-hearing get together on 9/04/2015.

(b) Documents A/B were accompanied by a locality/neighbourhood plan Documents A/B went out together after my directions had been issued on 26/02/2015. The plan would have been Document E which not only shows the boundaries of the currently claimed neighbourhood on App/1 but also discloses a different locality comprising polling districts 1 and 2 within the Leatherhead South ward of MVDC (which was in accordance with the claim made in the Form 44 at Box/6). Those responding were invited to agree to the boundaries of the claimed neighbourhood, failing which they

were invited to suggest an alternative. The applicant cannot be sure that those responding received a colour copy of the locality/neighbourhood plan at Document E but, even if they did not, the boundaries of the areas in question would have been apparent on the face of the uncoloured plan.

(c) Document C was a document entitled: *'Reminder of Importance of Neighbourhood & Locality'*. She specifically said at the top of the document that it was *'to help refresh your memory'*. The new plan (App/3) also accompanied this document to prospective witnesses by reminding them that the locality had been changed to polling station XB (within the same ward of Leatherhead South). By the time this statement had come into being it would seem that most of the statements had probably already been put in (*'Most of you have covered neighbourhood in your statements'*). The note (which was evidently circulated to her oral witnesses shortly before the start of the public inquiry) encouraged them to reflect on the correct neighbourhood: *'Establishing a Neighbourhood is possibly the barrister's biggest challenge'*. The note ended with a revised date for a get together at the house of a witness, Susannah Golding, on Sunday 12/04/2015 which was the day before the start of the public inquiry. The applicant accepted that by Document C she was trying to prepare her witnesses. As she put it, *'I wanted them to think through their statements again'*. She said that she was trying to prompt them to come to the inquiry *'and to be prepared'*. She denied, however, that she was prompting or coaching her witnesses when it came to the evidence they should give when it came to the issue of neighbourhood.

(d) Document D is headed: *'Conduct & Guidelines for Witnesses at the Hearing'* which contained guidance on how to address the Inspector, to keep *'calm, cool and polite'* and to take care when giving answers to questions. We should in fact have started with Document F (which was the first to go out) but it was produced late. The document is dated 11/07/2014 and is headed: *'Dear Leach Grove Wood Supporters'*. The context of this document was the decision of the registration authority to hold a non-statutory inquiry and the document invited 20 witnesses to come forward to provide written evidence for use at the public inquiry. The document also contained an exhortation to local inhabitants to provide financial support to help with the costs of instructing a barrister. Those responding were invited to fill in the form where

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requested and to return it either to the address of the Leatherhead Residents' Association or to the applicant, who dealt with these forms in her oral evidence.

(e) The applicant said that she considered it her responsibility to prepare witnesses for the public inquiry *'to the best of my ability'*. She wanted to reassure her witnesses *'without putting words in their mouth'*.

(f) Documents G/H deal with the Highlands Road allotments. We have the names and addresses of a number of allotment holders in June 2001 and as at 18/10/2014. The applicant also gave oral evidence about this by identifying how many allotments were taken up in 2014 and the number of allotment holders living within the claimed neighbourhood.

(g) Pulling all this material together, it appears that in 2014 there were a total of 51 allotments of which only 49 were taken up. Of the 49 allotments, 15 were taken by those living within the claimed neighbourhood. The numbers change if one allows for the actual numbers of people involved as a number of allotments are held by couples. The applicant said that a total of 57 people are involved with allotments (i.e. as sole or joint allotment holders) whether living inside and outside the claimed neighbourhood, of which 27 (or 47%) lived within the claimed neighbourhood. This percentage obviously assists the case on cohesion. In the case of the June 2001 particulars within Document H, 37 individuals were identified by the applicant as allotment holders of whom 27 (or 73%) lived within the claimed neighbourhood.

(h) The applicant's statement will be found at A1/D6. She and her husband (who are not dog walkers) have used the wood for recreation ever since they moved into the area in 1991. I think they may even have two allotments (Plots 20B/21B). There is no pattern to their use which mainly involves walks for pleasure but it is frequent. She says that it may average out in her case at around once a fortnight. Use is not so frequent in the winter. She says that she sees children playing there along with mothers with prams. She recalls groups of boys riding cycles on the jumps (in two locations – one still very evident, the other very much less so in the central area which she pointed out to me at the accompanied site visit) and others simply watching what was going on. She said that she used to clear up the large amount of litter which they left behind, as did other locals. She seemed to recall that this occurred in 2009 when, as she put it, there were

three groups of boys making their jumps *'everywhere'*. She said that *'we were getting to the stage where we couldn't use the paths anymore as the boys were taking it over'*. This is hardly indicative of LSP and was probably neither prolonged nor otherwise had the requisite quality of qualifying use.

(i) The applicant objected to the assertion in cross-examination that *'there are commonly no people in the wood'*. She said that there was a 60/40 or 70/30 per cent chance that *'you would meet somebody in the wood'.* She accepted that she did not always see people in the wood.

(j) The applicant sought to justify her case on neighbourhood by saying that, bounded by the roads (see App/1), the area has *'a community and village feel to it'*. She says that a combination of the public buildings mentioned above and green space *'fosters a quiet but strong community spirit'*. She thinks of the claimed neighbourhood as her *'immediate neighbourhood, and that, at a guess, say 50-60% of my waking time is spent within it'*. When asked by Dr Bowes why she considered the claimed neighbourhood to be her *'immediate neighbourhood'* she said it was because of the number of people she knows who live within its boundaries *'and the quiet community spirit'*. When asked what distinguished the claimed neighbourhood from (as she put it) *'the broader community outside it'*, she said that people living within the neighbourhood were closer to her physically and that a lot of her time was spent in her neighbourhood – some 50-60% of her waking time: *'The infrastructure is there. Everything I need is there. I grow my own vegetables. I work at home. People come to me. I get involved in local campaigns'.* This was a reference (a) to the *'Fortyfoot Road Campaign'* between 2009-14 which involved the surfacing and adoption of this road, and (b) litter picking in the application land in October 2014 on the part of volunteer members of the Leatherhead Residents Association (the applicant sits on its Environmental Sub-Committee).

(k) Mr Clay cross-examined the applicant closely about the changes made by her in relation to her locality/neighbourhood claim which have already been addressed in paras 2/5 above. She accepted that those who put in EQs subscribed to a neighbourhood based on polling districts 1 and 2 within the MVDC ward of Leatherhead South (i.e. as per question/6 in the Form/44 – this is shown on the plan

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attached to the application at Appendix/2, Map/3 – see RA/B12). In other words, the current formulation of the applicant's case on locality/neighbourhood was never even addressed by these witnesses in this evidence.

(l) It gets worse than this in that the EQs ask those responding to confirm (a) that the area outlined in green on the attached map was the relevant land (see RA/B10 – this is Map/1 in Appendix/2 to the Form/44), and (b) that he or she considered themselves *'to be a local inhabitants of the area in which Leach Grove Woods is situated'*, to which they all, not surprisingly, said *'Yes'*. In the result, they all answered affirmatively in circumstances where the relevant map attached to their EQs (i.e. the map at RA/B10) did not even delineate the boundaries of the area in respect of which those responding were claiming to be a *'local inhabitant'*. RA/B10 bears no relation to the neighbourhood plan at App/1 and shows only a handful of roads in close proximity to the application land. As a neighbourhood plan, it is wholly inadequate for current purposes.

(m) The same applies in the case of the map described as Map/2 which was also included within Appendix/2 to the Form/44. Map/2 is specifically linked to the applicant's comments in Section/7 of the Form/44 which deals with the justification for registration and the use of the land by local inhabitants *'of the South Leatherhead neighbourhood'* which is, I take it, a reference to polling districts 1 and 2 within the South Leatherhead ward. Map/2 does not actually delineate (whereas Map/3 at RA/B12 did) the neighbourhood which was originally being contended for (i.e. the two polling districts) and, of course, it bears no relation either to the applicant's current formulation at App/1 when it comes to her case on locality/neighbourhood. The applicant said that her Form/44 was filled in with the assistance of Dr Bowes but I rather doubt whether he was even on the scene to help at this point.

(n) The applicant said that her husband helped draw up the plan at App/1. She said that Dr Bowes was involved in the reformulation of her locality/neighbourhood claim. It seemed that there were not enough witnesses who could speak for the larger area on RA/B12 showing the two polling districts. She said it was this plan which she put to her witnesses at the public inquiry and she said that she selected only those witnesses to give oral evidence whom she *'thought were brave enough to do it'*. She readily

accepts that she gave her witness the guidelines comprised within the above-mentioned Documents at A/B/C/D.

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(o) Before Dr Bowes very sensibly acknowledged on behalf of the applicant that, for the avoidance of doubt, the perimeter of the claimed neighbourhood was a mid-point running along the relevant highways, the applicant had asserted that her neighbourhood included the housing on both sides of Highlands Road and Epsom Road, going as far to say even that it included the whole of St John's School. She said that the neighbourhood boundary *'includes the buildings on or abutting the pavements on the outer edges of the red line'* (on App/1). At one point in cross-examination, the applicant accepted that the neighbourhood was in fact more extensive than shown on her neighbourhood plan (quite possibly because she said that she had friends living outside the boundaries shown on such plan) although, as she put it, *'my neighbourhood'* is as shown on the application plan. As I was concerned about her evidence under this head, I gave the applicant time to confer with her counsel following which Dr Bowes confirmed that the claimed neighbourhood perimeter was in fact a mid-point in the relevant carriageways rather than at the edge of the red line shown on App/1.

(p) The applicant was cross-examined at length on her locality/neighbourhood claim. It seemed obvious (as she herself accepted) that she did not have a correct understanding of the terms neighbourhood and locality. She accepted, by way of example, that more than half the allotments and those who used them came from outside the claimed neighbourhood. She conceded that there was also a considerable fluctuation in the number of people using the allotments and that there was not a long waiting list for allotments which is clearly significant on the issue of neighbourhood. Another inconsistency is the fact that on Document F (see para/126 above) the applicant has included in her call for witnesses anyone living in Reigate Road which falls outside the claimed neighbourhood. In the same document the applicant mentions that land might become a village green by *'walking in it rather than en route to somewhere else*'. Although this might arguably raise the spectre of coaching, Mr Clay was at pains to point out that there was no suggestion on his part of bad faith.

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(q) In general I considered the applicant to be an honest and genuine witness not least when it came to her own use of the wood and that which she observed on the part of others. Further, although it was certainly my clear impression that she had not deliberately set out to direct the way in which evidence should be given by her witnesses when it came to neighbourhood, her reminder at Document C is bound to have been influential in steering her witnesses towards an acceptance (at least in the case of those who did) of the map at App/1 as showing the true neighbourhood. At the end of the day, the existence of neighbourhood for present purposes has to be an objective judgment in light of all the relevant circumstances as opposed to a judgment in which decisive weight is accorded to the subjective beliefs of those who choose to give oral evidence about this. As I think the applicant rightly said in Document C: *'Establishing a Neighbourhood is possibly the barrister's biggest challenge'.* In my view, the applicant is bound to have realised that a great deal of weight was going to be attached by her oral witnesses to her eventual neighbourhood plan.

130. **Susannah Golding**

(a) Ms Golding had lived at the following addresses: (i) at 5A St John's Road between 1999-2001 (ii) at 2 Poplar Road between 2001 -2007 and (c) at 22 Poplar Road to the current date. All these addresses lie within the claimed neighbourhood. She therefore used the wood between 1999-2013 i.e. for 14 years.

(b) Ms Golding's statement dated 16/03/2015 is at A1/D9 and it is accompanied by her EQ dated 20/03/2013. Her statement begins by agreeing with the claimed neighbourhood shown within the red lines on App/1 which she said she had no hand in drawing up but which she says she was shown when she was drawing up her statement. She considers the people living within this area as being her neighbours. She says she walks or cycles on the roads within the neighbourhood on a daily basis and feels *'a definite sense of community with the people that live here'* with whom she says she greets in passing or stops to speak to. She says that it is a really *'family-friendly'* neighbourhood and that her children (who were aged 14, 12 and 9 in 2013) had grown up in the area and used the land for building camps and playing hide and seek. She also deals with places where people meet such as the Church (which in

cross-examination she accepted was outside the neighbourhood), the recreation ground and the land.

(c) Ms Golding is a dog-walker and she uses the wood twice daily and she says that she meets up with neighbours walking their dogs. Her children also played in the wood on a regular basis. She also picked wild garlic and collects kindling from autumn through to the spring, often on a daily basis. She says that the wood is an important part of her life and an essential part of her local community.

(d) Ms Golding was pressed in cross-examination on the neighbourhood issue. It was put to her that, in effect, there was no single community group or activity serving the interests of those who lived in claimed neighbourhood, although Ms Golding asserted that a large number of people using the allotments, for instance, were local to the area. She did say, however, that she had seen very few people living outside the claimed neighbourhood using the land.

(e) In explaining her involvement, Ms Golding said that *'we think'* Leatherhead Hospital might close down in which case the land *'would be vulnerable to development'*. She said she was asked by the applicant whether she was interested in becoming involved with her application to register. She was and was given the EQ and was also asked to provide a statement. It is plain from what she said that she was asked to deal with how often she used the land and for what purpose. The applicant also showed her a map and she was asked what she considered were the boundaries of her neighbourhood and the neighbourhood plan which the applicant eventually produced met with her approval.

(f) As to where she walked within the wood, Ms Golding said that although she used the main paths she did not necessarily stick to them. She has been walking dogs since 2008 and this is one of the reasons (I think it was her main reason) for using the land. She says that the paths are *'well trodden'* and that nothing grows on them although when the brambles spread over onto the paths then she herself has cut them back. She says that most of the fallen trees have blown over recently. Some of the older trees which have fallen over have been on the ground for some time.

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(g) Like the applicant, Ms Golding thinks that any maintenance carried out on the land by the NHS authority has been minimal and it is certainly untrue that they kept the paths open in the period 1993-2013. She characterised the objector's maintenance efforts as being *'fire-fighting rather than maintenance'*. She was only aware that the NHS owned the wood when the signs went up. She thought that it had belonged *'to the people of Leatherhead, having been given to the authority by a Mr Leach'*.

(h) I have no hesitation in accepting Ms Golding's evidence.

131. **Sandra Sullivan**

(a) Ms Sullivan moved to 1 Highlands Close with her partner in December 2011. She therefore used the wood for the last 2 years of the qualifying period. Her statement is dated 15/03/2015. Ms Sullivan (who works from home) and her partner use the land for dog-walking at least four times a week. She said that she goes *'round and round the woods'* and sometimes goes further afield to the recreation ground. She certainly walks off the tracks and goes wherever she can without getting caught up in the *'twigs and brambles'*. She said that she also saw other people walking their dogs through the wood some of whom she knew although only two lived in her street. She also mentioned *'seeing people coming and going with gates'*, which I take to be a reference to those with homes backing onto the land in Highlands Avenue.

(b) She too accepts the claimed neighbourhood which she says is a friendly place *'with the Church Hall, recreation ground, application ground and the allotments offering a central focus for everyone … Leatherhead is the town and wider community to which we belong … Our community is in the streets and open spaces around our own, the people we talk to on a daily basis whilst out walking the dog or doing a spot of gardening at the front of the house. This is the roads defined on the map produced by Flip Cargill plus a few more streets around the Church we regularly walk too'.*

(c) When cross-examined Ms Sullivan made it clear that she was not told that she should agree to the neighbourhood plan. In producing her statement she used Document A as a guide. She also agreed that she walked outside this area (Worple Road and St Mary's Road to the south and to the weir on the western side).

(d) Ms Sullivan was similarly an honest and genuine witness and I also accept her evidence.

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132. **Elizabeth Turner**

(a) Mrs Turner and her husband lived at 4 Highlands Road between 2006-2012 and thereafter, until January 2015, at 55 Windfield. They now live at Walton-on-the Hill. They therefore used the wood for around 7 years during the qualifying period. They are both serving police officers. Mr Turner is a handler of police dogs one of whom he keeps at home permanently. They have two boys aged 2/4. Mrs Turner's statement is dated 16/03/2015 and will be found at A1/D22.

(b) The Turner family are very happy living in Leatherhead. She has developed strong friendships with her neighbours and enjoys using the local amenities of the recreation ground, the allotments, the church in Church Road and the town centre. Her children flourish in the local community.

(c) They have throughout regularly walked their dogs in the wood. At Highlands Road they would walk their dogs in the wood after dark. She said that they continue to use the wood at least three times a week. Since the birth of their first child in 2010 they have taken the children to play games in the wood. In her statement she said that they used the wood at least twice a week for recreational visits and that they quite regularly meet other dog-walkers, some of whom are known to them. Before the signs went up in 2013 she thought the wood was publicly-owned. She noted that away from the pavements, the wood and the recreation ground were the only dog-walking areas in the area. She thought that the wood was a 15 minute walk from the boundaries of the claimed neighbourhood which she supported. She said that when she was given Document A by the applicant (with plan) she was *'left to get on with it'*. She is clearly a supporter of the claimed neighbourhood.

(d) I have no hesitation in accepting Mrs Turner's evidence.

133. **Russell Turner**

(a) Mr Turner's evidence follows that of his wife. His statement is also dated 16/03/2015 and will be found at A1/D24. With suitable changes, the statements of Mr and Mrs

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Turner are identical. Mr Turner is a police dog-handler. He and his wife work shifts which are not always the same. Sometimes he walks the dogs on his own.

(b) On walks he predominantly uses the wood although he sometimes used the recreation ground when he was with the children. He walks a circuit of the wood. He uses the paths and has seen others doing the same. Whilst living at Highlands Road (2006-2012) he walked three dogs (one pet and two police dogs – one of these dogs had to stay on the lead) in the wood whereas, at Windfield (until January 2015), he had two dogs (I think these were both police dogs whom he used to take home). He says that he has seen other *'fairly local'* families in the wood.

(c) He too agrees with the extent of the claimed neighbourhood. He says that the area is welcoming and friendly and that people he used to know also used the wood. He accepted that people to the south of Highlands Road used the wood although, with the exception of one family, he did not know anyone living within this area.

(d) Mr Turner was an honest and genuine witness whose evidence I also accept.

134. **Mrs Jennifer Hollingshead**

(a) Mrs Hollingshead lives at 65 Highlands Road which backs onto the wood. Her statement and EQ is at A1/D11/D11.1. Mrs Hollingshead has lived at this address since November 1985 and has therefore used the land for more than 20 years. It seems that she started doing so when she took on an allotment in around 1990. They walked their dogs in the wood after 1992 where they sometimes met up with other dog-walkers.

(b) Mrs Hollingshead gave up work to have a family in 1995 and as the children grew up and started at the Fortyfoot Playgroup and then, following on at St Mary's Primary School, she walked with the children through the wood which seems to have been a place of distraction and fun as she says that a five minute walk home usually lasted for thirty minutes with the children and their mother finding things of interest in the wood, such as collecting beech nuts, fir cones and looking out for the wildlife (birds and insects, trees and plants). Sometimes their school friends joined them on the way back home. It seems that the children also played in the wood whilst their parents worked on their allotment.

(c) Mrs Hollingshead was rather vague about App/1 although she recalls receiving written advice from the applicant which would have been Documents A/B which she says came with a map. It must have been the neighbourhood plan at App/1 as she can recall the green parcel marked LGW on the document in question and says that it had another area but she cannot recall whether it was coloured or not. In re-examination she thought that the map she saw was probably black and white. In re-examination she clearly accepted the claimed neighbourhood (*'most definitely'*) which she accepted was her neighbourhood which she said was an area where she knew people – *'I know people outside area but I wouldn't class them as neighbours'* (at least half of her children's class at St Mary's Primary School lived within the claimed neighbourhood (she said that the school had around 180 pupils in 6 forms in an age range of 4-7). As she put it: *'You see other mums with their children and a lot of them live in that area'* (meaning the claimed neighbourhood). She also said that the wood, playgroup, primary school and recreation ground were *'key factors'* by which I took her to mean were key cohesive features (although the school closed around a year ago). It was Mrs Hollingshead who thought that the area to the south of Highlands Road was a *'posh area'* although she accepted that some of the 5-7 years olds living in this area would have attended St Mary's Primary School. She also accepted that anyone who could afford it used the playgroup.

(d) When questioned about her use of the wood Mrs Hollingshead said that she mainly strolls with her dogs on the main paths. There were, she said, more trees in the early years but several had blown over in the storms which brought about changes in the route of the paths passing through the wood. Commenting on the activities of others whom she had seen in the wood (see para/7 of her EQ), she said that some of the people whom she had seen lived within the claimed locality.

(e) I have no hesitation in accepting the evidence of Mrs Hollingshead.

135. **Emma Hollingshead**

(a) Emma Hollingshead (whose evidence I accept) is Mrs Hollingshead's daughter. She is aged 20 and her statement will be found at A1/D10. She was born in 1995 and can even remember, as a three year old, walking through the wood with her mother in her push chair on the way to her playgroup. This was followed by trips through the wood

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on the way to St Mary's Primary School and playing there with friends some of whom lived to the south of Highlands Road. She recalls cycling through the wood and stopping and sitting on fallen trees. In the summer she recalls making camps out of fallen branches. As she got older she took the family dogs for walks in the wood. She also enjoys sitting and watching the birds and flowers and taking photos. However, she says that the wood is not as popular as the recreation ground (this was obvious on my accompanied visit to the area).

(b) Ms Hollingshead has seen dog-walkers and cyclists using the wood along with children and their mothers. She remembers boys cycling on the so-called bumps before someone put a stop to it. I understand her evidence to be that this activity lasted for around 2 months. She has never seen anyone with equipment carrying out maintenance in the wood – *'that's why it's so natural'*. She says that more people are using the wood for dog-walking early in the morning before they go to work. There are also dog-walkers in the lunch hour. At weekends Ms Hollingshead says that can stay in the wood with her dogs for between 1-2 hours. In the evenings she has only ever seen 2/3 dog-walkers.

(c) When it came to neighbourhood, Ms Hollingshead agreed with the claimed neighbourhood plan. She also mentioned that the two middle schools and secondary school in Leatherhead are outside the claimed neighbourhood. She still meets up with some of her friends at St Mary's Primary School. She recalled that they used to play in the wood on their way to school.

136. **Julia Jarrett**

(a) Mrs Jarrett has lived at 6 Highlands Avenue (which backs on to the wood) since 1979 and is thus a 20 years plus user of the land. Her statement and EQ is at A1/D12 and D12.1.

(b) Mrs Jarrett uses the wood (which she always assumed was public open space) once a week although not when it is muddy. Her children used to play and make dens in the wood and could also ride their bikes there in safety. Her grandchildren also play in the wood. The trees in the wood form a pleasant backdrop to her garden. She says that it is a delightful open space.

(c) Mrs Jarrett agrees with the claimed neighbourhood and she saw the map relied on by the applicant when she drew up her statement. She says that her community includes the land within the red lines citing the fact that it included the application land in the centre, the allotments, the school and the hospital – *'That seems to me to be a community'*. She also said, however, that her neighbourhood included the church on Church Road which, until the 1990s, she regularly attended (her children also sang in the choir). The church is, however, outside the area of the claimed neighbourhood.

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(d) I accept Mrs Jarrett's evidence. Her evidence was also noteworthy for the fact that I questioned Mr Clay on the relevance of that part of his cross-examination which concerned (in effect) this witness's subjective belief as to her entitlement to be using the wood *'as of right'*. Mr Clay said that he needed to ask questions as to whether this witness knew or ought to have known that she had a right to be using the wood and that this was relevant on whether her use was permissive. Mr Clay told me that he was familiar with the decision of the House of Lords in *R v Oxfordshire County Council ex parte Sunningwell parish Council [2000] 1 AC 335* when it was held that the law did not require subjective belief in the existence of the right. The same point is also addressed at [68-69] in *Newhaven* namely that whether use is to be treated as being *'as of right'* is a matter which should be assessed objectively.

137. **Ken Ellis**

(a) Mr Ellis has lived at 48 Windfield since November 1999. He therefore used the wood for around 13 years before January 2013. His statement and EQ will be found at A1/D8 and D8.1.

(b) Mr Ellis did not entirely accept the claimed neighbourhood plan at App/1 as he thought that his neighbourhood would also include (a) the High Street (i.e. as a continuation of Epsom Road) (b) The Withies where there is a catholic church which he attends (The Withies lies well outside the claimed neighbourhood) and the whole of Church Street.

(c) He accepted in cross-examination that the Leatherhead Residents Association covered a wider area, as did the hospital (which he said comprised a number of clinics rather than being a hospital for in-patients), the Bowls Club, the Library (which is just outside the claimed neighbourhood on the east side of Church Street) and the Doctors

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Surgery at Linden Pit Path (again, just outside the claimed neighbourhood, but within polling district XB). He said that his neighbourhood would include all these facilities which *'we need as a community … Facilities everyone needs in the town'*.

(d) Mr Ellis and his wife have always had at least one dog which they regularly walk in the wood. He and his wife have also made many friends on their daily walks in the wood.

(e) Mr Ellis is a regular user of the wood for dog-walking. He was clearly an honest and genuine witness but his evidence on neighbourhood certainly did not assist the applicant.

138. **Les Prescott**

(a) Mr Prescott (whose evidence I accept) lived within the claimed neighbourhood at 26 Poplar Road for some 10 years between 2001-2010. He now lives in Yarm Court Road which is to the south of Highlands Road and outside the claimed neighbourhood. His statement and EQ will be found at A1/D20 and 20.1. He says that he and his wife used the wood for walks around once or twice a month in the summer but rather less than this in the winter. They saw others in the wood, including children playing and dog-walkers, whom he says *'were mostly neighbours we recognised including friends living in Highlands Avenue'*.

(b) He agreed with the claimed neighbourhood which he and his wife *'felt to be a part of'*. He also mentioned the following facilities: (a) the hospital (b) the Methodist Church (in Church Road) (c) the Church Hall (d) the Scout Group meeting place in Fortyfoot Road (e) the allotments and (f) the recreation ground which he said made it *'feel like our neighbourhood'.* Mr Prescott accepted that these facilities served *'a wider community'.* He said that *'they are part of the glue which binds my community together'*. He also agreed with Mr Ellis that High Street and Church Street should be included within the claimed neighbourhood. He also said that he knew a *'significant'* number of people living within the claimed neighbourhood. On the face of it, he seems to be defining his neighbourhood by reference to his relationships with other people rather than by reference to his surroundings.

139. **James Moore**

(a) James is aged 12. He lives at 22 Highlands Avenue. His statement and EQ is at A1/D16 and D16.1. James can get into the wood via a gate in his back garden.

(b) It seems that James spends *'a lot'* of time in the wood with his friends (he mentioned Alex who also lives in Highlands Avenue). They climb trees, play around on their bikes or make dens. James said that he goes to the wood more often in the spring/summer/autumn when he thinks he visits three or four times a week. He does not visit the recreation ground as often as he goes to the wood to play around. He sees lots of people walking dogs in the wood.

(c) The family considers the wood so special that they actually buried their cat there as it use to prowl around inside the wood.

(d) James gave his evidence with great confidence and I have no hesitation in accepting what he said to the inquiry.

140. **Christopher Moore**

(a) Christopher is the brother of James. He is aged 10. His statement and EQ is at A1/D17 and D17.1. Christopher likes to pay in the wood with his elder brother and his friend Piers. He likes climbing trees and building dens. His mother can get them in for their tea by walking out of their garden gate. It was Christopher, I think, who produced the three photos of boys (that included his friends Lorcan and Alex) playing in the wood.

(b) Christopher said that he plays in the wood three or four times a week. He said that he did not see a lot of people in the wood although *'you do see people walking through'.* He said that the wood was important to him.

(c) Despite his young age, Christopher gave helpful evidence with confidence and great care. I certainly accept what he told me.

141. **Piers Bunford**

(a) Piers is aged 11 and lives at 5 Highlands Avenue. His statement and EQ will be found at A1/D5 and D5.1. Piers obviously had a lot of help with his statement.

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(b) The wood is next to his home and close to his friends with whom he plays in the wood on his bike. He used to attend St Mary's Primary School and played in the wood before and after school. He also used the wood once as part of his scouting activities (he was also in the cubs which used the same building and he can remember that they too used the wood once for some organised activity).

(c) He says that whilst in the wood he sees people who live close by playing with their dogs. His neighbour also uses the wood for running practice. He says that he has been using the wood as a play area for as long as he can remember. He said that *'it's a nice place'*. Piers plays with James and Christopher Moore in the wood. They also play with another boy called Alex who also lives in Highlands Avenue. Piers says that he uses the wood frequently – *'whenever we have some free time'*. He says that he sees a lot of people in the wood – *'People on bikes and with dogs – children generally playing and building dens'.*

(d) In the case of Piers, I reiterate what I said in the case of the other two boys, namely that he gave his evidence with considerable confidence and I was grateful for the assistance he and his two friends. I certainly accept all that Piers told me about his own use of the wood and of what he saw there.

142. **Sharon Pavey**

(a) Ms Pavey has lived with her partner at 52 Highlands Road since March 2003 and therefore used the wood for a little under 10 years within the relevant period. They mainly use the wood for walking their dog. Ms Pavey produced 4 photos taken in 2014-15. Her statement is at A1/18.

(b) Ms Pavey said that the wood is safe for walking her dog and they go there daily, sometimes more than once a day (mornings and evenings). She says they see *'lots of other people walking through (and around) and enjoying the wood with their dogs and young children'*. She said that they meet most of their neighbours by walking their dog in the wood, although there are other users whom they do not know.

(c) Ms Pavey gave limited evidence on neighbourhood. I understood her to be saying in her statement that the key (or cohesive) features which make up her neighbourhood are the wood, the Beeches, Woodlands School, the hospital and recreation ground.

Her reference to *'within the boundary'* in para/2 of her statement implies, I think, that she is a supporter of the claimed neighbourhood.

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(d) Ms Pavey was also an honest and genuine witness.

143. **Steven Pavey**

(a) Mr Pavey's statement at A1/D19 is the same as his partner's. He says that it is difficult to exercise his dog in the recreation ground whereas they can walk their dog around the paths in the wood without getting their dog dirty. He does the evening walk. He says they mainly stick to the paths although his dog (whom they are happy to let off the lead) *'will deviate'*. He says they meet up with other dogs. They use various of the paths within the wood – *'We always see somebody, especially at this time of year when it's lighter … In summer you always see children cycling around'*.

(b) In common with his partner, Mrs Pavey was an honest and genuine witness and I have no hesitation in accepting their evidence.

144. **Heather Ward**

(a) Mrs Ward has lived at 35 St John's Road since 1978. Her statement and EQ is at A1/E24 and E24.1.

(b) She began by dealing with the neighbourhood issue. She thinks that Kingston Avenue (which backs onto Trinity Primary School – which she agreed accepted children from outside the claimed neighbourhood – she included this school as *'all my local grandchildren went there'*) and Park Rise should be added to the claimed neighbourhood (where, she says, many of the residents have known each other for years), as she also knew most of the residents within these roads. Judging from her statement, she would include Upper Fairfield Road as well as this is where her GPs Surgery is located which, she says, serves this area. She also has several friends in Upper Fairfield Road.

(c) She explained that her neighbourhood was anywhere within *'easy'* walking distance of her home. As she put it, this was on the principle that her group of friends lived within walking distance of her home. She agreed that it meant that her neighbourhood was larger than that claimed by the applicant (*'The red line is not a big area'*). She also

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agreed that there was a mix of housing within the claimed neighbourhood, comprising housing of different ages and styles. The area appeals to her *'as we meet people we know as we go around the area'*. She says that the people she meets on her walks are those whom she sees regularly. She accepted, however, that she goes for walks outside the claimed neighbourhood and gave as examples of this trips to her GP or to the dentist or to the library.

(d) Mrs Ward has used the wood for many years. She says that the qualifying period 1993-2013 includes the childhood of three of her grandchildren (now aged 12, 10 and 9) who also lived in St John's Road. They regularly went for walks and played in the wood (which she says was within easy walking distance of her home), meeting up with other children or families whom they knew from Trinity School. In the 1970s her own children had also used the wood as a place to play.

(e) Mrs Ward said that it is in the summer holidays *'when you see the children'* in the wood. She has even been involved in Easter egg hunts in the wood. She thinks that she walks in the wood on average once a fortnight, weather permitting.

(f) Mrs Ward was plainly an honest and genuine witness. Her evidence on neighbourhood was, however, of little assistance to the applicant.

145. **Michael Brian**

(a) Mr Brian has lived at 30 Highlands Road since 1992. His statement and EQ is at A1/D4 and D4.1. Although his wife knows the applicant, he was not involved in the preparation of the neighbourhood plan.

(b) He supports the claimed neighbourhood although judging by his statement he would have preferred it if it had included the church at Church Road. Otherwise he says that the area contains all the ingredients for a neighbourhood citing the shops in The Crescent (which, when questioned, he said comprised a takeaway, a shop that sold kitchen appliances and a health food shop which he accepted were not used predominantly by residents living within the claimed neighbourhood), the (former) school, hospital, allotments, recreation ground and bowls club with the wood being central to the area. As he put it: *'Yes, it's a neighbourhood'*.

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(c) Until the signage went up in January 2013, Mr Brian thought that the wood was common land to which the public had a right of entry seeing as the land was unfenced and was not cared for in any way. He had no idea that it was connected with the NHS. He says that some of the paths are clear but that others are overgrown at different times of the year. Sometimes the growth at the sides of the tracks are cut back. He says that he has observed management within the wood taking place *'from time to time'.*

(d) Mr Brian's use of the wood over (as he put it) the last 10 years has been specifically with his three grandchildren who have enjoyed trips to the wood. He said this: *'The wood has formed and continues to form the young lives of all three children who all call the area the wooded park'*. His youngest grandchild (aged 5 and now at school) always wants to go to the wood whenever he visits his grandfather and the other, older, grandchildren (aged 13 and 11) never seem to mind going with him. He thinks that he goes to the wood around 30-40 times a year, mainly during the last 10 years, although it seems that his visits are less frequent now that his youngest grandchild has started at school. He says that he has seen and spoken to other adults and dog-walkers in the wood. He said they sometimes walk outside the paths. Whenever the children walk away from the established paths he says that he would follow them. He says that the wood is busier during the school holidays. I understood from his evidence that those whom he mainly comes across in the wood are dog-walkers although he does see accompanied children.

(e) I think that Mr Brian's use of the wood is fairly limited although his evidence on neighbourhood was supportive of the applicant's case. I thought that, in common with others, Mr Brian was an honest and genuine witness.

146. **David Brett**

(a) Mr Brett has lived at 41 Highlands Road since 1977. Before that, he lived at 64 Winfield after 1972. His statement and EQ will be found at A1/D3 and D3.1.

(b) In his statement Mr Brett says that he and his family used the wood *'as part of their local environment over the years'* and he specifically mentions bird watching, animal watching and picking blackberries. He says that in recent years he goes for walks in

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the wood. His use is said to be at least monthly but sometimes weekly or even more often than this. His EQ also shows that he has seen children playing in the wood and others using it to walk to school, the allotments or to the recreation ground.

(c) In his oral evidence he says that he would have started using the wood in 1972 when he said there were more trees than there are today. By 1993, however, his own children were in their 20s and had left home. He finds the wood convenient as it is flat *'and very nice to walk in'*. He says that the wood has its *'thoroughfares'* and that the paths change as the trees fall down.

(d) On the question of neighbourhood, his statement notes that he agrees with the neighbourhood plan. As he puts it, it is an *'accurate depiction of the immediate environs of which we are a part'.* In his oral evidence he said that his community *'consists of people and all sorts of things'*. However, as the question of neighbourhood was explored in his evidence it was clear that he thought that it might even extend beyond the boundaries of the claimed neighbourhood. For instance, Mr Brett did find the exclusion of the church in Church Road *'puzzling'*. Overall, however, he seemed to accept that the claimed neighbourhood could be designated as a community in its own right with the wood located right in the middle of it.

(e) Mr Brett was an honest and genuine witness but I am not sure that he was really sure of his ground when it came to neighbourhood as I suspect that he found the concept difficult to grasp.

147. **Ms Alison Draper**

(a) Ms Draper has lived at 95 Poplar Road since 2001. Her statement and EQ will be found at A1/D7 and D7.1. Before 2001 she lived in Kingston Avenue for around a year and a half. This is outside the claimed neighbourhood. She says that she bought her home because of its proximity to the wood which has an abundance of wildlife. In her oral evidence she said that the wood *'provides a green corridor for wildlife'* and is a *'haven'*.

(b) Ms Draper is supportive of the claimed neighbourhood. She mentions all those facilities included within its boundaries which she says she has either used or visited. In her oral evidence, she specifically cited the recreation ground (where there are

sometimes festivities involving the scouts and Mencap), the hospital (where she received physiotherapy at one time and also played the piano at church services), the Beeches care home (which evidently has open days and where she also played the piano – she also knows that local people have relatives at the home), the scout hut, the church hall (as a member of a hand bell group), the allotments (she is not an allotment holder although she knows people who are) and the parish church in Church Road where, at one time, she sang in the choir (she said she knew a lot of people in the area who attended this church. As a school governor (of a school in north Leatherhead) she said that she would have visited all the schools in the area. She also mentioned the retail outlets and opticians in The Crescent. She conceded in her oral evidence that all the community facilities within the claimed neighbourhood *'are enjoyed by people from within and outside the red line. No facility is enjoyed exclusively by people living within the red lines'* which is, of course, a reference to the boundaries of the claimed neighbourhood.

(c) In terms of her use of the wood, she said she went there for regular walks (*'I walk in and around the woodland. I walk around it a lot'*). Before 2006 she was not a dog-walker but between 2006-09 she looked after her daughter's dog when she used the wood daily in the early morning before going to work. She says that she now walks in the wood either early in the morning or later in the evenings. She says that she collects wild garlic in the spring, elderflowers in June and elderberries and blackberries in the autumn. Sometimes she collects small branches for kindling and she often meets local people whom she knows live within the claimed neighbourhood, when engaged in these activities in the wood. She also mentioned seeing local children (whom she believed lived in Poplar Road) building a camp (this would have been recently and had not lasted very long) and riding bikes *'on an assault course they had built'*. In her oral evidence she said that *'these children have moved on'*. In her statement Ms Draper says that since 2001 she has used the wood weekly but it would, as indicated, have been on a daily basis whilst she had a dog.

(d) Ms Draper was likewise an honest and genuine witness. As with other witnesses her evidence on neighbourhood did not greatly assist the applicant.

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148. **Ms Imani Ayimba-Golding**

(a) Ms Ayimba-Golding's statement and EQ is at A1/A1/D1 and D1.1. She is aged 16 and lives at 22 Poplar Road. I think the family had earlier lived at St John's Road which also lies within the claimed neighbourhood.

(b) When (she thinks) she was only 2 she attended a nursery at the scout hut. She recalls after nursery playing in the wood with her parents. Later, until the age of 5, Ms Ayimba-Golding used to attend St Mary's Primary School. Since the age of 11, however, she has been attending a school on the other side of the motorway.

(c) Ms Ayimba-Golding says that she used to play in the wood a lot when she was growing up. When she was small her mother would take her there to play, sometimes with friends. These were friends who lived within the claimed neighbourhood. She still has friends who used to go with her to this school, one of whom lives in Highlands Avenue. When she was older she used to ride her bike around the wood with her sisters and also picked flowers in the summer and collected wild garlic for her father.

(d) Ms Ayimba-Golding recalls that she used to cycle through and play in the wood (she also played in the recreation ground). Her family also had 2 dogs (after 2008) for seven years although they now have only one dog which Ms Ayimba-Golding takes for a walk in the wood at weekends and in the school holidays.

(e) Ms Ayimba-Golding also attended a Sunday club at the church hall in Church Road. Evidently they would all troop across the road to the church at the end of the service. Her mother also used to have an allotment.

(f) Ms Ayimba-Golding said that she now goes into the wood once a week for a walk. She also runs in the wood as part of a wider circuit which takes in the recreation ground.

(g) As for neighbourhood, Ms Ayimba-Golding agrees with the claimed neighbourhood. She says that it is where most people she knows live. It is also a *'walkable distance'* from her home to see her friends whereas if she wanted to go into the town centre she would ride her bike.

(h) Ms Ayimba-Golding was a good witness for the applicant and I certainly accept her evidence. Although only young, she gave evidence with great assurance. It is plain that she has used the wood frequently over the years.

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149. **Ms Leila Ayimba-Golding**

(a) Ms Ayimba-Golding, who is aged 14, is Imani's younger sister and they attend the same school. Her statement is at A1/D2 and D2.1. Her evidence mirrors that of her sister.

(b) She says that she has walked in the wood for as long as she can remember. She remembers being taken there by her mother after school and playing hide and seek in the woods. She loves the flowers and collects wild garlic and kindling for her father. She also used to ride her bike over the humps which boys had made in the wood.

(c) She was shown a map of the claimed neighbourhood by her mother. She has many friends living both inside and outside its boundaries. She has her bike and goes where she wants. She also takes their dog for a walk in the wood. Her mother also has another dog or dogs to look after and she walks them there as well. They walk a loop of the wood and do not stick to the paths. She rode her bike on the humps which she says was popular for a couple of years.

(d) Ms Ayimba-Golding was also a confident witness and I also accept her evidence. It is plain that she and her family have been frequent visitors to the wood.

150. **Timothy Jones**

(a) Mr Jones has always lived at 67 Windfield since 1965 (he was born in 1959). His statement and EQ are at A1/D13 and D13.1. He says that he has been going into the wood since 1959 which was much larger that it is today as the general area was less developed. For instance, he thinks that St Mary's Primary School was only built in 1972/73 and that Woodlands School would have been built in approximately 1993/94 with the road being made up at around the same time.

(b) In his statement he says that there is *'a definite community of people who know, enjoy and "use" Leach Grove'*. He speaks of those who live close to the wood and those further away who also use it as (in effect, and as he does) *'a destination'* in its own

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right. He says that some people living locally use the wood on a daily basis whereas others (including himself) would use it less regularly.

(c) Mr Jones says that he has used the wood regularly since 1993. The frequency of his visits vary but in his statement he thinks that he would have gone there every few months to take photographs. In his oral evidence, the claimed frequency of his visits for photography extended to once a fortnight although in the spring it could even be every day and he said that he might spend an hour there. It would be less than this in the summer, perhaps once a week *'to see what's going on'*. He said he could be there for between five to thirty minutes depending on whether there was *'anything interesting going on'*, which was a reference to plant life which he considered a suitable subject for photography.

(d) Although a metallurgist by training, Mr Jones is also a very keen landscape photographer and he takes photos of plant life in the wood. He also walked his dogs there (*'at least every week in the last years up to 2013'* – I think his dog died at the end of 2013 and had been with Mr Jones since 2007). He also mentions seeing local children playing in the wood, particularly those living in Highlands Avenue who have openings in their back gardens. He can also recall the boys riding their bikes on the humps to give a more exciting ride. He says that he has seen different groups of boys playing in the wood over the years.

(e) Interestingly, Mr Jones says that the paths change every two or three years. In 1972, for instance, they were entirely different to what they are now. He has certainly never seen anyone carrying out maintenance within the wood although he has seen some recent cutting.

(f) Although I thought that Mr Jones was probably exaggerating the frequency of his trips to the wood to take photographs, the thrust of his evidence was plain (and which I accept), namely that he has been a regular visitor to the wood over many years and has observed others there from time to time also engaging in informal recreation consistently with the evidence of all the others who gave oral evidence in support of the case for registration.

151. In summary, including the applicant herself, there were 22 oral witnesses supporting the case for registration. Of these, 5 were minors (the Ayimba-Golding sisters, the Moore brothers and Piers Bunford) and one other (Emma Hollingshead) was aged only 20 and whose recollection of her early life would probably only have gone back to the late 1990s. If I had to, I would categorise her as a 15 year user. On the face of it, we have 22 oral witnesses of whom 7 were 20 year plus users, 7 were users for between 10 to 15 years and 8 for less than 10 years. Of the 22 witnesses, 3 now live outside the claimed neighbourhood (Turner x2 and Draper).

Applicant's written evidence

152. Of those whom it was hoped would give oral evidence (see A1/tab/D), 4 did not show up whereas Heather Ward, who was not intending to give oral evidence, did so. I have read all the evidence behind A1/tabsD&E. The weight to be attached to this material is limited as these witnesses did not appear to be questioned about their written evidence. When looked at in the round, however, the written evidence was largely consistent with the oral evidence. It is plain, I think, that the wood is well used for informal recreation by those living near enough to access it on foot without having to walk too far from their homes. The number of witnesses providing written evidence (statements and EQs) behind A1/tabsD&E adds up to 54 of whom only 22 gave oral evidence.

153. Beyond the statements and EQ behind A1/tabsD&E there are (a) the letters of support from 7 individuals behind A1/tabF2 (which I have also read); (b) an initial batch of 74 EQs and (c) a further batch of 288 EQs making a grand total of 362 EQs. I have looked at this material but not in great detail. This has undoubtedly been a well supported application. I have also looked again at the documents within A1/tabF1/F3 which do not really take the matter any further. It seems to me to be plain and obvious that the wood has for many years been a well used location for informal recreation.

154. Lastly, the applicant put in the written evidence of her husband Ian Cargill at A1/E31 who dealt with the locality issue. Mr Cargill deals with the polling district XB. He says that MVDC do not maintain maps of the various polling districts. Instead the records which they maintain are merely of lists of streets. Mr Cargill did, however, carry out a search online and he came across a report to MVDC titled *'Implementation of Electoral*

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Review of Surrey County Council' dated 13/02/2013. The report sought approval (which was given) to the amendments which were being made to the various polling districts across the Borough (for instance, two new polling districts were added to the South Leatherhead ward). One sees from the report what the boundaries are in the case of polling district XB (which necessitated a small adjustment to the plan at App/1 which now includes Highlands Park) (E39/41).

155. An FOI request was made to the relevant officer at MVDC (Shaun Hughes) regarding electorate and other details in relation to polling district XB and his reply is at E43. In his email dated 19/05/2015, Mr Hughes says that there is no statutory obligation for the Electoral Registration Officer or Returning Officer to provide the information requested in the applicant's email dated 19/04/2015. He did, however, provide some information in relation to the polling district XB, namely that it contained 1,644 electors and 989 properties shown in what is described as a Property Register. I deal below with the legal position in relation to polling districts.

Submissions of the parties' advocates

156. In the first instance, I shall deal with the submissions of both parties to the exclusion of locality and statutory incompatibility which I will look at separately as they are discreet and complex issues.

Submissions of the applicant

157. **Sufficiency of use for LSP**

(a) The applicant argues that this has been made out on the evidence and that there has been due compliance with the reasoning of Sullivan J in the *McAlpine* case.

(b) The applicant invites me to conclude that the land has been in general use by the local community for informal recreation for the relevant period in light of the written and oral evidence.

(c) The oral witnesses confirmed that they had seen others using the land for LSP, and have indicated where they live within the claimed neighbourhood.

(d) Reliance is placed on the evidence of Christopher Moore, James Moore and Piers Bunford all of whom indicated that the land was a play area for the local children. They were frequently there with their friends from within the neighbourhood.

(e) It is contended that there are photographs of recreational use taking place on the land which also contains a network of tracks with no obvious inhibitions on usage throughout the qualifying period.

(f) It is said that the land is to be preferred over the Fortyfoot Road recreation ground because of its seclusion, tranquillity, attractiveness to train dogs off the lead, making dens, and as a place to walk when conditions are wet because of the well-trodden paths.

(g) In planning terms, the land has over a number of years served a recreational function.

(h) The applicant also claims that the objector has been well aware of the public's use of the land and could not have failed to appreciate that it was in general use by the local community for informal recreation.

(i) In light of the above, it is contended that the land cannot be said to be in mere sporadic recreational use by the occasional trespassers but rather in general use by the local community for informal recreation.

(j) The whole of the land is being used for informal recreation in legal terms even though, in practice, not all of it is actually being used. In the first place, paths criss-cross the land and, in the second, the rest of the land is claimed to be *'part-and-parcel of the enjoyment of the whole land'.*

158. **Do the users come from a qualifying neighbourhood within a locality?**

(a) As indicated, I deal merely with the issue on neighbourhood whose boundaries are identified on App/1.

(b) The applicant argues that the neighbourhood test is not a high threshold relying on Sullivan J in *R(Cheltenham Builders) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) who said at [85] that all that is required is that the area has a *'sufficient degree of cohesiveness'* and that a housing estate might well meet that test.

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(c) Dr Bowes submits that the neighbourhood issue was most recently re-visited by HHJ Behrens QC in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch.). There the Inspector found *'The Haws'* and *'Banksfield'* constituted a neighbourhood on the basis of cohesion of their interconnecting streets which surrounded the application land at *'Yealdon Banks'* at [99]. The court ruled that the inspector had been wrong to find that the two areas comprised a single neighbourhood, but that it was in fact correct to say that they amounted two separate neighbourhoods on the basis of the cohesion of their interconnectivity and the rationality of the boundaries at [104], [105] and [107]. Dr Bowes submits that this conclusion was not challenged on appeal and no adverse comment about it was made by the Court of Appeal when, by a majority, it upheld the decision of the first instance judge.

(d) Dr Bowes submits that, when it came to cohesiveness, a common theme in the evidence was that witnesses met other local people whilst using the land. In other words, the close proximity of the land to their homes and the homes of others within the claimed neighborhood was itself a cohesive factor.

(e) Dr Bowes also points to the following matters which, as he puts it, *'serve as conductors for cohesiveness'*, namely:

- The parish church of St Mary and St Nicholas on Church Road.
- The church hall on Church Street which, it is said, *'also acts to bind the Church within the neighbourhood'* (even though it lies outside its boundaries).
- Then there are the allotments (of which 27 (out of 57) are held by inhabitants of the neighbourhood - in 2001 37 out of the 57 were held by inhabitants of the neighbourhood).
- There is also the scout hut in which the local scout troop regularly meet of which children living in the neighbourhood would be members (i.e. James Moore and Piers Bunford).
- There is the Fortyfoot Road playgroup which meets in the Mencap Hall on Fortyfoot Road which a number of local inhabitants use.
- Throughout the qualifying period St Mary's Primary School was attended by a number of children living within the claimed neighbourhood (Mrs Hollingshead

thought that about half of her daughter's year lived within the neighbourhood, with only three or four living south of Highlands Road).

- The neighbourhood also has distinctive urban boundaries, serving to bind the smaller interconnecting streets within them together (a matter of some importance to HHJ Behrens in *Leeds*).
- Dr Bowes submits that it was clearly stated by witnesses that the claimed neighbourhood represents their neighbourhood, and that beyond the very busy major roads to the north, west and east lies outside their immediate neighbourhood. Witnesses were also clear that south of Highlands Road was a different neighbourhood.

(f) Dr Bowes submits that the claimed neighbourhood in this case falls into the housing estate category mentioned by Sullivan J in *Cheltenham Builders* or that of HHJ Behrens' group of interconnecting streets in the larger urban setting such as that which applied in *Leeds.* He submits that the presence of community facilities which either (i) fall physically outside the claimed neighbourhood or (ii) are used by a wider range of people than those living within the neighbourhood, is no bar to them being *'assessed in the factual matrix of cohesiveness'*. As Dr Bowes puts it: *'This is because they act as rallying points around which the neighbourhood can bind'* or, as Mr Prescott explained, that they acted as the *'glue'* which binds the *'existing community'* within the four roads. Dr Bowes says that that *'must be correct as a matter of law because facilities on a housing estate cannot be said to be for the exclusive use of the residents of that estate'*.

159. **Was the use of the land for lawful sports and pastimes?**

(a) Quite apart from the evidence of walking, with or without dogs, Dr Bowes also relies on the evidence children playing, making dens and camps etc, blackberry picking, garlic picking, collecting fallen pine cones, using the land as a destination for nature and bird watching, biking, picnicking, photography, collecting sticks and as a place to stroll for quiet reflection, sitting and listening to music etc.

(b) In the case of the use of paths on or crossing the land, where the tracks are not public rights of way (as is the case in this instance), Lightman J held in *Oxfordshire* at [2004]

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Ch 253 at [103] that where there are no public rights of way over the land the registration authority should approach the matter as follows:

'… The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e.g., an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e.g., fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.'

(c) Dr Bowes submits that much of the recreational walking, with or without dogs, in this instance could not rationally be described as *'transitory'*. In particular, he cites from the evidence of the following:

- Sandra Sullivan who walked *'in a double eight' 'round and round'* the wood.
- Elizabeth Turner does a *'circuit on the paths'*.
- Stephen Pavey who also walked *'circuits of the wood'*.
- Sharon Pavey who explained that most people she saw were walking *'around'* and not *'through'* the wood.
- Jennifer Hollingshead who used *'the paths to walk around the wood'*.
- Emma Hollingshead whose route to school would not take her through the wood - she explained that she would detour off her route to play in the wood.
- Stephen Pavey who explained that the usual route to the allotments would not involve going through the wood yet he had seen people walking through the wood on their way to the allotments.

160. Dr Bowes submits that the vast majority of users did not use the wood as a place of mere transit. He says that the use is on all fours with the criteria for qualifying user laid down by Lightman J in *Oxfordshire*. In this instance, he argues, *'there is plainly sufficient LSP to justify registration of the land'*.

161 Has the use been continuous? Dr Bowes submitted that it had in that there was before the public inquiry evidence spanning the entire qualifying period. Indeed, there was evidence of user dating from the late 1960s. In the circumstances, Dr Bowes submits that I should find that the use of the land for informal recreation had been continuous.

162. **Was the use permissive or otherwise by right?**

(a) It is common ground that the effect of the signage erected on 9/01/2013 rendered subsequent use permissive.

(b) It was not alleged by the objector that use prior to 9/01/2013 would have been permissive. Nor was it alleged that user was either *Barkas 'as of right'* or otherwise subject to an implied permission arising from the way in which the wood was managed and/or as a result of the exercise of statutory powers.

(c) Dr Bowes submits that the only inference that can properly be drawn on the evidence is that the objector and its predecessor tolerated the consistent recreational use and chose to acquiesce in it. That choice, Dr Bowes submits, viewed objectively, can only mean that the use of the land has matured into a legal right which justifies registration.

163. **Can the registration authority lawfully determine this application?**

(a) Dr Bowes also deals with the *res judicata* issue. However, in light of his concession in his closing submissions, Mr Clay is not claiming (in my view, quite rightly) that a *res judicata* estoppel precludes the registration authority from determining this application on its merits.

(b) I think Dr Bowes is right when he submits that the decision on the part of the registration authority to consent to the withdrawal of the 2012 application was not a final decision on the merits of the application. As such, no *res judicata* arises.

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Submissions of the objector

164. **Quality of the applicant's evidence**

(a) Mr Clay submits that the EQs should be treated with great caution unless they are supported by witnesses who appear at the inquiry. He is clearly right about this. He does though accept that they are of some evidential importance insofar as they comprise a large number of consistent statements which do indicate that such use of the land which did take place consisted predominantly of walking (with or without dogs) and cycling on journeys between destinations outside of the site itself, rather than the recreational activity of walking within the land itself.

(b) For instance, Mr Clay submits that most of those responding appear to have ticked the boxes which are concerned with walking to other destinations - school, allotments, Leatherhead, and the recreation ground. He also says that they are consistent in being marked by an absence of the evidence of user that would be expected to be provided in support of any successful application. In fact, Mr Clay goes as far as to say that the application stands or falls almost entirely on the basis of the evidence heard and submissions made at the public inquiry which, he says, was unsupported by any independent corroboration from anyone who did not have a direct stake in the outcome.

165. Mr Clay concedes that at no time during the qualifying period was the application land held for purposes which permitted informal public recreation to take place on the land. Essentially the land was held for the purposes of the wide-ranging statutory health functions of SCC and, after 21/07/1993, of the various NHS bodies mentioned above.

166. **Sufficiency of use**

Mr Clay submits that the numbers supporting the application are insufficient to justify registration. He also says that in the case of those seen by oral witnesses, the evidence linking these individuals to the claimed neighbourhood was very tenuous and *'unconvincing'*.

167. **Neighbourhood**

(a) Mr Clay rejects the claimed neighbourhood which he said had gone through a number of changes. Indeed, in her own oral evidence the applicant said that she thought the area that formed her own neighbourhood was actually wider than that shown on App/1.

(b) Mr Clay submits that the area chosen as her neighbourhood by the applicant lacked cohesion and failed to meet the statutory test. He contended that many of the witnesses called by the applicant were influenced in their choice of area by leaflets and a meeting of supporters at the home of Susannah Golding. Indeed, the applicant confirmed in cross-examination that only those living within the *'neighbourhood'* were invited to give evidence in support of the application.

(c) Mr Clay submitted that the claimed neighbourhood was merely part of the urban area of Leatherhead which happened to surround the land. He said it was arbitrarily chosen and was not recognisable as a community in its own right and had no relationship with the administrative districts, wards or parishes of the area. He said its boundaries were vague and self serving and largely corresponded to the area within which most of the applicant's friends and neighbours and her chosen witnesses lived.

(d) It was said that the area has no particular character or social cohesiveness other than that created for the purposes of the application and a number of witnesses accepted in cross examination that their friends and community went wider than the area claimed which seems to have been based on the geographic spread of her witnesses.

(e) Mr Clay submitted that the boundaries of the claimed neighbourhood were not precise and appeared to cross or run along different sides or the centre of roads. The identified *'neighbourhood'* had arbitrary boundaries and, save from proximity to the site, had nothing to identify it as a neighbourhood or locality to enable it to meet the statutory test. Some parts have no relationship to manmade or topographical features. It was also said that the area is highly mixed, has no coherence in terms of its architecture, physical character, or its uses, or social or administrative community. It relies largely on community facilities, shops, library, theatre etc which are outside the defined area and which are used by a much wider catchment.

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168. **Use of the land for LSP**

(a) Mr Clay invites me to find that the overwhelming majority of the applicant's references to use in the EQs refer to use which is of a transitory nature and he relies on the evidence of Mr Hindson who mentioned a number of matters:

- use of footpaths for walking between destinations outside the wood and for dog walking;
- that he had seen bike tracks on the paths which indicated that cyclists rode through the wood travelling between destinations;
- that he had never seen children playing in the wood;
- he described one occasion in 2012/13 when he found evidence that someone (he imagined children) had constructed a bike jump from planks of wood;
- that he had never seen anyone picking blackberries in the wood.

(b) Mr Clay submits that the evidence of walking, with or without dogs, or cycling was limited to a very small number of local residents and the use for children's play appears to have been only sporadic and mainly associated with use by children from adjoining properties in Highlands Avenue.

(c) It is also claimed that some of the tracks simply linked domestic garden gates with the principal paths, and I was reminded of the vendor's indemnity when the application land was transferred to SCC in 1969.

(d) It is said that the use of the land was low key and/or intermittent and the evidence suggests only very limited use by a small minority of the inhabitants of the claimed neighbourhood. Mr Clay also submits that casual bird watching while out walking in the wood is not LSP. I do not accept this.

(e) Mr Clay submits that most of the wood is not even capable of being used for LSP and should not even be considered for registration. He reminds me of what the applicant said in 2012 in support of her original application, namely that only around 45% of the land was accessible. This seems to me to be an under-estimate by reference to what

one sees at the moment - clearly more trees have fallen over the last 3 years. John Hindson also says that only around 45% of the land is accessible by way of footpaths.

(f) Mr Clay submits that the presence of paths is not in itself evidence of recreation and would also have varied over time. It is also said that walking to the school, to the allotments and into Leatherhead is an activity which is consistently recorded on the applicant's EQs and the majority of the completed forms refer principally or only to this activity. It is further submitted that it would be reasonable to infer that Mr Hindson's observations of what was happening on the land after 2012 would have applied before-hand. The weight of the applicant's case on qualifying use is also said by Mr Clay to be undermined by the absence of independent evidence i.e. from someone with no interest in the outcome of the application.

(g) Mr Clay submits that user is primarily referable to rights of way type use and is not explicable on the basis that the whole of the land on either side of footpaths is also used for informal recreation. Accordingly, while the objector may have gained the impression that people were using the paths for access and passage, the nature of the user has been such as not to give the outward appearance of use of the wood for LSP as of right. In other words, it is submitted that the predominant use of the land is that of the use of the paths which would be more consistent with right of way or highway use rather than the exercise of TVG rights and reference is made to the decisions in *Laing Homes* and *Oxfordshire* and to how the claimed user would have appeared to the landowner.

(h) Mr Clay also submits that the objector has not acquiesced in any significant wider use of the wood because (i) the nature of the user was such that it would not appear to represent a right to use the whole of the woods for LSP; (ii) other than walking on the paths, the level of use was so trivial and sporadic elsewhere that it would not have appeared to the reasonable landowner to be the assertion of the right claimed; and (iii) that the main user appears to be associated with use of footpaths or casual activities ancillary to such use, such as dog walking or bird watching, which would not be perceived by the landowner as the assertion of the much wider right to indulge in LSP throughout the whole of the wood.

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169. **For a period of 20 years**

I think the point being made under this head turns on the claimed infrequency in relation to the evidence in the case of the children's bike jumps which seems to have been limited to children and their friends living in Highlands Avenue which was sporadic.

170. **As of right**

I take this head out of turn but Mr Clay is raising two issues on 'as of right' which I think properly fall under other heads. Firstly, he mentions that of statutory incompatibility which is one of construction and I deal with this separately. Secondly, he says that the use relied on would not have given the outward appearance of use as of right over the whole of the land. The main issue, of course, is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to the lesser right, i.e. a right of way. This is an issue relating to qualifying LSP rather than 'as of right'.

171. **Statutory incompatibility**

Submissions of the objector

(a) The objector contends that section 15 of the 2006 Act should not be interpreted as extending to the land since registration would conflict with the statutory purposes under which it was held by the public bodies in question during the qualifying period.

(b) *Newhaven* is cited, in particular the leading judgement of Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agreed). The landowner's argument was set out at [75]:

'NPP's argument is that section 15 of the 2006 Act should not be interpreted as extending to the Harbour because it was reasonably foreseeable that registration of the Beach as a town or village green would conflict with the port authority's future exercise of its statutory powers".

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At [76] Lord Neuberger continued:

'There is no express exclusion [from section 15 rights] *of land held by statutory undertakers for statutory purposes*. *Therefore any restriction on the scope of section 15 would have to be implicit. NPP argues that statutory incompatibility provides that restriction.'*

(c) The objector rightly contends that no statutory enabling power exists which would confer power on an NHS body to grant the public recreational rights on land held for health purposes. That will not, of itself, however, prevent a green from being registered: see *Newhaven*, at [80] (per Lord Neuberger).

(d) Lord Neuberger said this at [91]:

'It is ... significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes.'

(e) In *Newhaven*, the Supreme Court considered the vires of the statutory body (in that case the port authority) and whether there was incompatibility between registration of the application land (i.e. Newhaven beach) as a TVG and the statutory purposes for which Parliament had authorised the landowner to acquire and hold such land. The court concluded at [92]: "*[In] our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.*"

(f) The objector continues that the court then defined the question at issue at paragraph [93]:

'The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where

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

"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

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

(g) *And at [94-95] Lord Neuberger continued:*

'There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates (section 33 of the 1847 Clauses Act). NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore (section 57 of the 1878 Newhaven Act, and paras 10 and 11 of the 1991 Newhaven Order).

[95] The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 - or to encroach on or interfere with the green - section 29 of the Commons Act 1876. See the Oxfordshire case [2006] 2 AC 674, per Lord Hoffmann at para 56.

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(h) The objector says that the beach in *Newhaven* was being used for LSP and the Court did not need to rely on evidence of actual port use of the beach:

(i) Lord Neuberger continued:

'[96]. In this case, which concerns as working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence.

[97] NPP has also suggested that vessels en route to and from other parts of the port might have to reduce speed in circumstances where such reduction would not be desirable to maintain the stability of the vessels. It also led evidence of proposals to unload materials for an offshore wind farm on the Beach. But we do not need to consider such matters in order to determine that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green.'

(j) The objector submits that the decision in *Newhaven* turned on the fact that although the beach was not actually being used directly for harbour purposes, it was nevertheless operational land and part of the Harbour and held for those statutory purposes, and registration would impede the NPP in the exercise of its statutory functions.

(k) The cites from [101-102] in *Newhaven* where Lord Neuberger said this:

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

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

[102] In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities …There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reasons of statutory incompatibility."

(l) The objector then poses this question: would registration of the land be incompatible with the statutory functions under which it is held?

He makes these points.

(i) The land was in 1993 transferred to the relevant NHS Trust by the Secretary of State for Health as part of a single contiguous landholding together with the adjoining Leatherhead Hospital and the rest of the land surrounding it, comprising car parks, lawns and wooded areas. Ms Condry's statement at paragraph 11 states:

*'On 20 September 1993, the Leatherhead Hospital site (including the Wood) was transferred from the Secretary of State for Health to Epsom Healthcare NHS Trust by way of a transfer order of the same date. I attach a copy of the completed Inland Revenue Particulars relating to this transfer as Exhibit "**AZC3**". The area of land transferred is shown edged red on the plan attached to this document.*"

(ii) The land edged red on the Plan attached to AZC3 forms a single contiguous area which includes the hospital and its grounds, as well as the land.

(iiii) SCC and the relevant NHS bodies held (and continue to hold) this land for the purposes of its health functions. As Mr Clay puts it: *'It is now held as part and parcel of the same title as the Hospital and its fate is inextricably linked to that of the hospital.'*

(iv) Although the land is very different in character to that of Newhaven beach, the two cases are analogous. The Beach is part of the *'operational land'* of the Harbour and the land is held, with other land, for health purposes.

(v) The term *'Operational land'* is a planning term and is defined in section 263 of the Town and Country Planning Act 1990 as *'land which is used [by a statutory undertaker] for the purposes of carrying on their undertaking'*. [The term *'statutory undertaker'* is any one of those bodies mentioned in section 262(1) and involves railways, tramways, road and water transport, canal and inland navigation, dock, harbour, pier or lighthouse undertakings or airport operators.]

(vi) Although the hospital is clearly not a statutory undertaker and the land is clearly not operational land within the meaning of the 1990 Act, the objector nonetheless submits that because the land is and was being held for health purposes by a public body it should be regarded as being analogous with the operational land of a port operator which is a statutory undertaker. The fact that every part of the land identified as being held for those purposes is not at any given time being used does not affect its status as land held for those purposes.

(vii) The objector claims that at no time after 1993 was any distinction drawn by the Secretary of State between the operational site of the hospital and the application land. The objector submits that *'the fate and function of the Site cannot be severed from that of the Hospital Site and its grounds. It is part of the same Title, held for the same purposes and to be available to the NHS for any of its statutory health functions, to be treated, in terms of its status, as part of the working Hospital land. The possible future need to use the land for the improvement or expansion of the hospital services that the PCT provides is no different, in principle, from, for example, the future works to alter the breakwater relied on by the SC in Newhaven, to establish statutory incompatibility.'*

(viii) The objector says that should the expansion or improvement of the Hospital services require the land, or any part of it, then there can be little doubt that its registration as a TVG would be capable of frustrating or impeding the exercise of its powers in respect of land which it holds for health purposes.

Submissions of the applicant on statutory incompatibility

(m) The applicant says that the fact that the land may be held within the same title as the operational hospital site does not mean that it is to be treated as part of the working

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hospital. The submission of the objector (premised on the decision in *Newhaven*) that registration of the land would give rise to statutory incompatibility is denied.

(n) Five submissions are made by the applicant in answer to the plea of statutory incompatibility.

(i) The objector's very wide interpretation of the doctrine would have the net effect of removing from the 2006 Act every public body which held land for statutory functions which, if it chose to exercise, would be frustrated by registration of its land as a TVG. That is plainly not the intention of Parliament. It is particularly apposite to mention what was said by Lord Neuberger at [101] in Newhaven:

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

(ii) The court in *Newhaven* did not in fact cast the doctrine in the very wide terms advanced by the objector. In the first place, the doctrine was held to apply only to land held *and operated* for a particular statutory purpose (see Lord Neuberger at [93]) compared to land merely in the ownership of an authority which might be used for a particular purpose inimical to TVG use in the future (see Lord Neuberger at [101]). In the second, the court did not choose to overrule, confine or even disapprove of the three cases cited at [98]-[100] for which the registration of the land as a TVG frustrated the proposed exercise of the public authorities' statutory powers.

(iii) The doctrine depends upon a statutory construction by reference to the rule that general legislative provisions do not allow derogation from a special one (see Lord Neuberger at [93]). The special provision at issue in *Newhaven* was a statutory duty to *'maintain and support the harbour'* (section 49 of the Newhaven Act 1847). The application land formed a part of the operational land of the harbour even though it was not actually used as such. It was part-and-parcel of the land to which a statutory duty to maintain and support applied. As such, the Supreme Court found an

incompatibility with the duty at s.49 Newhaven Act 1847 and registration of the land as a TVG (at [94]).

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(iv) By contrast there is no similar special duty imposed upon the NHS which would permit derogation from the general application of the scheme of the 2006 Act. Reference was made to the general duty on the Secretary of State at section 1 of the National Health Service Act 2006 as being an analogous duty to section 49 of the 1847 Act. This is wrong.

First, because section 1(1) requires the Secretary of State to *'continue the promotion in England of a comprehensive health service designed to secure improvement …'*, it does not place a duty on the Secretary of State merely a target, as the Court of Appeal held in *R v North & East Devon HA ex parte Coughlan* [2000] 2 WLR 622 (considering the materially identical wording of the 1977 Act) (per Lord Woolf MR at [22]). The fact the Secretary of State does not, in fact, secure *'a comprehensive health service'* is immaterial provided he has regard to the target to attempt to secure one to meet its objectives (per Lord Woolf MR at [25]).

Secondly, and in any event unlike section 47 of the 1847 Act there is no duty upon the Secretary of State to secure a health service on the application land. It is, therefore, incorrect to say that there is a duty of any kind to do anything on the application land. The point is best illustrated by reference to its enforcement: a claim for judicial review could not be sustained against the NHS for disposing of the hospital site and the land for a non-health purpose *per se*, whereas a claim might well be sustained against the port authority for disposing of land comprising part of the operational harbour in Newhaven because Parliament has specifically required it to maintain and support Newhaven harbour.

(v) Dr Bowes says that even if that is wrong, the land still cannot rationally be said to form part of the working hospital land in contrast to the man-made beach in Newhaven which was part of the working harbour to which a specific and narrow statutory duty fell upon the port authority to maintain and support. The beach was in fact part of the operational land of the statutory port undertaker (at [8]). The definition of operational land (which concerns land of statutory undertakers) is *'land which is used [by a statutory undertaker] for the purposes of carrying on their undertaking'.* The

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land here is not used and never has been used by the NHS for the purposes of carrying on their undertaking (of health care functions). Indeed, it has been fenced off from the hospital site for the entirety of the qualifying period.

(o) Accordingly, the applicant submits that it has no case to answer on statutory incompatibility.

Further submissions of the objector in reply on the issue of statutory incompatibility

(p) The objector does not accept that its approach on this issue would have the effect of excluding all public authorities from the ambit of section 15; nor does the decision in *Newhaven* narrowly confine the doctrine of statutory incompatibility to (a) operational land (b) statutory undertakers, and (c) public bodies whose powers arise from a special Act.

(i) The objector does not cast the doctrine as widely as the applicant suggests. It is accepted that the court did not seek to extend the doctrine to local authorities who might in future wish to develop land: *Newhaven* [101]

(ii) The position of local authorities is entirely different from the NHS. Local authorities and some other public bodies (e.g.: development corporations) have a range of express powers to hold land for open spaces and recreation and are therefore in a position to protect their position regarding public access to land by holding land for recreational purposes under a swathe of powers, including e.g. Open Spaces Act 1906, as well as powers to dedicate land for recreational purposes when held for e.g. highways, housing or planning.

(iii) The Courts have been willing to infer that where such power exists (for example the 1906 Act) and where land has been used for recreation by the public, it can be inferred that it holds the land under such powers, even where it is not held or appropriated for other purposes: see *Naylor* at [45] and, indeed, the ratio in *Barkas*. For these reasons, following *Barkas*, local authorities with powers to hold land for recreational purposes are largely immune from claims under section 15.

(iv) By contrast, the NHS has no power to hold land for public recreational purposes. It is only able to hold land for 'NHS' purposes.

(v) In enacting the 2006 Act, it cannot have been intended by Parliament that those public bodies who hold land only for health purposes and are unable to prevent prescriptive rights from being created, are nevertheless subject to section 15.

(vi) The objector's case is that the scope of the doctrine of statutory incompatibility is much narrower than that attributed to it as *'every public authority which holds land for statutory purposes'* by the applicant in her further submissions, and would apply to a relatively narrow band of public bodies which have no power to hold land as recreational open space and which are thereby precluded from relying on the decision in *Barkas*.

(vii) *Newhaven* recognised the relevance of this at [79] in describing the private law of prescription: *'As prescription is based on the fiction of a grant, a landowner who could not have granted the claimed easement cannot suffer prescription'.*

(viii) The point is explored further at [91]:

'As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging 'as of right' in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, McEvoy v Great Northern Railway Co [1900] 2 IR 325, (Palles CB at 334-336) which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.'

(ix) The objector acknowledges that this is not the complete answer: see *Newhaven* [92]:

'In this case if the statutory incompatibility rested <u>only</u> on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility

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because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act." [emphasis added]

(x) In other words, the statutory incompatibility may arise where both (a) the public body has no power to hold land for recreational purposes; and (b) the use of the land for section 15 user would be incompatible with the exercise of the statutory purposes.

(q) In response to the applicant's submission that the court in *Newhaven* did not cast the doctrine in the wide terms advanced by the objector:

(i) The objector says that *Newhaven* addressed all possible future activities of the port operator. It was also unnecessary for the port operator to show current interference with its operational activities. Indeed, there was an express finding that *'There has been no user as of right by the public of the Beach that has interfered with the harbour activities"* [92]. It is, therefore, unnecessary, in order to demonstrate statutory incompatibility, to show either (a) that there is current active use of the land for statutory purposes, or (b) proven actual conflict between the relevant statutory purposes and the claimed user as of right.

(ii) The three cases at [98] to [101] of *Newhaven* are distinguished by the Supreme Court on the basis that (a) there was no statutory incompatibility alleged, and (b) the question did not arise. All three cases related to local authorities. None related to NHS or NHS purposes.

(r) There is nothing in the *Newhaven* decision which restricts the doctrine to statutory undertakers who hold the land under a *duty*, such as that involving the duty under section 49 of the 1847 Act. Rather, the decision is concerned with, and repeatedly uses the term, *'purposes'*. Statutory incompatibility is not confined to rights which conflict with *duties*, but arises wherever there is a conflict between those rights and any statutory *purposes*, whether they are established in the form of powers, duties or functions. The ratio of *Newhaven* is that it is not possible to acquire rights by prescription against a public authority which had acquired land for specified statutory

purposes when the use of the land for those purposes would be incompatible with those statutory purposes: [91]

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(s) The objector says that the applicant is wrong in not applying the doctrine to operational hospital land.

(i) The objector relies on the full definition of *'operational land'* in section 263 of the Town and Country Planning Act 1990 and associated regulations which are much more complex than the short definition in subsection 1(a). Section 263 provides as follows:

'(1) Subject to the following provisions of this section and section 264, in this Act 'operational land' means, in relation to statutory undertakers:

(a) land which is used for the purpose of carrying on their undertaking

(b) land in which an interest is held for that purpose.

(2) *Paragraphs (a) and (b) of subsection (1) do not include land which in respect of its nature and situation, is comparable rather with land in general than with land which is used or in which interests are held,, for the purpose of carrying on of statutory undertakings.'*

(ii) The curious wording of subsection (2) is for the purpose of excluding shops, offices, showrooms and dwelling houses even if used in some way for the undertaking: see discussion in Encyclopaedia of Planning Law Vol 2 at P263.04 and *Minister of Fuel and Power ex p. Warwickshire County Council* [1957] 1 WLR86; 8P&CR 305.

(iii) Moreover the definition of operational land does apply expressly to certain land acquired with the intention of using it for the purpose of the undertaking where the acquisition occurred before 1968. For the full explanation of the term, the inspector is referred to the relevant pages of the Encyclopaedia of Planning Law Volume 2 at P263 and P264 which makes it clear that land can acquire the status of *'operational land'* through a range of different means, including having at one time had temporary planning permission for development which would, if carried out, involve its use for the purpose of carrying on the undertaking, even if that permission is spent and has expired.

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(iv) In short, *'operational land'* is not concerned only with land in active use for the purposes of the statutory undertaking.

(v) The doctrine does not distinguish between land which is, at any given time, being *actively* used from land which may, at any time, be inactive but would qualify as being *'in use'* in the sense of being held for that purpose. The term *'use'* in the definition of Operational Land in the TCPA 1990 is not concerned with distinguishing active use *within* the land held by statutory undertakers for their statutory undertaking, but rather with distinguishing land which is held for their statutory functions by one means or another, and land which is not. Port authorities and other statutory undertakers are often large private companies (e.g. BAA) which may hold land for whatever purpose they please and their land holdings may and usually does include both *'operational land'* and land which is not *'operational land'*.

(vi) In the case of Leatherhead Hospital the application land is (a) part of the same title, and (b) is held under identical powers for identical functions and purposes. In any case, *Newhaven* does not suggest that the beach was in such active use, nor had any interference with the statutory duties or purposes occurred as a result of the use of the beach for LSPs.

172. **Locality of polling district XB**

Submissions of the applicant

(a) Dr Bowes submits that a polling district can amount to a locality for the purposes of the 2006 Act. In *Paddico (267) Ltd v Kirklees Borough Council* [2012] EWCA Civ. 262 Sullivan LJ approved the commentary in *Halsbury's Laws of England* that a locality is:

'…some legally recognised administrative division, as for instance a county, a hundred, a forest, a region of marshland, a city, a town or borough, a parish, a township within a parish, a villa, a hamlet, a liberty, a barony, an honour, or a manor'.

(b) A polling district is defined by reference to section 18A of the Representation of the People Act 1983. It is, therefore, the applicant asserts a *'legally recognised administrative division'.*

(c) Dr Bowes mentions that Sullivan LJ overruled the finding of Vos J in *Paddico* that a conservation area could be a locality. As previously indicated, he said this at [2012] EWCA Civ 262 at [29]:

'It is true that its boundaries are legally significant, but they are legally significant for a particular statutory purpose, and those boundaries would have been defined by reference to its characteristics as an area "of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance" (see section 69(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990) – rather than by reference to any community of interest on the part of its inhabitants.'

(d) Although not mentioned specifically by Dr Bowes, again in *Paddico*, Carnwath L.J also stated at [62]:

'The alternative suggestion of the Conservation Area seems wholly implausible, since it is not a description of a community, and in any event it was not in being for the whole of the relevant period. I accept that, where one has an historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. However where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link.'

(e) Dr Bowes submits that a polling district's boundaries are defined in accordance with strict rules, as set out in section 18A(3) of the 1983 Act:

'(3) The following rules apply–

(a) the authority must seek to ensure that all electors in a constituency in its area have such reasonable facilities for voting as are practicable in the circumstances;

(b) in England, each parish is to be a separate polling district;

(c) in Wales, each community is to be a separate polling district;

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(d) in Scotland, each electoral ward (within the meaning of section 1 of the Local Governance (Scotland) Act 2004) is to be divided into two or more separate polling districts.'

Dr Bowes continues by stating that it is as such a requirement that polling districts are defined by reference to *'community of interest[s] on the part of its inhabitants'* because it is a statutory requirement to preserve existing communities. He says that that legislative requirement is re-enforced by the Electoral Commission Guidance at 5.15:

'The following should be considered as part of the assessment of the suitability of polling district boundaries:

Are the boundaries well-defined? For example, do they follow the natural boundaries of the area? If not, is it clear which properties belong in the polling district?

Are there suitable transport links within the polling district, and how do they relate to the areas of the polling district that are most highly populated? Are there any obstacles to voters crossing the current polling district and reaching the polling place e.g. steep hills, major roads, railway lines, rivers?'

(f) Dr Bowes also points out that *'polling districts'* is used as an example of a *'locality'* by the editors of *Gadsden* at 14-26.

(g) Dr Bowes submits that the clear object of local custom is certainty. The full text of the section of *Halsbury's Laws* (Vol/12(1) at para/616) approved by Sullivan LJ in *Paddico* reveals this objective. As such, the requirement is not whether the polling district is visible on a map (in the sense, I take it, of having definable boundaries) but rather if it is sufficiently certain, as *Halsbury's Laws* explains:

'A custom must be certain in respect of the locality where it is alleged to exist … Some definite limit must therefore be assigned to the area in which the custom is said to obtain'.

(h) Dr Bowes therefore submits that a *definite limit* does reveal itself from the polling district and *Paddico* represents no barrier to recognising a polling district as a locality. Dr Bowes does, however, accept that the boundaries of the polling district will have

changed but he says that this does not preclude its recognition as a locality in law for the purposes of the 2006 Act. He cites three authorities in support of this proposition.

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(a) *Bremner v Hull (1866) LR 1 CP 748*: this case concerned a dispute involving the correct basis for the elections of churchwardens in the parish of Prestwich in Lancashire, a matter regulated by custom. The claimant had established what would otherwise have been a custom as to the election of the churchwardens. However, it objected to the custom on the basis that in 1848 the township of Whitefield had been severed from the parish and became a new district. Before that time, the arrangements for churchwardens from the township of Whitefield had been the same as those in respect of the other five unsecured townships. Erle CJ held that the 1848 change was not relevant to establishing a custom on the basis of 20-year custom:

'As to the effect of the order in council creating Whitefield a new district, I am unable to see any difficulty. Taking away the care of souls in a portion of a parish or district does not affect the cure of souls in the rest of the parish or the rights, powers and duties of the ecclesiastical officers appointed thereto.'

(b) *R v Inhabitants of the Hundred of Oswestry (1817) 6 M & S 361* concerned the obligation of the inhabitants to maintain a bridge over the River Tanah. Originally, the Hundred of Oswestry had comprised 60 townships, but in 1543 another was established by statute. Abertanah, had transferred from the county of Merioneth in Wales. It was thus argued that Abertanah was not liable to maintain the bridge. However, the High Court rejected the argument holding that the Hundred of Oswestry had a legal existence independently of its precise boundaries. Holroyd J stated:

'Although the hundred has varied at different times in its component parts, still it may be charged as a hundred immemorially.'

(c) In *Leeds Group v Leeds CC* [2010] EWHC 810 (Ch.) at [89] HHJ Behrens held that notwithstanding that Yeadon had ceased to exist in 1937 on its own terms, it still was capable of being a locality because the boundaries of Yeadon were *'defined'*.

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(i) In light of these authorities, Dr Bowes contends that the *'overriding policy objective'* in customary law is that of certainty of entitlement (see *Halsbury's Laws* at Vol.32 para.16). He submits that the relevant polling station, which is the candidate locality in this instance, qualifies at it is:

- known to the law as defined pursuant to statute;
- defined by reference to the convenience of its inhabitants as a matter of law;
- certain at the point of registration because of the statutory list of streets.

Submissions of the objector on the claimed polling station locality

(j) Mr Clay makes the point that the chosen locality was not specifically relied on by the applicant herself or any of her witnesses in their evidence. There is, of course, no reason why it should be as a locality either exists in law or it does not. There is, for instance, no necessity to show that it is a cohesive community as applies in the case of a statutory neighbourhood.

(k) Mr Clay submits that a polling district is neither an administrative district nor an area with legally significant boundaries. It is no more than a bare list of addresses and is more akin to a postal code. It is an area within which electors are required to use a certain polling station. It has nothing to do with the community and they hold nothing in common other than a shared polling station which they are required to use at elections.

(l) Dr Clay submits that there is no precedent for a polling district. He also says that the older cases [*Bremner* and *Oswestry*] in relation to custom, relied on by the applicant, do not assist in determining whether a polling district is a locality for the purposes of the 2006 Act. He argues that the essential component of certainty is absent in that the applicant is unable to identify the existence of the current boundaries throughout the whole of the 20 year qualifying period. He clearly relies on the fact that the current polling district only came into being in February 2013 once the 20 year qualifying period had expired. He says that the applicant has produced no evidence to identify where the boundaries of the polling station were either at the beginning or end of the qualifying period. Moreover, he says that the polling district has no boundaries shown

on any published document and merely comprises a list of addresses falling within its catchment.

(m) As Mr Clay puts it, whilst sympathising with the applicant's difficulties in obtaining information in relation to the predecessor polling districts, we are nonetheless bound by what Carnwath LJ said in *Paddico* at [62]:

' ... where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link.'

Nor, he says, does it enjoy *'a community of interest'* (Sullivan LJ at [29]) who says in the case of a Conservation Area that it does not exist *'by reference to any community of interest on the part of its inhabitants.'* In dealing with this in his closing oral submissions, Mr Clay distinguished a ward which returned members and polling stations which did not.

Late submissions from the applicant on locality

(n) Dr Bowes sent me a further submission in which he stated that the applicant had been informed by County Councillor Tim Hall (a current member of SCC representing Leatherhead as well as being a member of MVBC between 1988-2010) who evidently chaired the SCC committee responsible for overseeing the boundary changes in 2013 which led to the change in what Dr Bowes describes as the *'ward patterns and the need to change polling districts'*. Mr Hall has evidently confirmed to the applicant that since 1988 there has always been a polling district B within the ward of Leatherhead South. It only received the addition of an 'X' in 2000 (as it is put to me):

'because the first letter represents where the ward comes on the list of wards (each ward is given a letter (e.g. X in the case of Leatherhead South) and then another letter to denote a polling district, e.g. B - thus Leatherhead South Polling Districts are XA, XB, XC, and XD).'

(o) Dr Bowes says that Mr Hall is able to confirm that the only change in the boundaries of the polling district since 1991 has been the relocation of the properties around Tyrrells

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Wood and Highlands Farm (of whose location I am unaware) to the new polling district XC in 2013 (this is to the East of the A24).

(p) On the face of it, I am being told that the boundaries of the relevant polling district (that is, by reference to the list of its constituent streets) have been constant throughout the qualifying period with the exception of the two areas which moved into the next polling district of XC.

(q) Dr Bowes therefore says that this means that there is now sufficient clarity when it comes to the boundaries of the claimed locality and the position is consistent with the ratio of *Oswestry* and *Bremner*. The point is that variations in the extent of the subject locality will not necessarily destroy the custom.

173. **Further submissions from the applicant on neighbourhood**

(a) Dr Bowes submits that neighbourhood can be shown *'by very mundane characteristics'*. Reference is made to the obiter dictum of HH Judge Behrens QC in *Leeds Group Ltd v Leeds CC [21010] EWHC 810 at [98-107]*. Dr Bowes emphasises (a) the fact that the claimed neighbourhood is contained within 3 roads (the so-called *'hard-edged urban boundaries'*) and (b) the fact that there is a change in character in the case of the settlement to the south of Highlands Road and his outline closing submissions at [29] in which he mentions the various facilities to which reference has already been made herein ranging from the church (which actually lies outside the boundary of the claimed neighbourhood) and St Mary's Primary School (now closed)). An important point made by Dr Bowes is that the boundary roads constitute *'distinctive urban boundaries, serving to bind the smaller interconnecting streets within them together'*. I certainly see the point being made by Dr Bowes about this but I think cohesiveness calls for something more than an area which is merely bounded by distributor roads otherwise the term *'neighbourhood'* in the 2006 Act would be practically meaningless.

Further submissions from the objector on neighbourhood

(b) Mr Clay submits that the *'factual situation fatally undermines the applicant's position'*. He says the claimed neighbourhood has *'no particular cohesion, other than one which is thrown along the roads which surround a group of people who have completed a*

proforma/questionnaire'. He also reminded me that some of the applicant's witnesses, even the applicant herself, were not supportive of the boundaries of the claimed area.

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(c) Mr Clay also submits that the area was somewhat contrived in that the applicant's case on the claimed neighbourhood seems to have been restricted to those who gave oral evidence. He also questions the exclusion of those features which were relevant to cohesiveness.

Discussion

174. **Sufficiency of use as of right for LSP on the land for at least 20 years (I shall be dealing with statutory incompatibility, locality and neighbourhood under separate heads)**

(a) Numerically, the application had ample support. As indicated, 54 individuals provided statements and EQs of whom 22 gave oral evidence. Of those giving oral evidence, 7 were 20 year plus users, another 7 were users for between 10 to 15 years with the remaining 8 having used the land for less than 10 years. In addition, albeit with some overlapping, there was a grand total of 362 EQs. If one turns to App/1, one sees the dashed blue line marking the boundaries of polling district XB. Within this area there are 1,644 electors (see email of Shaun Hughes dated 19/05/2015 at A1/E43). We have no population figures as such for either the claimed locality or the claimed neighbourhood (which are relatively small areas) but it seems to me that, without more, the numbers of those who supported the application to register were sufficient to justify registration.

(b) One has, of course, to look at all the evidence in the round to determine whether the number of people using the land would have been sufficient to signify that it is in general use by the local community for informal recreation. My impression of the evidence as a whole is that the claimed use for LSP was sufficient.

(c) Those who gave oral evidence all said that they observed others using the land and it is reasonable to assume that a number of these individuals would have lived within the claimed locality/neighbourhood in view of its proximity to their homes. Moreover, the written evidence of those who did not give oral evidence is also largely consistent with

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and supportive of the oral evidence given by the applicant's witnesses in relation to the use of the application land for more than twenty years without permission or objection.

(d) The analysis of Sullivan J in *McAlpine Homes* at [73-77] is also very helpful under this head. It is clearly material that the land (for which the landowner had no use) is within easy walking distance of local housing and is plainly suitable for dog-walking and children's play. It is also easy to access the wood and there were no signs forbidding entry. Generally the circumstances were entirely consistent with the contentions of the applicant's witnesses that people were using the wood for informal recreation without restriction.

(e) Very sensibly, no issue was taken on spread as it was obvious that the supporters of the case for registration were adequately spread throughout the claimed locality/neighbourhood. This can be seen on the plan at O1/86A.

(f) No issue arises on *'as of right'*. There were no vitiating features in play which would preclude use as of right and the application land was at no time held by SCC or by any of the various NHS bodies mentioned herein for purposes which conferred an entitlement on members of the public to use the land for informal recreation. For instance, there was no evidence of any overt act or acts on the part of the objector, or its predecessor, to demonstrate that, before January 2013, the landowner was granting an implied permission for local inhabitants to use the wood. No issue either was taken on interruption. On the face of it, time did not stop running during the qualifying period.

(g) It seems to me that one can look at the expressions *'LSP'* and *'on the land'* together. In the case of LSP, there were credible accounts from a number of witnesses who spoke of their use of the wood as a place for informal recreation. This would have been mainly walking, with or without dogs, and children's play. The wood is an ideal environment for those who simply wish to wander around under the trees where there is plenty of space for dogs to roam off the lead. The place has much to commend it in environmental terms and there are plenty of openings off the main paths in which children can play, build camps or simply fool around on their bikes. There are a number of interconnecting paths and one can see just how easy it is to walk circuits around the wood, not least for those looking for a relatively short walk near their home.

The main 2/3 paths running through the wood are plainly heavily used. Grass no longer grows on these paths where the earth is very compacted and I consider that they would provide firm ground to walk on even in the wetter parts of the year.

(h) I have already indicated what my findings are in the case of each of the applicant's witnesses all of whom I found to be credible witnesses whose evidence I accept save that in the case of Timothy Jones I suspect that he may well have exaggerated the amount of photography which he did in the wood.

(i) In making this finding I have borne in mind that people are not very good at recalling accurately events that occurred some time ago. This reflection applies to many witnesses (on either side) at TVG inquiries, seeking to recall conscientiously events of many years ago. It will apply particularly where the events in question, such as walking dogs and playing with young children etc, are not of a kind to be particularly memorable. It applies with equal force to evidence which has not been subject to cross-examination. I also bear in mind that those giving evidence for the applicant will often be those who feel most strongly about development and who wish the wood to be retained for continuing recreational use. It seems to me that the overall pattern of events in the case of the wood, not least in relation to its long-standing planning status, is consistent with the evidence of the applicant's witnesses when taken as a whole, rather than giving undue emphasis to the evidence of particular witnesses.

(j) I turn next to LSP and the assertion (in effect) that the wood has predominantly been used as a place of transit on the established paths rather than as a destination in its own right for LSP. The law under this head has already been addressed (*Laing Homes* and *Oxfordshire* [47]) and, as it seems to me, the questions I have to decide fall within a narrow compass, namely (a) whether any proven use of the land was in the nature of transit over defined routes, and (b) whether any use outside these defined routes would have been only occasional and/or ancillary to the exercise of putative rights of way over the land. In my view, purely transitory use would undoubtedly have taken place but it was not the only or main use as I consider that there would also have been substantial use of the wood for LSP, such that it would have been plain to a reasonable landowner on the spot that such use was referable to a right to enjoy

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recreation over the whole of a wider area of land rather than the lesser right, i.e. of a right of way.

(k) I have borne in mind those passages within *Laing Homes* [102-105] which require me to discount user which would suggest to a reasonable landowner that users believed they were exercising a public right of way which would include situations where a dog off the lead roams freely outside the footpath whilst its owner remains on the footpath or where owners are forced to retrieve their dogs which have run away from the footpath or where walkers casually or accidentally stray from the paths without any intention of going onto other parts of the application land. In my view, dog-walkers are liable to be using the tracks and roaming elsewhere within the wood. As I say, there are a number of interconnecting tracks on what is a small compact site. This is not, for instance, a case involving circular paths around fields or that of a single path or short cut leading to a specific destination (say shops) beyond the land where one might reasonably expect a flow of pedestrian traffic using the land mainly for the purposes of transit. This, however, is a case involving a small wood with a plethora of tracks which is likely to be magnet for local dog-walkers and children looking for somewhere interesting to play not too far away from their homes. Having said that, I do accept that the wood would have been used as a place of transit for parents and children walking to and from St Mary's Primary School yet, by the same token, there was evidence of children's play on the way home after school. For instance, Mrs Hollingshead said that what should have been a 5 minute walk home from the playgroup and, later on, the primary school, usually lasted for 30 minutes with the children finding things of interest to do in the wood such as collecting nuts, fir cones or looking out for the wildlife. Sometimes their school friends would join them.

(l) I should address the issue of *'on the land'*. The objector asserts that not all of the land would have been used for LSP. If this is right then I have to consider severance. As previously indicated, it is my impression that around 60-70% of the wood is reasonably accessible for LSP. This is not a case like *Oxfordshire* where only 25% of the land area, which was scrubland, was occupied by paths and clearings which would have been reasonably accessible to what was described as the hardy walker. Despite this, the House of Lords still found that such a narrow area of use would not necessarily be

inconsistent with a finding that there was recreational use of the land as a whole. As Lord Hoffmann put it at [67]:

'For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk'.

In the event, the House of Lords chose not to interfere with the factual finding of the inspector, taking the view that every case depended on its own facts.

(m) It is clearly understood that the expression *'on the land'* in section 15 does not mean that the registration authority has to look for evidence that every square foot of the land has been used. In my view, in determining whether it can sensibly be said that the whole of the land in this instance is registrable, the correct approach is to determine whether the unused areas are in fact integral to the enjoyment of the land as a whole. A wood such as this is a case in point. There are areas of mature growth which are unused or used only occasionally but they are palpably integral to the enjoyment of the wood as a whole. It would be absurd to sever out these unused areas.

175. **Statutory incompatibility**

(a) Put shortly, the issue is whether land held for the statutory purposes of the NHS falls within the same category as land held by a statutory undertaker for the purposes of its operations such that, consistently with the decision in *Newhaven*, the land in this instance would not be registrable as a matter of law.

(b) I have set out the competing submissions of the parties on this issue at [171] and, having considered the matter carefully, I prefer those of the applicant under this head.

(c) I agree with the applicant that the fact that the application land forms part of the same freehold title as the hospital site should not mean that it must be treated as part of the working hospital site when, as a matter of fact, it plainly is not and never has been.

(d) I also agree with the applicant's submission that the objector's case on statutory interpretation would in practice emasculate the provisions of the 2006 Act when it came to land held by public bodies for specific statutory functions. This can hardly

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have been parliament's intention and support for what the applicant argues can clearly be found from what was said by Lord Neuberger at [101] in *Newhaven*:

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

(e) Dr Bowes rightly draws attention to what Lord Neuberger said at [93], namely that the doctrine was held to apply only to land that was acquired and held by a statutory undertaker (which does not apply in this instance) whose continuing use (because of the conflict between the applicable statutory regimes) would be inconsistent with its registration as a TVG. In *Newhaven* the operational land of the harbour (of which the beach formed part) was subject to statutory provisions which imposed on the undertaker a positive duty to maintain and support the operational land of the harbour which, in the event that works had to be executed in a way which affected the public's use of the beach were it registered as a TVG, there would be an obvious and irreconcilable clash as between the conflicting statutory regimes. The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

(f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being. As Dr Bowes says, in *Barkas* at [66] Lord Carnwath explained that land in public ownership is not outside the 2006 Act and to suggest that any land held for purposes inimical to TVG rights would be outside the 2006 Act would be absurd, not least as it might give rise to unnecessary speculation and debate about what the landowner's future intentions were for the land in contrast to the wholly proper analysis which, in my view, arises from *Newhaven* which focuses on the specific duty or duties

which are imposed on a landowner (in its capacity as a statutory undertaker) with regard to its holding and management of the land which would clash with registration of the land as a TVG. As indicated, no such conflict impacts on the holding of the land in this instance in the performance of the statutory health functions of the NHS and those bodies through whom they are discharged.

(g) Nor do I accept either that the principle in *Newhaven* applies only to those public bodies which have no power to hold land for public recreation since it might mean in practice that all or most publicly held land is outside the 2006 Act. This is because land held for statutory purposes which embraces the principle in *Barkas*, or which otherwise entitle local inhabitants to use the land for recreation, would be non-qualifying, as would land held by public bodies with no powers to permit recreation such as might apply, for instance, in the case of land held for education. In my view, if registration was to have been avoided during the relevant qualifying period in this instance then the answer was permissive signage or making user contentious.

(h) I therefore take the view that the doctrine of statutory incompatibility has no application in this case.

176. **Is a polling station a locality in law?**

(a) I agree with the submissions of the objector on this issue. The claim being made by the applicant is not one for which there is any authority which would bind the registration authority to accede to this submission.

(b) Mr Clay is, in my view, right when he submits that a polling district is not a qualifying locality within the meaning of this term where it is first used in section 15(3). I accept that a polling district is an area with legally significant boundaries but it has nothing to do with any community of interest on the part of its inhabitants. It is concerned entirely with the practicalities of administering the electoral process within a given area and has no reference to any community of interest on the part of its inhabitants (see *Paddico* at [29] and [62]). It is not as if polling districts return members.

(c) In arriving at the above view, I have taken into account the current Guidance of the Electoral Commission when it comes an overview of the legislative requirements when it comes to polling districts and polling places.

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For instance, at 5.15 it is stated as follows under the heading *'Polling Districts'*:

'The following should be considered as part of the assessment of the suitability of polling district boundaries:

- *Are the boundaries well-defined? For example, do they follow the natural boundaries of the area? If not, is it clear which properties belong in the polling district?*
- *Are there suitable transport links within the polling district, and how do they relate to the areas of the polling district that are most highly populated? Are there any obstacles to voters crossing the current polling district and reaching the polling place e.g. steep hills, major roads, railways lines, rivers?'*

The foregoing matters plainly focus on the administrative practicalities at elections.

(d) Whilst I accept that polling districts may well be chosen for the convenience of its inhabitants, it seems to me that this is not a description of a community falling within the meaning of the term locality where used in section 15(3). If it did then the term 'locality' would, in my view, be devoid of any coherent meaning at all and could feasibly embrace legally significant boundaries of more or less any description without having any credible relationship at all with the claimed TVG, and, in my view, this cannot have been the statutory intention.

(e) A further difficulty facing the applicant under this head is that she is unable to identify with any or adequate precision the boundaries (or even its existence) of the relevant polling district (or any of its predecessors serving the area) throughout the whole of the relevant qualifying period. What we have is a current polling district created in February 2013 once the qualifying period had already expired. As Carnwath LJ stated in *Paddico* at [62]:

' ... where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link.'

(f) On the face of it, however, in view of the claimed evidence from Mr Hall, it seems that the applicant may now be able prove this. As indicated above, the late submission from Dr Bowes dated 1/06/2015, if true (and there is no suggestion that the information coming from Mr Hall is or is likely to be erroneous), suggests that the applicant is now able to demonstrate with sufficient clarity both the existence and boundaries of the polling district throughout the qualifying period. On the other hand, although the current process is admittedly an informal one, it is, as it seems to me, very unfortunate indeed that on such an important point as this the applicant was unable to lay out such evidence on the final day of the inquiry. I do not know what Mr Clay thinks about this new information emanating from Mr Hall and which comes to me via the applicant and then through her counsel without any verifying documentation in support. I suspect that Mr Clay would be calling on me to ignore it as it is unsupported by any credible documents and also comes very late in the day. At any rate, it was still open to Mr Clay to deal with this in further submissions but he has chosen not to do so and, accordingly, I deal with the matter on the basis of the evidence as it has been presented to me which I take to be accurate.

(g) However, because of the view I take on the inability of a polling district to constitute a locality in law I do not consider that anything turns on this evidence from Mr Hall.

177. **Neighbourhood**

(a) The term 'neighbourhood' is an ambiguous term. It may mean *'the vicinity'* of a place or a person (see e.g. *Stride v Martin [1897] 77 LT 600*) but it may also refer to an area that is recognisable as having a degree of coherence such that people would recognise it as being separate or different from the areas immediately surrounding it. It is, in this sense, that the term 'neighbourhood' is used in the 2006 Act. It seems plain to me that a neighbourhood must be understood as meaning a cohesive area which is capable of meaningful description in some way. But beyond that it has no particular requirement, and whether the claimed neighbourhood is made out is a question of fact.

(b) In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression, and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is <u>not</u> a

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neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

(c) The residential properties comprised a mix of styles and ages and there was nothing in the way of facilities (that is, with the exception of the land itself) serving predominantly the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve (or rather served in the case of St Mary's Primary School) a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such a small parade of shops with a post office, licensed premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of those features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses, when asked to cast their mind to it, considered that their neighbourhood was simply the area in their own particular vicinity or where their friends mainly lived. I also think that most of the applicant's oral witnesses were unduly influenced by being presented with App/1 in their support of the claimed neighbourhood.

(d) It was also significant that a number of the applicant's witnesses took the view that the neighbourhood should in fact have been more extensive than claimed. In other words, there was no unanimity amongst the applicant's witnesses that App/1 was the true neighbourhood. See, for instance, the evidence of the applicant herself (who it seemed to me - as she herself accepted - did not really have a correct understanding of the terms neighbourhood and locality) and that of Sandra Sullivan, Julia Jarrett, Ken Ellis, Les Prescott, Heather Ward, Michael Brian and David Brett. For instance, more than one witness was puzzled as to why the church was not included within the claimed neighbourhood (whereas the church hall on the other side of the road was) which struck me as a bizarre omission. Indeed, it was the evidence of Imani Ayimba-Golding that she attended a Sunday club at the church hall in Church Road. Evidently they would all troop across the road to the church at the end of the morning service.

(e) Lastly, this neighbourhood had no name. That is not a necessary requirement, but if there is historical cohesiveness in respect of an area, one might expect it to have acquired some form of collective description.

(f) I have also borne in mind that when Parliament amended the Commons Registration Act 1965 to permit registrations to take place by reference to *'a neighbourhood within a locality'* it intended to make it easier to register TVGs, and did so by allowing them to be registered by reference to a concept that was not precise either as to definition, or as to boundary (see *Oxfordshire* per Lord Hoffmann at [27]). However, notwithstanding this, my conclusion for the reasons I have set out above (i.e. because the area does not have sufficient individual cohesiveness or community identity) is that the claimed neighbourhood is not a 'neighbourhood' within the meaning of the 2006 Act.

(g) It seems to me that if Parliament had intended that a neighbourhood should be interpreted to mean the area in which the recreational users reside, then it would have said so. Moreover, whilst I accept that the bar is set low in the *Leeds Group* litigation, having been to the area in this case and heard the evidence, I take the view that, as a matter of fact and degree, the applicant has fallen well short of what is required to be proved in order to satisfy the neighbourhood element.

178. **Findings of fact and recommendation**

(a) I find that a significant number of the local inhabitants of the claimed locality shown within the blue dashed lines on App/1 (being the polling district XB within the Leatherhead South ward of MVDC) indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(b) I find that a significant number of the local inhabitants of the claimed neighbourhood shown within the red lines on App/1 and falling within the locality of Leatherhead South ward also indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(c) I find that the objection advanced by the objector that the land was not registrable on the ground of statutory incompatibility was not made out.

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(d) I find that the claimed locality is not a locality within the meaning of section 15 of the 2006 Act.

(e) I find that the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act.

(f) Because the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG, my recommendation to the registration authority is that the application to register (under application number 1869) should be rejected.

179. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *'the reasons set out in the inspector's report dated 9/06/2015.'*

William Webster

12 College Place

SOUTHAMPTON

SO15 2FE

Inspector **9th June 2015**

Appendix 1

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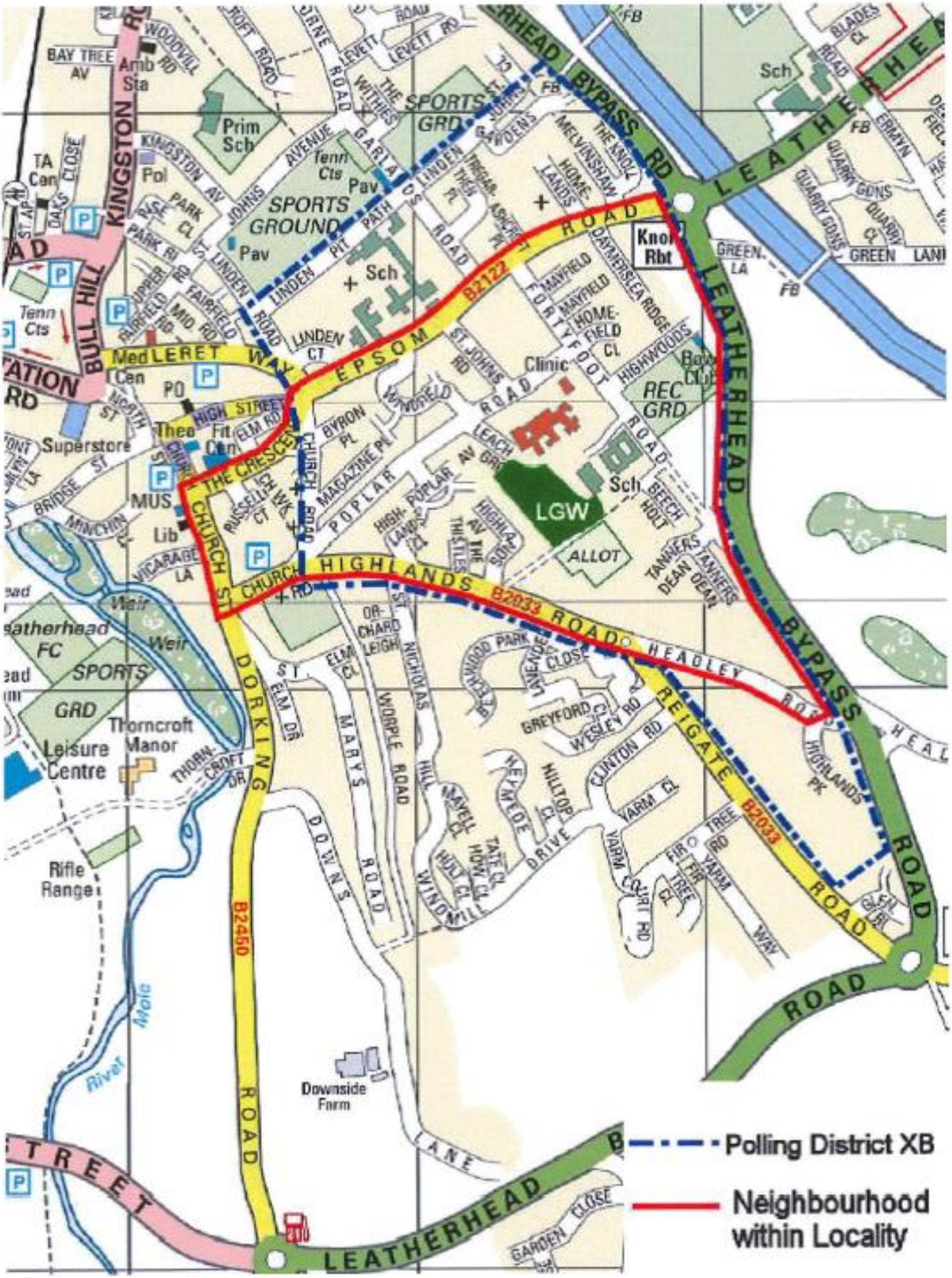

Polling District XB
Neighbourhood within Locality
LEATHERHEAD BYPASS ROAD
KINGSTON ROAD
BULL HILL
EPSOM ROAD
B2122
LERET WAY
HIGHLANDS ROAD
B2033
REIGATE ROAD
B2033
DORKING ROAD
B2450
LEATHERHEAD ROAD
LEATHERHEAD BYPASS
CHURCH ST
CHURCH ROAD
THE CRESCENT
POPLAR AV
LINDEN ROAD
ST JOHNS ROAD
HEADLEY ROAD
WORPLE ROAD
MARYS ROAD
DOWNS ROAD
LANE
STREET
SPORTS GROUND
SPORTS GRD
REC GRD
LGW
ALLOT
Prim Sch
Sch
Clinic
Knol Rbt
Tenn Cts
Pav
Pol
PO
Thee Fit Cen
Superstore
MUS
Lib
Weir
Leatherhead FC
Thorncroft Manor Leisure Centre
Rifle Range
River Mole
Downside Farm
Amb Sta
TA Cen
Med Cen
BAY TREE AV
WOODVILL RD
KINGSTON AV
PARK RISE
PARK RI
PARK CL
OAKS CLOSE
ST AP
UPPER FAIRFIELD RD
MID RD
FAIRFIELD RD
NORTH ST
HIGH STREET
ELM RD
BRIDGE ST
MINCHIN CL
VICARAGE LA
CHURCH ST
RUSSELL CH WK
CT
MAGAZINE PL
BYRON PL
WINDFIELD
LEACH GRO
HIGH-LANDS CL
HIGHLANDS AV
THE THISTLES
TANNERS DEAN
BEECH HOLT
ORCHARD LEIGH
ELM CL
ELM DR
NICHOLAS HILL
BEECHWOOD PARK CLOSE
LANE CLOSE
GREYFORD CL
WESLEY RD
CLINTON RD
YARM CL
YARM COURT RD
FIR TREE CL
FIR TREE RD
YARM WAY
HIGHLANDS PK
HEYMEDE DRIVE
HILLTOP CL
MAVELL CL
TATE CL
HOW CL
HULL CL
WINDMILL
THORN-CROFT DR
LEVETT RD
THE WITHIES
ST JOHNS
GARDENS
LINDEN PATH
LINDEN CT
TREGAR ASHCROFT PL
MELVINSHAW
THE KNOLL
HOME-LANDS
DAYMERSLEA RIDGE
MAYFIELD
FORTYFOOT
HOME-FIELD CL
HIGHWOODS
BLADES CL
ERMYN
QUARRY GDNS
QUARRY CL
GREEN LANE
GREEN LA
GARDEN CLOSE
FB
B

Appendix 2

SURREY COUNTY COUNCIL COUNTY VALUER'S DEPT.

LAND IN FORTYFOOT ROAD, LEATHERHEAD.

AREA COLOURED PINK : 7·1 ACRES. (APPROX)

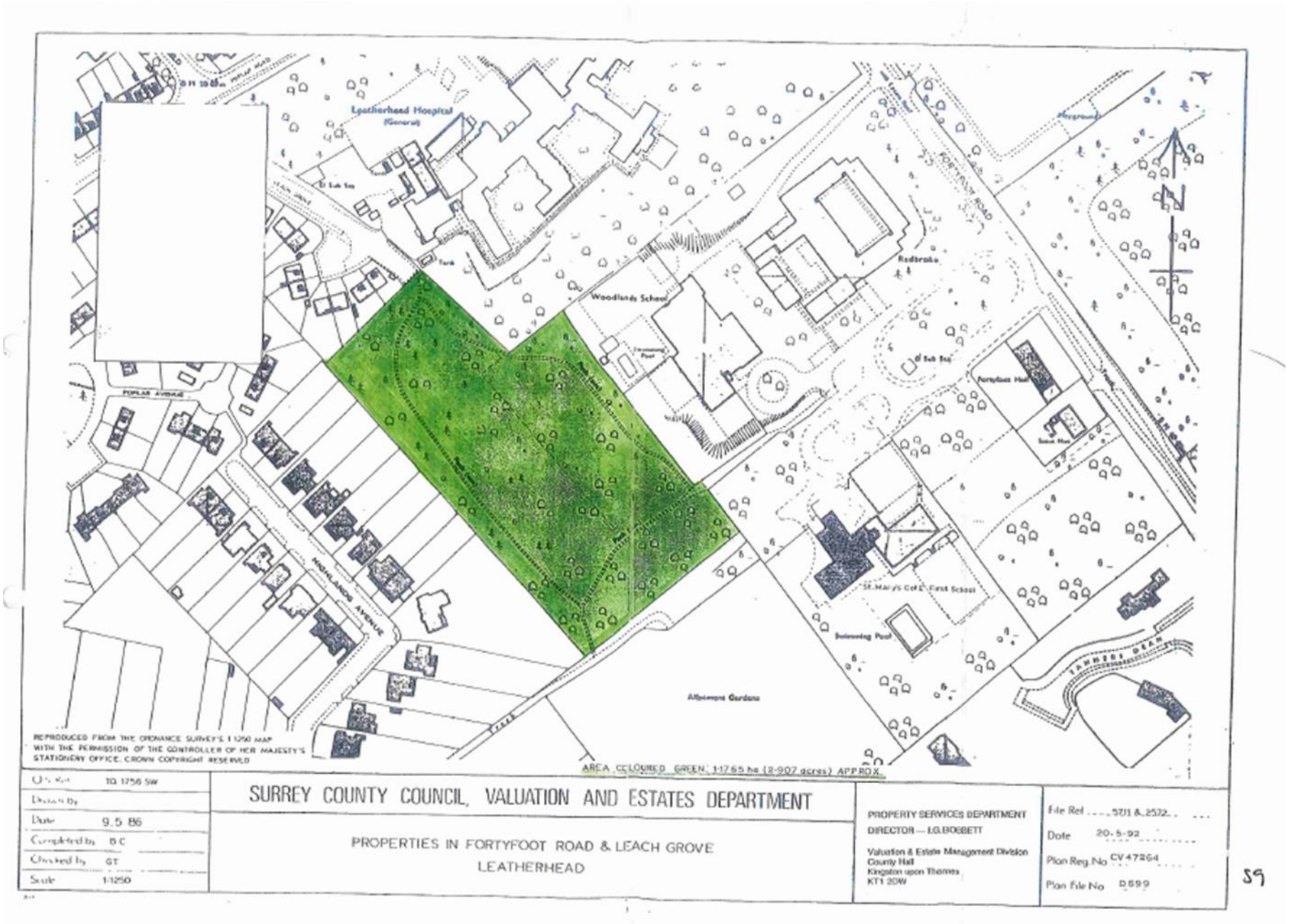
SCALE : 1/1250

PREPARED BY | CHECKED BY | O.S. 1756 ...

3530

56

Appendix 3


Leatherhead Hospital (General)
Woodlands School
Redbrake
FORTYFOOT ROAD
POPLAR AVENUE
HIGHLANDS AVENUE
Allotment Gardens
St. Mary's C of E First School
Swimming Pool
TANNERS DEAN
REPRODUCED FROM THE ORDNANCE SURVEY'S 1:1250 MAP WITH THE PERMISSION OF THE CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE. CROWN COPYRIGHT RESERVED
AREA COLOURED GREEN: 1.1765 ha (2.907 acres) APPROX.
O.S. Ref TQ 1756 SW
Drawn by
Date 9.5.86
Completed by BC
Checked by GE
Scale 1:1250
SURREY COUNTY COUNCIL, VALUATION AND ESTATES DEPARTMENT
PROPERTIES IN FORTYFOOT ROAD & LEACH GROVE
LEATHERHEAD
PROPERTY SERVICES DEPARTMENT
DIRECTOR — I.G.BOBBETT
Valuation & Estate Management Division
County Hall
Kingston upon Thames
KT1 2DW
File Ref 5701 & 2572
Date 20-5-92
Plan Reg No CV47264
Plan File No D599
59

8

Appendix 4

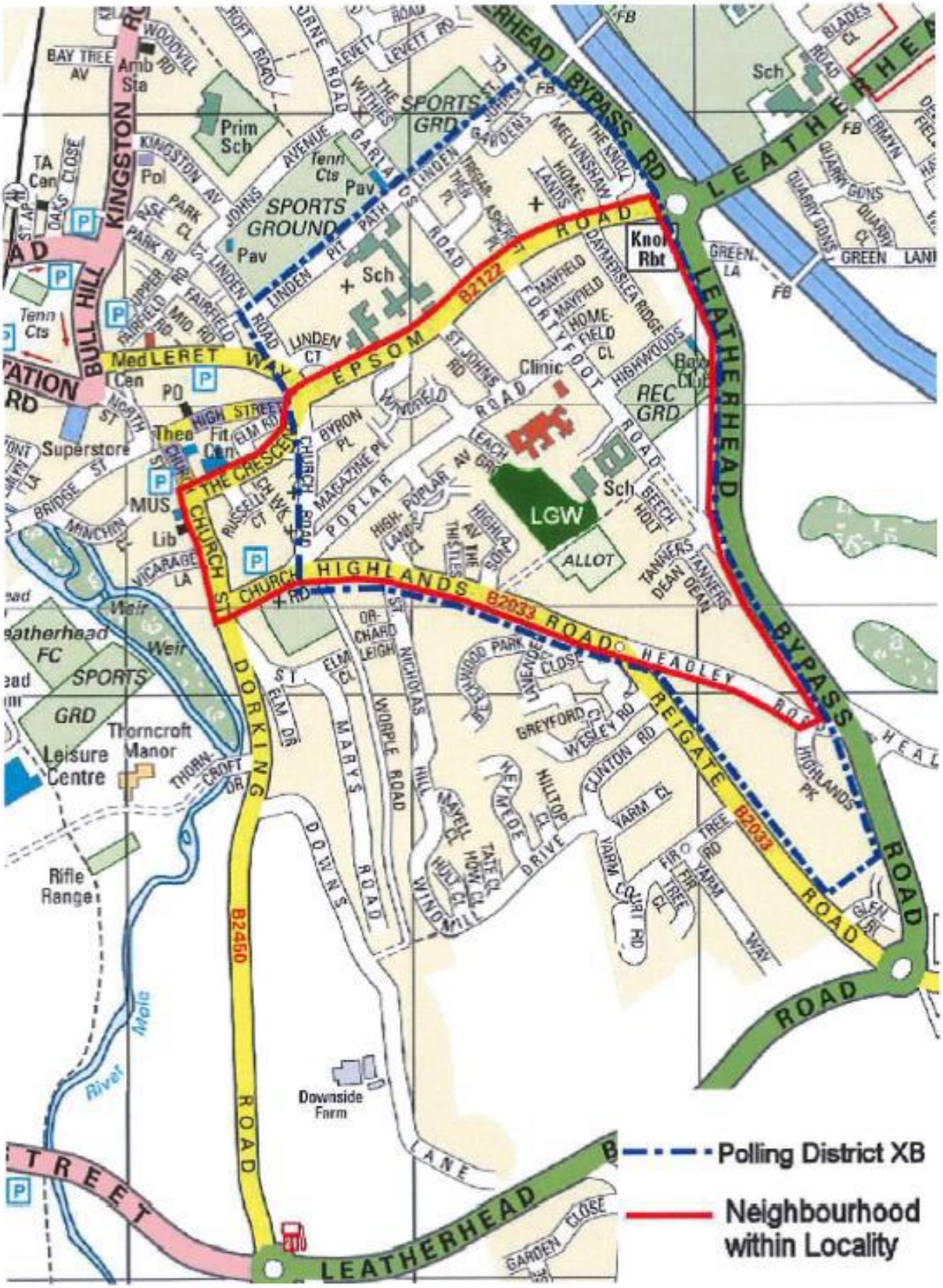

Leatherhead Hospital
(Surgical)
Woodlands School
Radbrae
Fortyfoot Recreation Ground
Bowling Grn
Poplar Road C of E Primary School Annexe
Swimming Pool
POPLAR ROAD
WINDFIELD
Sherborne Walk
LEACH GROVE
POPLAR AVENUE
ANDS AVENUE
Estate Management Services
location Leatherhead Hospital
project ref.
job
title
drawn
checked
scale 1:1250
date 19 June 1991
approved
traced
drawing no. RB/MDS/140/11.
rev.
REPRODUCED FROM THE ORDNANCE SURVEY MAP WITH THE PERMISSION OF THE CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE, CROWN COPYRIGHT RESERVED
EXTRACT FROM O.S. SHEET NO. TQ 1756 NW, SW

62

8

ANNEX C

8



PLANNING AND REGULATORY COMMITTEE

DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX C 2016 HIGH COURT JUDICIAL REVIEW JUDGMENT

8

Case No: CO/6227/2015

Neutral Citation Number: [2016] EWHC 1715 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/07/2016

Before :

MR JUSTICE GILBART

- -

Between :

THE QUEEN

on the application of

NHS PROPERTY SERVICES LIMITED

- and -

SURREY COUNTY COUNCIL

-and-

TIMOTHY JONES

- -

- -

Jonathan Clay and **Matthew Lewin** (instructed by **Capsticks LLP, Solicitors of Wimbledon**) for the **Claimant**

Douglas Edwards QC and **Katherine Barnes** (instructed **by Joanna Mortimer, Principal Solicitor, Surrey County Council**) for the **Defendant**

Dr Ashley Bowes (instructed via Direct Access) for the **Interested Party**

Hearing dates: 14th-16th June 2016

- -

Judgment

MR JUSTICE GILBART :

ACRONYMS AND ABBREVIATIONS USED IN THE JUDGEMENT

CA 2006	Commons Act 2006
C(RTV)Regs 2007	Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007
CR(E)Regs 2014	Commons Registration (England) Regulations 2014

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (as set out in Human Rights Act 1998 Schedule 1)
RA	Registration Authority
NHSPS	NHS Property Services Limited
SCC	Surrey County Council
PCT	Primary Care Trust
IR	Inspector's Report and Recommendations

Introduction

1.
This claim relates to the registration on 6th October 2015 by SCC, as Registration Authority, of land known as Leach Grove Wood, Leatherhead, Surrey as a town or village green pursuant to s 15 of the CA 2006. It did so, having concluded that the criteria in s 15 of CA 2006 were met. Those criteria are that

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

2.
That land is owned by the Claimant NHSPS. The land was registered pursuant to an application made by Mrs Phillippa Cargill. She has now emigrated from this country. The Interested Party was a supporter of her application and has been made a Party without objection from the Claimant, so that the case for those who supported the application could be made to the Court.

3.
NHSPS objected to the application. A non-statutory inquiry was held by an Inspector, Mr William Webster, Barrister, who then reported to SCC that he recommended that the application be refused. He held that while there had been the indulgence as of right in lawful sports and pastimes for at least 20 years, the Applicant had not identified a "locality," or alternatively a "neighbourhood within a locality." He had rejected the Claimant NHSPS' case that there was a statutory incompatibility between the statutory purposes for which the land was held and registration pursuant to section 15 of the CA 2006. It is to be noted that while that is a matter of fundamental importance (see R (Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7 ("Newhaven") at [91]- [93] per Lord Neuberger and Lord Hodge) it is not set out in s 15 CA 2006 as a criterion.

4.
The relevant Committee of SCC concluded that the criteria were met. The case for SCC was that it did so on the basis that the "neighbourhood within a locality" test was passed. The Committee's reasons for granting the application did not address the argument about statutory incompatibility at all.

5.
The issues raised in this case are:

(1)
was SCC under a duty to give reasons for its decision?

(2)
if so, what standard of reasoning was required?

(3)
did SCC give adequate reasons for finding that the criteria were met?

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(4)
was the finding that there was a “neighbourhood” one which SCC could reasonably make?

(5)
given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has SCC shown that there was no basis for concluding that there was statutory incompatibility?

(6)
was the conduct by SCC of the meeting which considered the issue fair to the Claimant NHSPS?

6.
I shall deal with matters as follows

(a)
An overview of the system of registration;

(b)
The land in question and its ownership;

(c)
The “locality” and “neighbourhood within a locality” arguments;

(d)
The respective cases at inquiry;

(e)
The inquiry and the Inspector’s Report and Recommendations (IR);

(f)
SCC’s consideration of the Inspector’s Report and the decision to register the land;

(g)
The case for NHSPS;

(h)
The cases for SCC and the Interested Party;

(i)
Discussion

(j)
Conclusions

(k) Costs

(l) Permission to appeal

(a) An overview of the system of registration

7.

Many cases have grappled in the last 20 years with the meaning of the tests in what is now s 15 of CA 2006. Happily, this judgement does not need to explore them, as there was very considerable agreement on the tests and approach to registration. The issues in this litigation related to other issues relating to reasoning, and to the application of the test of statutory incompatibility in Newhaven.

8

8.
This was an application under s 15(3) CA 2006 made to the Registration Authority (SCC). The relevant parts of s 15 read:

“15 Registration of greens

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) .....

(3) This subsection applies where—

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

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the relevant period.”

9.
It follows that, subject to the one reservation noted below, if a significant number of the inhabitants of either a “locality” or a “neighbourhood within a locality” are shown to have used the land for informal recreation as of right (not by right – see R(Barkas) v North Yorkshire CC [2014] UKSC 31 [2015] 1 AC 195 [2014] 3 All ER 178) for a period of at least 20 years before the end date relevant to the application (here the 20 years ending on 9th January 2013), and the application was made within the relevant period, then the application must be granted.

10.
There is one important rider to be made as a result of the decision in Newhaven, which is that s 15 CA 2006 does not:

“.... apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green”

(per Lord Neuberger and Lord Hodge in Newhaven at [93]).

11.
The process is regulated in some areas by the C(RTV)Regs 2007. They apply to Surrey. By Regulation 5, the application must be sent by the RA to any landowner (and others with interests) and publicised otherwise, and a date set for the receipt of objections. By Regulation 6, the RA must decide to proceed to consider the application, and in doing so (a) must consider all objections made by the date when it elects to proceed further, and (b) may consider those received afterwards up to the time it finally disposes of the application (Regulation 6).

12.
Although there is no statutory provision for the holding of inquiries, it is now commonplace for an RA to arrange for an Inspector to hold one and report to it. That happened in this case. However, the decision on registration is made by the RA. When it has disposed of the application, it must give notice of that fact to, inter alios, the applicant, and every person who objected whose address is known (Regulation 9). That notice must include, where it has granted the application, details of the registration, and where it has rejected the application, the reasons for the rejection. That includes anyone who did object within time, or whose objection was considered.

13.
That can be contrasted with the CR(E)Regs 2014 which apply in some other areas, apparently as part of a pilot scheme, where the duty to give reasons applies whether the application has been granted or rejected (see Regulation 36(3)).

14.
I shall in due course consider whether there is a duty to give reasons to an objector when an application has succeeded, and if so the extent of the reasons which must be given.

(b) The land in question and its ownership

15.
The land in question is, according to the Inspector, a parcel of woodland containing a range of deciduous and evergreen trees. He described it as unkempt, run down, and as having had little management over the years. Some trees had fallen, and there are also some self-seeded trees on the land. The Claimant had also felled some trees recently as they presented a risk to health and safety. The tracks within the site are free of obstruction and easy to walk on, which showed that there had been heavy use. Some of the land is covered by impenetrable undergrowth. The land is criss-crossed by tracks. The Inspector's assessment was that 60-70% of the land was reasonably accessible for informal recreation. He found that the land was used both for recreation and as a place of transit between local roads, allotments, the former St Marys CE Primary School, and other local places. He described it as an attractive location for walking, with or without dogs, and for children's play. The unused areas were integral to the enjoyment of the area and formed part of the function and attractiveness of the area.

16.
On 9th January 2013 the Claimant erected a notice on the land stating that it was private land, and that the public had permission to enter it on foot, but that it could be withdrawn at any time.

17.
The IR sets out the history of the land. It also identified some, but by no means all, of the relevant statutes identifying the powers of the various NHS bodies which have held the land. It was also apparent to me at the hearing of this claim that neither the Claimant, nor SCC nor the Interested Party, had researched that issue thoroughly. What follows includes the known and agreed facts of ownership and transfers, but also identifies the relevant statutory powers.

18.
The land forms part of an area of land, which to put the matter loosely to begin with, is owned by part of the National Health Service. It forms part of a landholding related to the Leatherhead Hospital. In 1948 it was transferred by the Trustees of the Hospital to the Minister of Health pursuant to the National Health Service Act 1946. In 1968, by virtue of the Secretary of State for Social Services

Order 1968 No 1699 it was vested in that Secretary of State. On 30th January 1969, a parcel of land (including the application site) was sold to SCC. The recital recorded that it was then surplus to the Secretary of State's requirements. It was acquired by SCC under general powers.

19.
It was appropriated in 1971 by SCC to "Education, Health and Social Services" and was noted as being required for the purposes of a hostel for the confused elderly, and for a proposed junior training centre. It was not acquired for use as recreational open space. However, those uses were intended for 4.35 acres. The remaining area was shown as being for a proposed health centre. No health centre was in fact constructed. The application site, which comprises that land, remained (and remains) undeveloped.

20.
Under s 16(1) of the National Health Service Reorganisation Act 1973 all land held by local authorities for health functions was to be vested in the Secretary of State on a day to be appointed. When the 1973 Act came into force, the Secretary of State's powers were those in s 2 of that Act (now repealed)

"(1) Without prejudice to his powers apart from this subsection, the Secretary of State shall have power—

(a)
to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by the Health Service Acts; and

(b)
to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

(2) It shall be the duty of the Secretary of State to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements.—

(a)
hospital accommodation;

(b)
other accommodation for the purpose of any service provided under the Health Service Acts;

(c)
medical, dental, nursing and ambulance services;

(d)
such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;

(e)
such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service in place of arrangements of a kind which immediately before the passing of this Act it was the function of local health authorities to make in pursuance of section 12 of the Health Services and Public Health Act 1968;

(f)
such other services as are required for the diagnosis and treatment of illness; and regulations may provide for the making and recovery of charges in respect of facilities designated by the regulations as facilities provided in pursuance of paragraph (d) or (e) of this subsection."

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20.
He had the power to acquire and use land (s 53(1)) of the 1973 Act and s 58 of the 1946 Act). By virtue of section 53(3) of the 1973 Act:

"The Secretary of State may use, for the purposes of any of the functions conferred on him by the Health Service Acts, any property belonging to him by virtue of any of those Acts."

21.
However, some health functions were discharged under the aegis of the Secretary of State for Social Services. On reorganisation of the Government Departments in 1988, such functions were transferred to the Secretary of State for Health – see the Transfer of Functions (Health and Social Security) Order 1988 Article 2. (It should be noted that the effect of that Order is misdescribed in the IR at [87]).

22.
In 1993 the land was vested in the Secretary of State for Health by SCC. As at that date the relevant statute affecting the Secretary of State's duties and powers was the National Health Service Act 1977. I should refer to ss 1(1), 2, 3(1) and 87(1) and (2):

"1 Secretary of State's duty as to health service

(1)
It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement—

(a)
in the physical and mental health of the people of those countries, and

(b)
in the prevention, diagnosis and treatment of illness,

and for that purpose to provide or secure the effective provision of services in accordance with this Act.

2 Secretary of State's general power as to services

Without prejudice to the Secretary of State's powers apart from this section, he has power—

(a)
to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act; and

(b)
to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

.....

3 Services generally

It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements—

(a)
hospital accommodation;

(b)
other accommodation for the purpose of any service provided under this Act;

(c)
medical, dental, nursing and ambulance services;

(d)
such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;

(e)
such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service;

(f)
such other services as are required for the diagnosis and treatment of illness."

.....

87 Acquisition, use and maintenance of property.

(1)
The Secretary of State may acquire—

(a)
any land, either by agreement or compulsorily,

(b)
any other property,

required by him for the purposes of this Act; and (without prejudice to the generality of paragraph (a) above) land may be so acquired to provide residential accommodation for persons employed for any of those purposes.

(2)
The Secretary of State may use for the purposes of any of the functions conferred on him by this Act any property belonging to him by virtue of this Act, and he has power to maintain all such property."

(It is also important to note the terms of that Act after the passage of the Health Care Act 1999 (which established PCTs) and the National Health Service Reform and Health Care Professions Act 2002, whose terms are dealt with below.)

23.
By the National Health Service Community Care Act 1990, NHS Trusts were created. By s 5:

"5 NHS trusts

(1)
Subject to subsection (2) or, as the case may be, subsection (3) below the Secretary of State may by order establish bodies, to be known as National Health Service trusts (in this Act referred to as NHS trusts), —

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(a)
to assume responsibility, in accordance with this Act, for the ownership and management of hospitals or other establishments or facilities which were previously managed or provided by Regional, District or Special Health Authorities; or

(b)
to provide and manage hospitals or other establishments or facilities."

(Under the predecessor legislation, there were Regional and Area Health Authorities, which would carry out the functions of the Secretary of State on his directions (see 1977 Act ss 8, 13.)

24.
By section 8 of the 1990 Act

"The Secretary of State may by order transfer or provide for the transfer to an NHS trust, with effect from such date as may be specified in the order, of such of the property, rights and liabilities of a health authority or of the Secretary of State as, in his opinion, need to be transferred to the trust for the purpose of enabling it to carry out its functions."

25.
The Epsom Health Care NHS Trust was created by statutory instrument in 1990 for the purpose of section 5(1) of the 1990 Act. Its functions under Article 3(2) of the Epsom Health Care National Health Service Trust (Establishment) Order 1990 were as follows:

(2)
"The trust's functions (which include functions which the Secretary of State considers appropriate in relation to the provision of services by the trust for one or more health authorities) shall be–

(a)
to own and manage hospital accommodation and services at the Epsom District Hospital" (address given) "and associated hospitals;

(b)
to manage community health services provided from Epsom District Hospital" (address given) "and to own the premises there from which those services are to be provided and any associated premises.

26.
The Leatherhead Hospital site, including the application site, was transferred to the Epsom Health Care NHS Trust on 20th September 1993. That Trust was dissolved in 1999 and its land and assets transferred to the Epsom and St Helier NHS Trust. In April 2002 Leatherhead Hospital (including the land) was transferred to the East Elmbridge and Mid Surrey PCT, and in 2006 was transferred to the Surrey PCT pursuant to statutory instrument.

27.
PCTs had been established under s 16A of the National Health Service Act 1977, which was inserted by s 2 of the Health Act 1999 and subsequently amended by s 2 of the National Health Service Reform and Health Care Professions Act 2002. By s 16A (3) of the amended Act of 1977

“(3) A Primary Care Trust shall be established for the area ……specified in its PCT order and shall exercise its functions in accordance with any prohibitions or restrictions in the order.”

Schedule 5A was also inserted into the 1977 act by the 2002 Act. It defines the powers of a PCT as follows in Part III:

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“Powers and Duties

General powers

“12(1) A Primary Care Trust may do anything which appears to it to be necessary or expedient for the purpose of or in connection with the exercise of its functions.

(2) That includes, in particular—

(a) acquiring and disposing of land and other property,

(b) entering into contracts,

(c) accepting gifts of money, land and other property, including

money, land or other property held on trust, either for the general

or any specific purposes of the Primary Care Trust or for all or

any purposes relating to the health service.”

28.
When PCTs were abolished in 2013 pursuant to the Health and Social Care Act 2012, the Hospital (including the land) was transferred to the Claimant under the Surrey PCT Property Transfer Scheme 2013. The land is held by the Claimant for the NHS Surrey Downs Clinical Commissioning Group, which operates Leatherhead Hospital.

29.
As a Clinical Commissioning Group (CCG) which is a creation of the 2012 Act, which amended the National Health Service Act 2006, its role as a CCG by virtue of the amended s 1I (2) of the 2006 Act, is:

“Each clinical commissioning group has the function of arranging for the provision of services for the purposes of the health service in England in accordance with this Act”

30.
By the amended s 2 of the 2006 it has the following “general power”:

“The Secretary of State, the Board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act.”

31.
By the amended s 14A (also inserted in 2012) any provider of primary medical services is a member of a Clinical Commissioning Group, none of whose areas overlap. By paragraph 20 of the amended Schedule 1A, (also by the 2012 Act) a Clinical Commissioning Group has “incidental powers” as follows:

“20 The power conferred on a clinical commissioning group by section 2 includes, in particular, power to—

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(1)
enter into agreements,

(2)
acquire and dispose of property, and

(3)
accept gifts (including property to be held on trust for the purposes of the clinical commissioning group).”

32.
The Claimant owns the freehold title of land which is the site of Leatherhead Hospital. The Claimant was set up pursuant to the power in s 223 of the National Health Service Act 2006 whereby

(1)
“The Secretary of State may form, or participate in forming, companies to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act.”

33.
The It follows from the above that at all relevant times, the land has formed a part of the land held by one of the various NHS bodies, and held for defined statutory purposes. There has at no time relevant to the application been a general power to hold the land for anything other than the statutory purposes set out above. I shall in due course compare and contrast the scope of those powers to those applying to other public bodies.

(c) The “locality” and “neighbourhood within a locality” arguments

34.
As is apparent from s 15 of the CA 2006, an applicant for registration must demonstrate either (a) that a significant number of the inhabitants of any locality, or (b) a significant number of the inhabitants 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. At one time it was thought that the second limb required one to show that the “neighbourhood” fell within the defined locality (see R (Cheltenham Builders Ltd) v s Gloucestershire DC [2003] EWHC 2803 [2004] JPL 975 per Sullivan J at [88]). However, since that was criticised by Lord Hoffman in Oxfordshire CC v Oxford City Council [2006] UKHL 25 [2006] 2 AC 674 at [27], it has been accepted that a neighbourhood can extend across the boundaries of a locality, as was made clear by Sullivan LJ in Adamson v Paddico 262 Ltd, Kirklees MBC and others [2012] EWCA Civ 262 [2012] 2 P & CR 1, at [23] (a decision reversed in the Supreme Court, but not on this point).

35.
Here the Applicant for Registration argued both limbs, i.e. she alleged use by a significant number of residents in (a) a locality, or (b) a neighbourhood within a locality. On the application form, the title of Box 6 is

“Locality or neighbourhood within a locality in respect of which the application is made”

to which she gave the answer

“South Leatherhead Neighbourhood based on polling districts Leatherhead South 1 and 2 lying within South Leatherhead Ward”

while in answer to Box 7, which sought justification for the application, she stated that the land at Leach Grove Wood had been:

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“used as of right by a significant number of the inhabitants of the South Leatherhead neighbourhood within the South Leatherhead ward on the Mole Valley District Council.....”

36.
The plans attached showed the boundary of the area which was said to constitute the “neighbourhood.” It covered a large area, consisting of a rough rectangle running from SSE to NNW. The area of the South Leatherhead neighbourhood was shown edged in red and running west along the A 24 Leatherhead by pass to the south from its junction with B 2033 Reigate Road. To the west it ran up Dorking Road as far north as its junction in the Town centre with High Street, and then westwards along Bridge Street within the Town centre to North Street until it met Leret Way. At that point it turned northeastwards along Upper Fairfield Road, St Johns Avenue and thence to the A243 Leatherhead Bypass, where it turned south. That bypass becomes the A 24 after the junction with Epsom Road at the Knoll Roundabout. The boundary then followed the A 24 across its junction with Headley Road, which crosses it from east to west, and then to its junction with Reigate Road.

37.
However, that original case was changed at the inquiry before the Inspector. In his opening submission before the Inspector, Dr Bowes described Mrs Cargill’s case thus:

“The Applicant advanced her case on two alternative propositions. Either, a significant number of users come from the locality of the Polling District XB or they come from the neighbourhood bounded by the roads B 2122, A 24, B 2033 within the locality of Leatherhead South Ward of Mole Valley District Council.”

38.
The effect of that, as shown on a plan put into the inquiry by Dr Bowes (and in the trial bundle at page 157A) was to identify three areas:

(a)
the Polling District XB. That abuts the northern boundary of the ward, but its NW to NE boundary runs south along Linden Pit Path and Linden Gardens (which lie south of the boundary line marked on the original application). Its eastern boundary is formed by the A 243 north of the junction with A 24, and then the A 24 southwards until the junction with Headley Road. The polling district boundary then turned westwards along Headley Road and then Highlands Road until it reached Church Road to the west, where it turned north, skirted the eastern side of the Town centre via Church Street and Linden Road and reached St Johns Avenue and followed the boundary described above north eastwards.

(b)
The ward contains all of that polling district, and much more as well. It extends as far east as the M 25 motorway, which runs from NW to SE to the NE side of the Town centre, but also includes land to the south and west of the built up area;

(c)
The neighbourhood boundary relied on is coincident with the extent of the polling district boundary, except that

(i)
it extends further west so as to include the small area bounded by the B 2122 and B 2250 south of the shopping centre, and

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(ii)
it excludes the area in the polling district north of Epsom Road, which it follows eastwards from its junction with Church Street to the A 24 at the Knoll roundabout.

39.
Thus one had a ward, which contained a polling district. The neighbourhood relied on covered part of the polling district area, together with a small area to its west. Both fell entirely within the ward boundary.

(d) The respective cases at inquiry

40.
The Claimant addressed the inquiry to resist both alternative ways of the Applicant putting her case in their submissions to the Inspector. In essence the two cases on this issue at the inquiry were:

(a)
The Applicant argued that:

(i)
The polling district was a “locality”, and a significant number of its inhabitants indulged as of right in lawful sports and pastimes on it for over 20 years;

(ii)
Alternatively, the area described above at paragraph 35 (c) was a neighbourhood, which fell within a locality, which for this purpose was the electoral ward, and a significant number of its inhabitants indulged as of right in lawful sports and pastimes on it for over 20 years;

(iii)
There was no statutory incompatibility preventing the land’s registration;

(b)
The Claimant argued that:

(i)
The polling district was not a “locality;”

(ii)
The area described above did not have the qualities of a “neighbourhood;”

(iii)
The activities on the land did not amount to twenty years’ user as of right for lawful sports and pastimes by significant numbers;

(iv)
The purposes for which the land was held prevented registration.

41.
As I shall describe below in more detail, the Inspector

a.
rejected the polling district as constituting a “locality;”

b.
rejected the Claimant’s arguments about statutory incompatibility;

c.
accepted the Applicant’s case that a significant number of the local inhabitants of the claimed neighbourhood (as amended) and falling within the locality of Leatherhead South ward indulged as of right in lawful sports and pastimes on the whole of the land for the period of at least 20 years ending on or about 9th January 2013;

d.
considered that it was not a neighbourhood for the purposes of s 15 CA 2006;

e.
recommended that the application to register the land as a village green be rejected.

42.
As noted above, the relevant Committee of SCC as RA held that the criteria for registration had been met. It had apparently addressed itself to the issues of whether the area identified was a “neighbourhood.” As will become apparent the Claimant did not raise issue before this Court on the issues of:

a.
whether there were lawful sports and pastimes;

b.
whether the number of users was significant;

c.
whether the user took place for at least 20 years until 2013;

d.
whether it was as of right.

43.
The live issues for the Court were therefore:

a.
whether the RA’s determination that there was a “neighbourhood” for the purposes of the s 15 test was unlawful, whether on the basis that its reasons it gave for doing so were improper, and/or on the basis that it gave no adequate reasons for rejecting the IR’s conclusions;

b.
given the absence of any apparent consideration by the RA of the Claimant’s case on statutory incompatibility, whether its decision was deficient unless the case on that topic was unarguable;

c.
whether the RA’s consideration of the application and objections thereto was fair.

(e) The inquiry and the Inspector’s Report and Recommendations

44.
I shall refer only to his conclusions unless some other part of his report requires mention in the context of those issues. I have included his conclusions on the issue of statutory incompatibility. For clarity, I emphasise that this aspect of the case was not dealt with by the RA, but as a matter of fairness to the Interested Party and generally, it is right that I set out his approach, which supported the Applicant's case for registration, and rejected the Claimant's objection on that ground.

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45.
I have already referred to the alternative bases upon which the Applicant argued her case. It was common ground before me that the Inspector had rightly rejected the first claimed basis, and Dr Bowes did not argue for it before me. That was wise, as it had no discernible merit, and it is hard to understand why it was ever advanced.

46.
The Inspector's observations on his site visit appear at paragraphs [114]- [119], and after reciting the evidence and submissions he heard, his conclusions appear at paragraphs [177]- [179].

"The claimed neighbourhood

114.
I have been around the claimed neighbourhood and the surrounding areas, partly on foot as well as in the car. I have also revisited the area as a desk top exercise on Google Earth street view which is now an indispensable tool in these cases. I am confident that I have, for present purposes, seen enough of the claimed neighbourhood and the surrounding areas.

115.
If one refers to App/1 one can see that we are dealing with a roughly triangular shaped area bounded by (running anti-clockwise) (a) Epsom Road (B2122) where it leaves the roundabout on the Leatherhead bypass; (b) The Crescent; (c) Church Street; and (d) Church Road until the road forks onto Highlands Road (B2033); and (e) thence into Headley Road until it meets the bypass. Dr Bowes clarified that the red line boundary is intended to be a mid-point in the affected carriageways.

116.
Within the neighbourhood there are a number of community buildings/facilities which I have already identified in paragraph 85, in addition to the recreation ground at Fortyfoot Road and the Church Hall on the north side of Church Road, all of which are used by individuals from a much wider area.

117.
For reasons which I do not understand, whereas the Church Hall lies within the claimed neighbourhood, the Parish Church of St Nicholas & St Mary, which is just across the road, falls just outside it. Nor are there any shops or convenience stores or the like within the claimed neighbourhood other than, within The Crescent, where one finds two takeaways, an opticians, a dental practice and a health shop of some description, all of which are bound to be frequented by people living within the town as a whole. The same applies in the case of the estate agents located on the corner of Church Street and Church Road. There is, for instance, no parade of shops which could be said to mainly serve the needs of an identifiable local community within the town of Leatherhead.

118.
The land lies roughly in the middle of the claimed neighbourhood and is, I think, a cohesive feature, but possibly the only one within the claimed neighbourhood. I suspect that most people using the

land, either as a place of transit or as a destination in itself for informal recreation, live in the nearby streets and would include many living in the streets to the south of Highlands Road which appear to me to comprise a number of separate developments of mainly detached dwellings, some of high value. The town of Leatherhead seems to be expanding in the gap between Highlands Roads and the bypass where there has been much residential development in recent years. One witness said that this was the 'posh area' of town.

119.
The major features in the gap between the north of the land and the railway line are St John's School and its extensive grounds, the two sports grounds on either side of Garlands Road, the Catholic Church of Our Lady and St Peter and Trinity Primary School. On the north-west side of the land we have the town centre which is, I think, mainly pedestrianised and, on the west side, we have, downslope, the River Mole (dominated by a heavily wooded weir area mid-stream) and the Bridge Street crossing. I have to say that without a much closer examination of the central area of Leatherhead (perhaps with the assistance of expert evidence) I have found it very difficult indeed to identify separate neighbourhoods within the town (in other words, where the characteristics of one area distinguish it from surrounding areas) as the area as a whole contains a good deal of residential and other development of varying I ages and styles which are not specific to the claimed neighbourhood although, in light of the evidence I heard, I do not doubt that within it, or at least in parts of it, there is a local community spirit."

(119-174) .....

175. Statutory incompatibility

(a) Put shortly, the issue is whether land held for the statutory purposes of the NHS falls within the same category as land held by a statutory undertaker for the purposes of its operations such that, consistently with the decision in Newhaven, the land in this instance would not be registrable as a matter of law.

(b) I have set out the competing submissions of the parties on this issue at [171] and, having considered the matter carefully, I prefer those of the applicant under this head.

(c) I agree with the applicant that the fact that the application land forms part of the same freehold title as the hospital site should not mean that it must be treated as part of the working hospital site when, as a matter of fact, it plainly is not and never has been.

(d) I also agree with the applicant's submission that the objector's case on statutory interpretation would in practice emasculate the provisions of the 2006 Act when it came to land held by public bodies for specific statutory functions. This can hardly have been parliament's intention and support for what the applicant argues can clearly be found from what was said by Lord Neuberger at [101] in Newhaven:

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

(e) Dr Bowes rightly draws attention to what Lord Neuberger said at [93], namely that the doctrine was held to apply only to land that was acquired and held by a statutory undertaker (which does not

apply in this instance) whose continuing use (because of the conflict between the applicable statutory regimes) would be inconsistent with its registration as a TVG. In Newhaven the operational land of the harbour (of which the beach formed part) was subject to statutory provisions which imposed on the undertaker a positive duty to maintain and support the operational land of the harbour which, in the event that works had to be executed in a way which affected the public's use of the beach were it registered as a TVG, there would be an obvious and irreconcilable clash as between the conflicting statutory regimes. The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in Newhaven) arises on the part of the landowner to do anything in the case of the land (in contrast to Newhaven) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

(f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being. As Dr Bowes says, in Barkas at [66] Lord Carnwath explained that land in public ownership is not outside the 2006 Act and to suggest that any land held for purposes inimical to TVG rights would be outside the 2006 Act would be absurd, not least as it might give rise to unnecessary speculation and debate about what the landowner's future intentions were for the land in contrast to the wholly proper analysis which, in my view, arises from Newhaven which focuses on the specific duty or duties which are imposed on a landowner (in its capacity as a statutory undertaker) with regard to its holding and management of the land which would clash with registration of the land as a TVG. As indicated, no such conflict impacts on the holding of the land in this instance in the performance of the statutory health functions of the NHS and those bodies through whom they are discharged.

(g) Nor do I accept either that the principle in Newhaven applies only to those public bodies which have no power to hold land for public recreation since it might mean in practice that all or most publicly held land is outside the 2006 Act. This is because land held for statutory purposes which embraces the principle in Barkas, or which otherwise entitle local inhabitants to use the land for recreation, would be nonqualifying, as would land held by public bodies with no powers to permit recreation such as might apply, for instance, in the case of land held for education. In my view, if registration was to have been avoided during the relevant qualifying period in this instance then the answer was permissive signage or making user contentious.

(h) I therefore take the view that the doctrine of statutory incompatibility has no application in this case.

176.....

177. Neighbourhood

(a) The term 'neighbourhood' is an ambiguous term. It may mean 'the vicinity' of a place or a person (see e.g. Stride v Martin [1897] 77 LT 600) but it may also refer to an area that is recognisable as having a degree of coherence such that people would recognise it as being separate or different from the areas immediately surrounding it. It is, in this sense, that the term 'neighbourhood' is used in the 2006 Act. It seems plain to me that a neighbourhood must be understood as meaning a cohesive area which is capable of meaningful description in some way. But beyond that it has no particular requirement, and whether the claimed neighbourhood is made out is a question of fact.

(b) In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is not a neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

(c) The residential properties comprised a mix of styles and ages and there was nothing in the way of facilities (that is, with the exception of the land itself) serving predominantly the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve (or rather served in the case of St Mary's Primary School) a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such a small parade of shops with a post office, licensed premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of those features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses, when asked to cast their mind to it, considered that their neighbourhood was simply the area in their own particular vicinity or where their friends mainly lived. I also think that most of the applicant's oral witnesses were unduly influenced by being presented with App/1 in their support of the claimed neighbourhood.

(d) It was also significant that a number of the applicant's witnesses took the view that the neighbourhood should in fact have been more extensive than claimed. In other words, there was no unanimity amongst the applicant's witnesses that App/1 was the true neighbourhood. See, for instance, the evidence of the applicant herself (who it seemed to me - as she herself accepted - did not really have a correct understanding of the terms neighbourhood and locality) and that of Sandra Sullivan, Julia Jarrett, Ken Ellis, Les Prescott, Heather Ward, Michael Brian and David Brett. For instance, more than one witness was puzzled as to why the church was not included within the claimed neighbourhood (whereas the church hall on the other side of the road was) which struck me as a bizarre omission. Indeed, it was the evidence of Imani Ayimba- Golding that she attended a Sunday club at the church hall in Church Road. Evidently they would all troop across the road to the church at the end of the morning service.

(e) Lastly, this neighbourhood had no name. That is not a necessary requirement, but if there is historical cohesiveness in respect of an area, one might expect it to have acquired some form of collective description.

(f) I have also borne in mind that when Parliament amended the Commons Registration Act 1965 to permit registrations to take place by reference to 'a neighbourhood within a locality' it intended to make it easier to register TVGs, and did so by allowing them to be registered by reference to a concept that was not precise either as to definition, or as to boundary (see Oxfordshire per Lord Hoffmann at [27]). However, notwithstanding this, my conclusion for the reasons I have set out above (i.e. because the area does not have sufficient individual cohesiveness or community identity) is that the claimed neighbourhood is not a 'neighbourhood' within the meaning of the 2006 Act.

(g) It seems to me that if Parliament had intended that a neighbourhood should be interpreted to mean the area in which the recreational users reside, then it would have said so. Moreover, whilst I accept that the bar is set low in the Leeds Group litigation, having been to the area in this case and

heard the evidence, I take the view that, as a matter of fact and degree, the applicant has fallen well short of what is required to be proved in order to satisfy the neighbourhood element."

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47.
The Inspector then passed to his findings of fact and recommendation. They read as set out below:

"178. Findings of fact and recommendation

(a) I find that a significant number of the local inhabitants of the claimed locality shown within the blue dashed lines on App/1 (being the polling district XB within the Leatherhead South ward of MVDC) indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(b) I find that a significant number of the local inhabitants of the claimed neighbourhood shown within the red lines on Appl1 and falling within the locality of Leatherhead South ward also indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(c) I find that the objection advanced by the objector that the land was not registrable on the ground of statutory incompatibility was not made out.

(d) I find that the claimed locality is not a locality within the meaning of section 15 of the 2006 Act.

(e) I find that the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act.

(f) Because the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG, my recommendation to the registration authority is that the application to register (under application number 1869) should be rejected .

179 Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be ' the reasons set out in the inspector's report dated 9/06/2015. '"

(f) SCC's consideration of the Inspector's Report and its decision to register the land

48.
As will become apparent, some issues arise about the way in which the application was addressed by SCC as RA.

49.
The matter was due to be considered by the Planning and Regulatory Committee of SCC on the morning of 23rd September 2015. Before the date of that meeting, the Head of Legal and Democratic Services distributed a report written by Ms Helen Gilbert, SCC's Commons Registration Officer. It recommended that the application for registration be rejected.

50.
Her report recited the application and the fact of the Claimant's objection. It stated that after a legal opinion had been sought, it was decided to arrange for a non-statutory public inquiry. It then included an analysis and commentary. It addressed the arguments on the meaning of "locality" and "neighbourhood," and recited the Inspector's findings of fact and recommendations at IR [178] (set out above). However, it never addressed any of the argument relating to statutory incompatibility, nor advised members of the terms of the Claimant's objection on this issue, nor of the cases put before the

Inspector at the inquiry, nor of his conclusions, save for the short finding at paragraph 178(c). The Inspector's report was listed as an Annex to Ms Gilbert's report.

51.
As to the issue of neighbourhood, she quoted paragraph [177 (b)] of the IR, and some but not all of paragraph [177(c)]. She then went on to set out the Inspector's Conclusions and Recommendations on all the issues as he had set out at IR [178], set out above, and then went on

"20 Village Green status is acquired over land where 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. The evidence provided with this application, and the subsequent investigations, show that this criteria" (sic) "has not been met.

21 Therefore, Officers recommend that the application be REJECTED. "

52.
At this stage, Dr Bowes, acting on behalf of the Applicant, sent representations to the Chairman and members of the Committee by email on the morning of 21st September 2015. The email was sent directly to the Chairman, Councillor Hall, and copied to the email addresses of the Committee members and of the officers. A copy was also sent to Messrs Capsticks, who were acting on behalf of the Claimant. Dr Bowes, who is a Councillor on a Borough Council in another part of Surrey, addressed the email to "members of the Planning and Regulatory Committee" and signed it "Ashley." It appears that he and Councillor Hall know one another. The representations which accompanied it, which were on his Chambers' headed notepaper, set out reasons why he contended that the members should disagree with the recommendation of Ms Gilbert in her report.

53.
That representation sought to support the claim that the "neighbourhood" relied on by the Applicant met the relevant criteria. It did not deal with the statutory incompatibility issue. While I am critical of Dr Bowes for addressing representations to the Councillors making the decision in an email signed with his first name, the representations were properly drawn and argued. Dr Bowes accepted frankly before the court that his use of his first name was unwise.

54.
Understandably the Claimant was concerned. On 22nd September 2015 its solicitor sent an email to the same addresses. Attached to it was a representation which sought to rebut that of Dr Bowes. It sought to endorse the Inspector's conclusions on the neighbourhood issue. It did not deal with the statutory incompatibility point.

55.
There is no doubt that at the meeting, the members, or at least some of them, had a copy of Dr Bowes' representation, and it was referred to during the meeting. However, there was no reference at all to the representation from Capsticks, the Claimant's solicitor. Understandably the Claimant was concerned about this, and the Court was also concerned to find out whether the Council or Councillors had received it. Some information was given to the Court by the SCC officers, but it was acknowledged to be incomplete. With the agreement of all parties, SCC has since the hearing explored what happened to the emails and representations. The Court is very grateful to the officers of SCC for their investigation. The Court has now been informed that:

"On day three of the hearing of the above claim Mr. Justice Gilbart requested that the Defendant confirm whether the letter of Dr. Ashley Bowes dated 22 September 2015 (at Claim Bundle ("CB") p. 338) and/or the letter of Messrs. Capsticks of 22 September 2015 (CB 348) were provided in paper copy to the Planning and Regulatory Committee at the meeting held on 23 September 2016.

We have now taken intructions with regards this matter. We are instructed that Dr. Bowes' letter was provided to the Committee in paper copy at the meeting; Capsticks' letter was not.

We are instructed that the reasons for this are as follows.

Dr. Bowes' letter was sent under an email of 21 September at 10:59 (CB 336), two days before the Committee meeting. It was sent to all members of the Planning and Regulatory Committee, together with Helen Gilbert, the Defendant's Commons Registration Officer and Claimant's solicitors Rachel Whale and Abi Condry of Capsticks. Dr. Bowes also sent an email to the Committee Clerks on 21 September 2015 at 11:15. In that latter email he requested that his letter be printed off and distributed to each Member at the meeting. Both Committee Clerks have now left the employment of the Defendant and their written records, which have been checked, do not confirm that Dr. Bowes letter was in fact distributed to the Committee. However, Mrs. Nancy El-Shatoury, a solicitor of the Defendant who attended the Committee, has been contacted by telephone whilst on leave and she has stated that she recalls that Dr. Bowes' letter was provided by the Committee Clerk in paper copy to members of the Committee.

Messrs. Capsticks' letter of 22 September 2015 was sent as an attachment to an email sent on 22 September 2015 at 15:30 (CB 341), the afternoon before the Committee meeting. It was sent to the same recipients as Dr. Bowes' email of 21 September 2015. As the Court was informed on day two of the hearing, the Defendant's electronic security system blocked the email and directed it to each recipient's "junk" box. No email was sent by Capsticks to the Committee Clerk or to any officer of the Defendant, other than Mrs. Gilbert. The Capsticks letter was not therefore retrieved by Mrs. Gilbert or any other officer before the Committee meeting, which took place the next morning so as to allow it to be distributed in paper copy.

Each member who was sent Capsicks' email of 22 September 2015 has been contacted to establish whether the email was received and read before the Committee meeting. Cllrs. Beardsmore, Sydney and Munro and Cllr Hall (who addressed the Committee as local member) have confirmed that they retrieved Capstick's letter from the "junk" box and read the letter before the Committee meeting. Cllrs. Essex, Taylor, Hicks, Mallett and Wilson did not retrieve the letter or do not recall reading the letter before the meeting. Cllrs. Cosser, Coleman and Johnson did not attend the meeting. The two substitute members who joined the Committee for the meeting – Cllrs. Ivison and Jenkins – were not copied into the Capstick's email and therefore did not receive Capstick's letter before the Committee meeting.

The information set out above extends somewhat beyond what is required in direct response to the Judge's question. However, we considered it appropriate to draw this information to the attention of the Judge nonetheless."

56.
That account shows that there was a regrettable lapse which meant that one side's late representation was before the Committee, whereas the other side's was not. A minority of members had received it by email, although it is not known if any had read it. I shall consider the significance of this issue below.

57.
SCC has accepted by subsequent written submission that the Court must assume that the members never saw the Capsticks submission. (It appears that the solicitor at Capsticks sent it from an email address not designated as “Not Junk” on Ms Gilbert’s email software programme.)

58.
There is a transcript of the Committee meeting. No-one objected to its being taken into account. Subject to one matter (relating to Dr Bowes’ representations) little turns on what is recorded in the transcript, and I prefer to look at the approved Minutes, which read as follows:

“The committee adjourned from 12. 15pm to 12.25pm for a short break. Upon reconvening the Chairman stood down from the committee and the Vice Chairman took the Chair.

31/15 APPLICATION FOR VILLAGE GREEN STATUS: LAND AT LEACH GROVE WOOD, LEATHERHEAD [Item 9]

Officers:

Helen Gilbert, Commons Registration Officer

Stephen Jenkins, Deputy Planning and Development Team Manager Mark O'Hare, Senior Planning Officer

Nancy EI-Shatoury, Principal Lawyer

Speakers:

The Local Member, Tim Hall, registered to speak and made the following points in reference to the application:

•
Expressed he knows the area well and the green space gets a lot of public use. .

•
Expressed that an area does not need to have shops to be considered. _ a neighbourhood. It does have sheltered housing, a scout hut and other community facilities.

•
The area is a cohesive community and has proved the green space is used

Commended the application for village green status to the committee.

Tim Hall then left the room at 12.28pm.

Key points raised during the discussion:

3.
The Commons Registration Officer introduced the report and informed the Committee that a neighbourhood must have some coherence to be acknowledged. The officer's recommendation was to reject the application.

4.
The Principal Lawyer explained that the Commons Act 2006 was specific about the criteria which need to be met in order for a piece of land to be granted Village Green status. However, the terms

locality and neighbourhood are not defined. Case law has developed which must be considered when seeking to define the terms. The Inspector had found that there was little to differentiate the claimed neighbourhood from the surrounding area and little to suggest cohesiveness. The only appeal available to either side following the committee's decision would be Judicial Review.

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5.
Members felt that an area did not require a particular type of building to be considered a neighbourhood. It could be considered that way if residents wish it to be. It simply required a sense of place. It was pointed out that many recent developments were not built with shops but this should not mean that they could not become a neighbourhood or locality. Members queried whether the Inspector's judgement would result in other urban areas being rejected as neighbourhoods, with only rural areas being judged to have met the necessary criteria. Members highlighted that the plans indicated that there was an infant school, recreation ground, allotment and parking area within the claimed neighbourhood. The Chairman countered that different people will have different definitions of neighbourhoods and that the Inspector had used case law to come to his conclusion.

6.
It was noted that the application had met all the other criteria set by the Commons Act 2006.

7.
It was noted that the land owner would not be able to develop or sell the land if it were to gain village green status.

8.
The Committee was informed that there was a recreation ground close to the proposed village green, it was noted that this did not affect the application under consideration.

RESOLVED:

Members rejected the officer recommendation to REJECT the application. It went on to APPROVE the application to register the land at Leach Grove Wood as a Village Green for the following reason:

Notwithstanding the Inspector's view, Members formed a different impression. Having considered all the evidence before them they came to the view that the criteria laid down by the Commons Act 2006 had been satisfied by the applicant."

59.
During the course of the meeting, after Councillor Hall had left the meeting, one member, a Councillor Richard Wilson, referred to Dr Bowes as a councillor at Woking, where he apparently chairs the Planning Committee, and referred to his expertise in town and country planning matters, and that he was well known to Ms El-Shatoury, SCC's principal lawyer. Councillor Wilson is recorded as saying that :

"I'm very minded to agree with Ashley on this one I think he did speak to me some time back to say that he was going to present something in front of us."

60.
I asked Dr Bowes whether it was true that he had spoken to Councillor Wilson. Dr Bowes told the Court that he had not done so, and certainly not about the case. I accept that. What is said in the transcript does not imply that the merits of the case were discussed at all, and Mr Clay does not suggest otherwise.

61.
As a result of the Committee's decision, the land was registered as a Village Green on 5th October 2015.

(g) The case for NHSPS

62.
Mr Clay and Mr Lewin put forward 5 grounds. On 17th February 2016, Collins J gave permission to apply for judicial review on Grounds 1-3 and 5, but not on Ground 4. The Claimant argued the grounds on which permission had been given, and sought permission to apply on Ground 4.

63.
Those grounds as set out in the application were:

(1)
SCC failed to give adequate reasons for its decision that the area was a "neighbourhood;"

(2)
the polling district could not be a locality, and a neighbourhood within it could not qualify as one under the Act;

(3)
the members acted irrationally, misdirected themselves, and took into account immaterial considerations;

(4)
the proceedings were unfair and in breach of Art 6 of ECHR because the Claimant's representations in response to the late representations by the Applicant were not considered by the Committee, and Dr Bowes was known to members;

(5)
both the Committee and the Inspector erred in finding that registration is compatible with the powers and duties of the NHS for whose purposes the land is held.

64.
As the matters were argued before me, the argument crystallised into the following:

(a)
the Committee was under a duty to give reasons for its decision, both because of the nature and effect of the decision, which deprives a landowner of the ability to use his land in a way which is consistent with its use as a town or village green, and because in this case there was a strong adverse recommendation from the Inspector;

(b)
the reasons given did not justify a conclusion that it was a "neighbourhood;"

(c)
there was no finding that justified the test that it was a "neighbourhood within a locality;"

(d)
the conduct of the proceedings was procedurally unfair. The Chairman was the local member, Dr Bowes was known to him and others, and the Claimant's case was not put before them;

(e)
in any event the statutory purposes by and for which the land is held are incompatible with registration as a town or village green.

8

65.
On the first issue (reasons), Mr Clay said that whether or not the statute required the giving of reasons, the Council had actually given some. That being so, the reasons given may be examined to see if any error is disclosed: Westminster City Council v SSCLG [2014] EWHC 708 (Admin). The summary of reasons must be drafted with greater care where the members differ from the officer: R(Potter) v Amber Valley BC [2014] EWHC 888 (Admin). Reference was also made to Hoard v SSCLG and others [2016] EWCA Civ 169 at [54] per Lewison LJ. Here the Committee had to explain why it disagreed with the Inspector. The test of the standard of reasoning is that in South Bucks DC v Porter No 2 [2004] UKHL 33 [2014] 1 WLR 1953 per Lord Brown at [43], [46] [49]- [50], [58]- [59].

66.
On the second issue (neighbourhood) Mr Clay submitted that there was confusion between the Applicant's witnesses as to the extent of the neighbourhood. He relied on the observations of Sullivan LJ in Cheltenham Builders Ltd v Gloucestershire CC [2003] EWHC 2003 [2004] JPL 975 at [85]

"…….. I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."

and contended that that required precise boundaries and sufficient cohesiveness in its character or community. He argued that the Committee never addressed those concepts, and failed to have regard to material considerations. He pointed to the fact that different witnesses referred to different areas, which must call into question the idea that there was a readily identifiable cohesive neighbourhood.

67.
He submitted that the reasons given did not enable one to see how they had decided that it was a neighbourhood. What one had instead was some generalisations without a firm conclusion.

68.
As to the third issue ("neighbourhood within a locality") he submitted that the case for the applicant for registration was based on the idea that a polling district could be a locality. The Committee had given no reasons to conclude that that test was passed. He also submitted that, on a proper reading of the IR [178] there was no finding that there was a neighbourhood within a locality, nor any such finding by the Committee. He said that locality had to be capable of legal definition, as shown by Adamson v Paddico 262 Ltd, Kirklees MBC and others [2012] EWCA Civ 262 [2012] 2 P & CR 1 at [97].

69.
Mr Clay submitted that there was no finding that it was a neighbourhood within the locality of an electoral ward as opposed to a polling district.

70.

On the fourth issue (unfairness in the proceedings) Mr Lewin argued that any procedure which deprived a landowner of the ability to use his land had to comply with the provisions of ECHR Article 6. The Committee's dealing with the issue was tainted by unfairness:

8

a.
both sets of representations should have been before the Committee;

b.
there was too close a relationship between Dr Bowes and the Chairman of the Committee and members;

c.
the objector should have had the opportunity to deal with the points raised by the Committee to justify registration.

71.
On the fifth issue (statutory incompatibility) Mr Clay's central submission was that the land was conveyed to the Claimant for the specific purposes of the CCG, and that that was incompatible with registration. Any use outside those purpose was out with the specific statutory powers which applied.

72.
He relied on R (Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7 per Lord Neuberger and Lord Hodge. There was, he submitted, an irreconcilable conflict between the purposes for which the land was held and use as a village green. One had to consider the statutory purposes. It was irrelevant that it was not currently in use.

73.
Similarly, arguments that the land could be sold off, or that it was functionally different from the land occupied by the hospital missed the point, which was whether there was a conflict with the statutory powers. It was very unusual to have this question asked where there was a user already in place which was incompatible. This question only arose when one was asking what the purposes enabled in the future, and whether there was incompatibility with them.

74.
The Inspector was wrong to approach this issue on the basis that the principle in Newhaven only applies to bodies which have no power to hold land for public recreation. That failed to recognise the fact that some bodies (e.g. like local authorities) have powers to hold land for recreational purposes, but some do not, such as the Claimant. That power is not to be found in its powers.

75.
Reference was made to BTC v Westmorland CC [1958] AC 126 at [78]; incompatibility was a question of fact to be assessed by what could reasonably be foreseen. The test is one of incompatibility- see R v Inhabitants of Leake [1833] 5 B & AD 469, 478 per Parke J as discussed by Viscount Simonds in BTC v Westmorland at p 144.

76.
The powers of the CCG are limited to the provision of accommodation for hospitals or other listed services- see s 3 National Health Service Act 2006. It is also under a duty (s 14Q of that Act) to exercise its functions effectively, efficiently and economically.

77.

SCC and the Interested party now rely on the obiter dicta of Ouseley J in Lancashire CC v Secretary of State for Environment etc and Bebbington [2016] EWHC 1238, where he was dealing with an area of land held by the County Council, and appropriated to educational purposes. Not only was this part of the judgement obiter but it was addressing a different statutory body with different powers. Ouseley J also found that there was no incompatibility between educational purposes and use as a village green. If that is true in an education case, it is certainly not the case where land is held for the statutory functions which applied in the instant case.

78.
The Committee never considered this aspect of the Claimant's case, whether by adopting the Inspector's reasoning or at all. It follows that their decision is flawed, and there must be judgment for the Claimant unless the Defendant or Interested party can show that there could be no incompatibility, in which case an argument could be made under section 31(2A) of the Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015.

(h) The cases for SCC and the Interested party

79.
To a large degree Dr Bowes for the Interested Party adopted the submissions made by Mr Edwards QC for SCC. I shall seek to indicate where there were any departures or admissions.

80.
Mr Edwards QC started by considering the nature of the "locality" and "neighbourhood within a locality" tests. He accepted that the polling district claimed by the Applicant was not a locality, but that an electoral ward undoubtedly was. He pointed out that the case was argued that way (in the alternative) by the Applicant, and she was not challenged for doing so by the Claimant at the inquiry.

81.
He submitted that it is now clearly established that an electoral ward amounts to a locality as a matter of law, referring to R (Oxfordshire and Buckinghamshire NHS Mental Health Trust) v Oxfordshire CC [2010] EWHC 530 (Admin) at [69], and Leeds Group PLC v Leeds City Council [2010] EWHC 810 at [88]- [89]. He also referred to the criteria for the identification of electoral wards in s 56 and Schedule 2 paragraph 2 of Local Democracy, Economic Development and Construction Act 2009**.** It followed that the live issue was only whether the area relied on was a neighbourhood, because it undoubtedly fell in a locality, and that was what the Inspector found at [178(b)]. His finding at [178 (c)] related only to the first alternative of the polling district. That being so, the test of "locality" within the second limb was undoubtedly met.

82.
On the first issue (reasons) Mr Edwards submitted that there was no duty to give reasons. The statutory regime had required the giving of reasons when an application was refused, not when one was granted, which could not have been a matter of oversight. The Courts should be slow to find a duty to give reasons when Parliament has not provided for one. He referred to the approach to this issue by Jay J in Oakley v South Cambridgeshire DC [2016] EWHC 570 (Admin) at [27]- [35] (a case of an unsuccessful challenge to a local planning authority for a failure to give reasons for a grant of planning permission against the advice of its officer). At [35]- [36] Jay J's summary of the authorities reads:

35..... The judgment of Sedley J in Institute of Dental Surgery" ([1994] 1 WLR 242), "which in my respectful view contains, despite its relative age, still the best and most authoritative statement of the

principles germane to the implication of a duty to give reasons. Rather than cite copiously from that decision, let me attempt the following summary:

(i) There are cases where the nature of the process itself, or the subject matter, calls in fairness for reasons to be given. Ex parte Doody" ([1994] AC 531at 562C-D) "was such a case.

8

(ii) There are cases where "something peculiar to the decision", some form of apparent aberration, triggers a reasons duty. Ex parte Cunningham" (R v Civil Service Appeal Board, ex p Cunningham [1991] 4 All E R 310) "was such a case, because the Court could evaluate for itself the discrepancy between the compensation awarded to Mr Cunningham by the board, and the compensation he would have received in an Industrial Tribunal.

(iii) Category (ii) above does not include decisions which are challengeable by reference only to the reasons for them. If there are no reasons, ex hypothesi there can be no challenge; but the absence of reasons cannot logically be the basis for requiring them. Pure academic judgments fall within this class of decisions.

(iv) The classes of case where reasons are or may be required are not closed.

36 I should add that Sedley J's formulation of "something peculiar to the decision" was his interpretation of the judgments of the majority in the Court of Appeal (McCowan and Leggatt LJJ) in ex parte Cunningham. McCowan LJ accepted Counsel's choice of words – "it cries out for some explanation from the board" - which is arguably more general. However, my reading of the majority view is that an explanation was called for because, without it, the decision was inexplicable."

83.
In Oakley Jay J declined to hold that there was a duty to give reasons for the grant of planning permission. Mr Edwards invited the conclusion that no reasons had to be given in the instant case. If a duty existed, it was met by short reasons. They did not have to meet the standards which would be required in a planning decision letter, which was a creature of the relevant legislation. The Court invited Mr Edwards to address the decision of the Court of Appeal in R (Assura Pharmacy Ltd) v E Moss Ltd (t/a Alliance Pharmacy) [2008] EWCA Civ 1356 where the court took the description of the nature required of reasons from a well known case in the planning field (Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P&CR 263 at page 272-3) and applied it to a decision of another kind, and did so where there was no statutory duty to give reasons. Mr Edwards accepted the Court's application of the standard in that case, but maintained his submission in the CA 2006 registration context.

84.
On the second issue (neighbourhood) Mr Edwards submitted that the decision was that of the RA, and therefore of the members. The inquiry had not been a statutory inquiry, and there was no statutory obligation to say why it differed from the Inspector. While the members were bound to have regard to the IR, it was their decision. There is nothing in the stated reasons which discloses any error of law. Further, the members had before them the IR and Ms Gilbert's officer's report, and the reasons given address the test of neighbourhood given in the Act.

85.
There was, he submitted, nothing inadequate about the reasons given.

86.

As to the third issue (neighbourhood within a locality) he referred to the preliminary parts of his submissions, recited above. The applicant had argued her case on this alternative basis, and the fact that the locality claimed was an electoral ward was an end of the matter. (This was effectively accepted by Mr Clay in his response).

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87.
All material considerations and relevant material were before the members, namely the IR, the officer's report, Dr Bowes' letter, the Claimant's letter and the representations of the ward councillor. (This submission must be read in the light of what transpired about the response from the Claimant to Dr Bowes' letter for the Applicant).

88.
The Committee had no need to identify the precise boundaries of the neighbourhood (see Leeds at [101] per Judge Behrens QC).

89.
On the fourth issue (unfairness) Mr Edwards resisted the argument that the references to Dr Bowes as 'Ashley' were significant. The Committee had addressed the issues. As to the letter from the Claimants, and the failure to distribute it to members, there was a risk to sending documents by email.

90.
In any event, there was nothing in the Claimants' letter which raised anything new. Even if the way in which the matter was dealt with was to be criticised, the decision would have been no different had the failures and omissions not occurred.

91.
On the fifth issue, Mr Edwards referred to the IR at [90 (f)]. He accepted that if it were held that the land was held for use by the CCG, it could only be used for those purposes. But that was to apply the wrong test. He referred to the Lancashire CC decision and the judgement of Ouseley J at [77]- [81]. There must be a duty to use land for specific purposes to negate registration. Ouseley J showed that the fact that it could be so used was not enough. This case was not to be compared to that in Newhaven where the land in question was part of a working harbour.

92.
Dr Bowes adopted Mr Edwards' submissions on the first 4 grounds, or made submissions to essentially the same effect.

93.
On the fifth issue (statutory incompatibility) he emphasised that the land had not in fact been used for the claimed statutory purposes. The Claimant had had two decades to make the point that recreational use was prohibited. He drew attention to the observations of Lord Brown in R(Lewis) v Redcar and Cleveland BC (No 2) [2010] UKSC 11 [2010] 2 AC 70 at [101]- [102] and [105] and submitted that like that (the recreational use of the golf course) this was not a case of give and take, but one where the owner had done nothing with his land and could not complain of registration.

(i) Discussion

94.
I can start by dealing with two matters very shortly. As Mr Clay effectively accepted in his submissions in response, an electoral ward is beyond question a locality for the purposes of the CA 2006. It is also

quite plain that the polling district was not a locality for those purposes, and no-one suggested to me that it could be. I am bound to observe that it is very puzzling that the original application made by Dr Bowes for his client could ever have argued the case in the way it did on the first limb. The critical test was always that of "neighbourhood." I turn now to the six main issues which I identified at paragraph 5 above.

(a) was SCC under a duty to give reasons for its decision?

95.
Given the fact that there is no statutory duty to give reasons, one must look to the ECHR and to the common law to see if one exists. The fact that there is no statutory obligation is a matter to be taken into account in considering that issue, but is not determinative of the point. The situation exists that the duty exists in some administrative areas under the CR(E)Regs 2014 but not in others governed by the C(RTV)Regs 2007. It follows that there is no matter of principle underlying the process which makes the giving of reasons undesirable. It appears that an anomaly has been left within the statutory code. I conclude that in this sphere it must be seen as being of little weight in determining the question of whether reasons are required where an application is granted after properly made objections have been advanced.

96.
It is therefore sensible to start from first principles. Article 6 of the ECHR "the right to a fair trial" reads

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly....."

If it applies, it is now firmly established that there is a duty to give reasons; see the judgement of Lord Phillips MR in English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605 [2002] 1 WLR 2409, [2002] 3 All ER 385. So the question is whether an application for registration determines the civil rights and obligations of the landowner of a piece of land which is the object of the application. It is to be noted that the decision to register a piece of land is not a matter where the RA has any discretion. If the criteria in the Act are met, then the registration must take place.

97.
The effect of registration is that the landowner can no longer use the land for any purpose inconsistent with use as a village green. Indeed, s 38 CA 2006 prevents (in the absence of a consent under s 39) works which have the effect of preventing or impeding access to or over the land, works of resurfacing, the erection of fencing, the construction of buildings and other structures, the digging of ditches and trenches and the building of embankments. The criteria for the grant of a consent under s 39 (which consent may only be given by the national authority (in England the Secretary of State for Communities and Local Government) apply tests not applicable to development control generally under the Town and Country Planning Act 1990, and some acts prohibited under the CA 2006, such as fencing or the digging of ditches, may not require planning permission.

98.
The effect of registration is also that a criminal offence is committed if a person interrupts its use or enjoyment as a place for exercise and recreation (s 2 Commons Act 1876).

99.

In my judgement the effect of registration is therefore a determination of civil rights or obligations. It permits user by others of property owned by the landowner, and restricts his or her own ability to use it or develop it. Further, the only route by which registration can be challenged is that of judicial review, which makes the existence of reasons yet more important to so that they can be the subject of judicial scrutiny. In my judgement, the giving of reasons is therefore required to achieve compliance with Article 6 of ECHR.

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100.
I turn now to consider the application of the common law. As De Smith's Judicial Review Seventh Edition at [7-099] points out, fairness may itself require, in a wide range of circumstances, that reasons be given. The traditional view is set out in Lloyd v McMahon [1987] AC 625 per Lord Bridge of Harwich at p 702, whereby, when one has to consider the requirements of fairness, one should take into account the character of the decision-making body, the kind of decision it has to make, and the statutory or other framework in which it operates. The court there adopted a minimalist approach. As Lord Bridge said in this passage of his speech:

"… [It] is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

101.
However, the law on this topic has continued to develop. Since the decision in R v Civil Service Appeal Board ex p Cunningham [1991] 4 All ER 310 (a "landmark decision" in the view of De Smith) it is established that fairness may itself require, in a wide range of circumstances, that reasons must be given. While it is of course stated in a case about prisoners, it is worth recalling the basis of the doctrine, as explained in R v Secretary of State for the Home Department, ex p. Doody [1993] UKHL 8 [1994] 1 AC 531 at 565 per Lord Mustill:

"My Lords, I can moreover arrive at the same conclusion by a different
and more familiar route, of which Ex parte Cunningham, [1991] 4 All E.R. 310 provides a recent example. It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judge sand actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view."

102.
While the Institute of Dental Surgery judgement of Sedley J was cited by Jay J in Oakley, it is right to point out that since then in R (Wooder) v Feggetter and another [2002] EWCA Civ 554 [2003] QB 219, Sedley LJ himself doubted that the Institute of Dental Surgery case would have been decided the same way had it been heard in 2002 (see [39]- [43]) and Brooke LJ at [23]).

103.

In the case of registration, one has the situation of a landowner being at risk of losing his freedom to do as he wishes with his land. In my judgement that demands the provision of reasons, so that he may know whether the decision was made on lawful grounds, and may be able to determine whether he has grounds to challenge it in the courts.

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104.
While I do not consider that the approach in the Institute of Surgery case has the persuasive force now that once it did, I do not depart from Jay J's approach in Oakley to the giving of reasons for the grant a planning permission. I find it instructive to consider the difference between the two statutory regimes. The grant of planning permission cannot determine rights as between persons, let alone impose obligations. It will always be open to the applicant for planning permission not to implement it, and it is of course fundamental to the statutory code for the imposition of conditions that they must relate to land under the applicant's control (s 72 Town and Country Planning Act 1990). It follows that the grant of permission does not determine private rights and obligations. In the case of the Claimant in Oakley, the Claimant was objecting to the grant of permission on land she did not own. It follows that the grant of permission to the applicant in that case was not determinative of any of the Claimant's rights or obligations. By contrast, a refusal of planning permission restricts the ability of the applicant (and/or landowner) to develop his/her land, so it is entirely appropriate that there is a statutory requirement for the giving of reasons for refusal, but none for the grant of permission.

105.
It is surely anomalous that under the 2007 Regulations those seeking the creation of a right are entitled to know of the reasons why their application to use someone else's land has been refused, whereas those seeking to avoid the concomitant restriction or curtailment of an existing right on their own land are denied the reasons why their case has failed. That would be anomalous whether or not the 2014 Regulations were to the same effect. But in my judgement the fact that they are to different effect but sit alongside the 2007 Regulations, as noted above, has itself no apparent explanation other than anomaly.

106.
Whether or not there is a duty to give reasons for grant in any event, in my judgement it cannot be right that no reasons are required when, as here, the landowner has made objections, and done so in the context of a statutory duty on the RA to consider them. I am therefore satisfied that there was a duty to give reasons. Further, I accept that even if there were no such duty, as reasons were given, the reasons given must be scrutinised against the appropriate standard.

(b) if so, what standard of reasoning was required?

107.
The starting point must be that the reasons given must be intelligible and deal adequately with the substance of the arguments advanced. They can be shortly stated. There is a very useful summary of the authorities in S Bucks v Porter at [24]- [25]:

"24 As already noted, three previous decisions of this House have considered the reasons requirement in a planning context. In this, the fourth, it is I hope convenient to start by assembling a number of the more authoritative and useful dicta from the many cases in the field. I begin with Megaw J's oft-cited judgment in In re Poyser and Mills' Arbitration [1964] 2 QB 467, 478:

"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

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25 In Westminster" (Westminster City Council v Great Portland Estates plc [1985] 1 AC 661), "Lord Scarman at p 673 set out the above passage and continued:

"[Megaw J] added that there must be something 'substantially wrong or inadequate' in the reasons given.

In Edwin H Bradley & Sons Ltd v Secretary of State for the Environment (1982) 264 EG 926, 931 Glidewell J added a rider to what Megaw J had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases."

At [34] Lord Brown also endorsed the passage in Bolton Metropolitan District Council v Secretary of State for the Environment (1995) 71 P & CR 309 per Lord Lloyd of Berwick at p 314-5, which includes the important principle that:

"What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the 'principal important controversial issues.'"

Re Poyser v Mills was not a planning case, but the others were. That is relevant because of the matters that appear below. However, the general standard to be attained is no different.

108.
Given the principle that the reasons must enable the persons concerned by the decision to know whether the tests set by the law have been addressed and addressed lawfully, in a registration case, that must include:

(a)
whether the applicant for registration has shown that the criteria in s 15 CA 2006 have been met, and why the tests have been met or not as the case may be;

(b)
in a case where an objection has been made on a ground known to law, whether that objection is or is not well founded, and why it was or was not well founded as the case may be.

109.
But given those parameters, what standard of reasoning is required? Here again, context is important. The S Bucks v Porter test is based in part on the duty to give reasons, but in part also on the tests in s 288 of the TCPA 1990 relating to whether or not the Claimant is a "person aggrieved." That is clear from the speech of Lord Brown at [26]- [34]. The summary at [36] flows from that discussion:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects

of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

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110.
It does not follow that the same test should simply be read across without adjustment for context to a case where the issue is not whether a Claimant may be able to resubmit a proposal in a different way, or where an objector could make a successful policy challenge on another occasion, but is whether the landowner is deprived of rights (or where the applicants fail to have rights created). In my judgement, in a CA 2006 case the standard must be that the losing party knows why they lost and what the legal justification was for doing so. That will include the reasons why a case submitted in accordance with the Regulations was rejected.

111.
Of course given the frequency of challenges to planning decisions being made in this Court or its predecessor, it is unsurprising that one looks to planning cases for the relevant standard, provided one makes the proper allowance for context. For example, in R (Assura Pharmacy Ltd,) v E Moss Ltd (t/a Alliance Pharmacy) [2008] EWCA Civ 1356, (2009) 105 BMLR 161 the Court of Appeal addressed the standard of reasoning required when some proposed pharmacies had been denied a place on the list of approved pharmacies held by the PCT for its area. In looking for a test by which the reasoning of the decision was to be measured, at [59] Lawrence Collins LJ looked to the well known tests in the planning field:

"decision letters such as the ones which are the subject of this appeal are to be considered on a "straightforward down-to-earth reading... without excessive legalism or exegetical sophistication": Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P&CR 263 at page 272-3, per Sir Thomas Bingham MR), applied in, e.g. MR Dean & Sons (Edgware) v First Secretary of State [2007] EWCA Civ 1083, at [43]." (That is also known as First Secretary of State & Anor v Sainsbury's Supermarkets Ltd [2007] EWCA Civ 1083)."

I intend to apply those tests, remembering always that it was for the RA to determine the matter, and not the Inspector.

112.
It will be recalled that under Regulation 6 of the 2007 Regulations (C(RTV)Regs 2007), the RA must decide to proceed to consider the application, and in doing so (a) must consider all objections made by the date when it elects to proceed further, and (b) may consider those received afterwards up to the time it finally disposes of the application (Regulation 6). It follows that in this case SCC as the RA had to consider not just the application, but also all the objections made to it at both stages. The Claimant's objection, which included the point about statutory incompatibility, was made at both stages. As it was one of the controversial issues, SCC was bound not just to consider it, but to give reasons for the conclusions it reached upon it.

(c) Did SCC give adequate reasons for finding that the criteria were met?

113.

I start by dealing with the obvious and substantial omission in the SCC reasons. At no point is the issue about statutory incompatibility ever addressed. There is not even a case to be made (and none was made to me) that it had been considered but not spelled out in the reasons. The officer's report merely recites the bare conclusion of the IR at [178(c)] and the reasons in the Minutes are entirely silent on the topic. It is not possible to say that the Inspector's view was adopted on this point, because there is not the slightest evidence that it was. It follows that unless SCC and Dr Bowes convinced me that the decision was bound to be the same, so that 31(2A) of Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015, this decision must be quashed. I shall return to that subject below. In any event, if Mr Clay's fifth ground is made out, the Registration was unlawful in any event.

114.
I pass now to the issue of the standard of reasoning on the subject of "neighbourhood." I shall do so first without having regard to the issues generated by the treatment of Dr Bowes' representations. I was at first attracted to the argument of the Claimant that the Committee had not grappled with the criteria in the depth applied by the Inspector, but Mr Edwards convinced me that in fact the Committee addressed the central question, which was whether the "neighbourhood" had the quality of cohesion looked for in the Cheltenham Builders case. The concepts in this area of the law are not ones of firm and precise definition. That is well illustrated by the decisions in Cheltenham Builders v S Gloucs DC [2003] EWHC 280], Leeds Group Plc v Leeds City Council [2010] EWHC 810 and [2010] EWCA Civ 1438 , and R(Oxfordshire etc NHS Mental Health Trust) v Oxfordshire CC [2010] EWHC 530 (Admin).

115.
The cohesion of a "neighbourhood" is not something which can be assessed by using some recognised technique. In that it is quite different from topics of the type where a proper appreciation is dependent to varying degrees of significance on expert knowledge. Thus if a Highway Engineer expresses a view that an access arrangement is acceptable, s/he will do by considering it against tested standards, and no doubt considering known data on the safety record on the stretch of road concerned. The question of whether a new development will be seen or hidden from various viewpoints, or the effect of operations on a nearby woodland can be assessed using standard techniques of landscape planning or arboriculture. Housing need can be addressed using demographic and other material. But the cohesion of a community, in the sense used in Cheltenham Builders is essentially a matter of impression.

116.
In that context, I do not consider that the Committee's approach to the issue can be criticised. It considered the Inspector's assessment, but then made its own, which it preferred. Even if there can be a heightened duty on a decision maker to give reasons for differing from a planning inspector or planning officer, I do not regard this as a comparable situation. This was a non-statutory inquiry presided over by an inspector who did not come to the inquiry as an expert but as a member of the Bar. His expertise lay in the law and practice relating to village greens, not in their identification, even assuming that such an expertise could exist. He is not a geographer or an anthropologist considering some technical test applied in field studies to the existence of a neighbourhood. This is not a case where the reporting Inspector officer is an expert in the fields of (for example) highway engineering in a debate about the design of a junction, or retail economics in a case where the extent of pent up demand is in issue, or housing need where there is an issue about the levels of projected housebuilding. The question of whether or not this was a neighbourhood in the sense used in the CA

2006 is not the same kind of question. It was very much a matter of impression where elected members could have just as much expertise as the inspector. They were not required to go through all of his reasoning, nor the various events at the inquiry. What they were required to do was to address the “neighbourhood” question as it stood before them, and the arguments for and against the Applicant’s case.

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117.
I therefore reject this aspect of the Claimant’s case, subject to the issue of the way in which Dr Bowes’ representations were dealt with.

(d) was the finding that there was a “neighbourhood” one which SCC could reasonably make?

118.
Given the conclusions under the previous head, the finding that there was a neighbourhood was undoubtedly a decision which SCC could reasonably make.

(e) given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has SCC shown that there was no basis for concluding that there was statutory incompatibility?

119.
I have put the question thus, because, given the failure to address the matter at all, the decision was legally flawed, and the Claimant must succeed unless 31(2A) of the Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015 applies. Subsections (2A), (2B) and (2C) read:

“(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A) (a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

120.
The starting point for addressing this topic is the decision of the Supreme Court in Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7 [2015] 2 WLR 601 [2015] AC 1547 [2015] 2 All ER 991, and in particular the leading judgement of Lord Neuberger and Lord Hodge.

121.
That case concerned the registration of 6 hectares of land known as the West Beach in Newhaven in East Sussex. That land was part of the operational land of Newhaven Harbour. It is currently covered by the sea for periods of time either side of high tide. On average the beach is wholly covered by water for 42% of the time, but for the remaining 58% it is only uncovered to some extent. It is entirely uncovered by water for only a few minutes at a time. ([10]).

122.

At [23]- [24] Lord Neuberger and Lord Hodge identified the issues in the appeal. The third issue was

“whether, in any event, section 15 of the 2006 Act cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function to which the land was to be put.” ([24])

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They turned to the third issue at paragraph [75]. At [76] they introduced the nature of the argument:

“Section 15 is in Part 1 of the 2006 Act, which extends to all land in England and Wales, with the exception of the New Forest, Epping Forest and the Forest of Dean (section 5), and land includes "land covered by water" (section 61(1)). There is no express exclusion of land held by statutory undertakers for statutory purposes. Therefore any restriction on the scope of section 15 would have to be implicit. NPP argues that statutory incompatibility provides that restriction. In support of its assertion NPP relies on case law in relation to public rights of way and private easements in English law and public rights of way and servitudes in Scots law.”

123.
They then addressed the English law of dedication and prescription, but warned that reference to case law on public rights of way, easements and servitudes was relevant by way of analogy only. They referred to the words of Lord Scott in R(Beresford) v Sunderland City Council [2004] 1 AC 889 at [34]:

“there are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence, and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.”

124.
They then pointed out that in cases where dedication is implied through user, the owner’s ability to dedicate remains relevant, referring to the Rights of Way Act 1932 and the Highways Act 1980, and referred to BTC v Westmorland CC [1958] AC 126, where the issue was whether the owners of the railway had the power to dedicate a path, which turned on whether it was incompatible with the statutory objects for which the land was held [78].

125.
Lord Neuberger and Lord Hodge then reviewed the English authorities on dedication and prescription ([78]- [80]) and the Scottish case law on the law of positive and negative prescription [79]- [90]. At paragraphs [91] to [93] they set out their conclusions on the principles to be applied. It is necessary to refer to them here. I have italicised the question which their Lordships said must be asked in these cases:

“Statutory incompatibility: statutory construction

91 As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging "as of right" in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, McEvoy v Great Northern Railway Co [1900] 2 IR 325, (Pales CB at 334-336) which proceeded on the

basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.

92 In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

93 The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in Bennion, "Statutory Interpretation" 6th ed (2013):

"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

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

126.
It is then helpful to see how Lord Neuberger and Lord Hodge applied the test which they had identified. They rejected the argument based on there having been cases which supported the view that land held by public bodies could be registered as town or village greens. Lord Neuberger and Lord Hodge said that they could be readily distinguished ([98]) and pointed out that in such cases the land had not been acquired and held for a specific statutory purpose. For example, in the “Trap Grounds” case (Oxfordshire CC v Oxford City Council [2006] UKHL 25 [2006] 2 AC 674) the land had not been held for specific statutory purposes that might give rise to a statutory incompatibility [99]. In Lewis v Redcar (the authority relied on by Dr Bowes) Lord Neuberger and Lord Hodge pointed out that the land had not been acquired and held for a statutory purpose which would be likely to be impeded if the land were to be used as a village green [100]. Given the arguments in this case one should look at paragraphs [101] to [102]:

“101 In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.

102 In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility."

I should refer also to [96] where their Lordships addressed the situation at Newhaven:

"96 In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

127.
It follows from those passages that:

(f)
one must consider the actual statutory powers under which the land is held;

(g)
the fact that in some cases parcels of land belonging to some statutory bodies have been registered does not give rise to a rule that any land held by a statutory body can be registered;

(h)
it is not necessary that the land in question is used for a purpose incompatible with use as a village green. What matters is whether, as a matter of statutory construction, the relevant statutory purpose is incompatible with registration.

128.
I can find nothing in the judgement of Ouseley J in Lancashire CC v Secretary of State for the Environment and Rural Affairs and Bebbington [2016] EWHC 1238 which is to any different effect. In that case land owned by Lancashire County Council ("LCC") was registered as a town or village green. LCC was the education authority and said that it held the land in that capacity. He rejected the challenge by LCC, made on various grounds, including that of statutory incompatibility. Ouseley J upheld the Inspector's conclusion that the land had not been acquired or held for educational purposes during the relevant 20 year period ([64]). Ouseley J then considered whether, if the land had been held for educational purposes, there was any necessary incompatibility between that and its use for recreational purposes, acknowledging that the issue did not arise for decision after his conclusion at [64]- see [65].

129.
Ouseley J concluded that there was no incompatibility between educational functions and use as a town or village green- see [79]. In that case what was urged upon him was that the general educational function required use of the land. He rejected that argument at [81]. It is important to see how he put the matter at [77]- [78]:

“77 It is clearly easier to apply the principle that the intention of Parliament was that the general Commons Act should yield to special Acts where the Act governs a specific statutory undertaker with specific functions to be performed over its landholdings. It is rather less easy to apply the principle where one general Act is said to yield to other general Acts, dealing with a local authority function. The notion that the general was intended to yield to the specific is very different from the general yielding to the general. But that glimpse of the rather obvious still leaves some issues as to how the line is to be drawn.

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78 In Newhaven, the land in question was obviously central to any changes which might be needed to the operation of the port. Two questions however which did not arise directly in Newhaven were (1) whether public recreational use is incompatible with the exercise of the statutory body's functions where some use can nonetheless be made of the land for its purpose but the range of uses, including the more important ones for its functioning is inhibited; and (2) if no use could be made of that land for the statutory purpose, how significant did the impact have to be on the performance of the statutory function for statutory incompatibility to arise, if other land could be used albeit less satisfactorily.”

There is nothing there which goes beyond Lord Neuberger’s and Lord Hodge’s approach of considering the nature of the statutory powers in question, nor is there anything which suggests that the only relevant statutory powers are those specific to the piece of land in question.

130.
Given the way in which this case was argued before the Inspector and before me by Dr Bowes for the Interested Party, it is necessary to stress that statutory powers are not identical across the range of statutory bodies. Just to take local authorities, there is a general power to acquire land under s 120(1) Local Government Act 1972 for the purposes of any of their functions under it or any other enactment, or for the benefit, improvement or development of their area. By s 120(2):

“A principal council may acquire by agreement any land for any purpose for which they are authorised by this or any other enactment to acquire land, notwithstanding that the land is not immediately required for that purpose; and, until it is required for the purpose for which it was acquired, any land acquired under this subsection may be used for the purpose of any of the council's functions.”

131.
It also has the power to appropriate land under s 122 of that Act

“(1) 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.”

132.
Those powers are much wider than those in issue here, and allow for land to be held for purposes other than those which authorised the land’s acquisition. They also permit land being held where no incompatibility could arise, such as land held for the benefit of the area. Some other statutory codes contain specific provision to ensure that public recreational access is afforded- e.g. the Water Industry Act 1991 ss 3 and 5. The contrast between those examples and the powers in issue here demonstrate that it is not sensible to treat all ownership by statutory bodies as being to similar effect. A case by case analysis is required.

133.
I turn now to consider the relevant statutory powers in the instant case. I have set them out in an earlier passage of this judgement. It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.

134.
Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities- see section 507A Education Act 1996.

135.
It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there any plans that it should be, but only whether there is incompatibility as a matter of statutory construction. If the land is in fact surplus to requirements, then the use of the CA 2006 is not the remedy.

136.
Given those conclusions, it is my judgement that there is a conflict between the statutory powers in this case and registration.

137.
For completeness, I should say something about the Inspector's approach to this issue. I refer to his conclusions in his report at [175].

(v)
As to his sub-paragraph (c), I disagree with him on the argument that the land should be treated differently from the area currently occupied by the hospital. It is held under the same title and for the same statutory purposes. If this were a town planning decision, where questions of what the best use of the land would be, or of proportionality, I would agree with him. But they do not arise, and the point taken before him by for the applicant was irrelevant.

(vi)
As to his sub-paragraph (d), that the Claimant's argument would emasculate the CA 2006 "when it came to land held by public bodies for specific statutory functions," his approach is not supportable in the light of Newhaven. The examples referred to above of land held for the purposes of local government, education and water resources show that the fear is not justified.

(vii)

As to his sub-paragraph (e) (the importance of a positive duty to use the land for a specific purpose) no such test appears in Newhaven or in CA 2006. There is nothing inconsistent with the purposes in the Act that the Claimant retain the land for potential future use. Indeed, prudent husbanding of resources might make long term retention a prudent course. Nothing in the Act sets a test of necessity which has to be satisfied to make the possession lawful. It is of course true that at Newhaven the land was an unused part of the working harbour. But Lord Neuberger and Lord Hodge regarded evidence about future proposals as irrelevant- see [96] and [97]. What mattered was the question of statutory construction ([97]).

(viii)
As to his sub-paragraph (f), he has equated one set of statutory powers (those entitling the NHS to possess this land) with the generality he has assumed exists in the powers of other statutory bodies to hold land under other statutory powers. As shown by examination of the Local Government Act 1972, the Education Act 2006 and the Water Industry Act 1991 above, it is unwise and misleading to make such assumptions. As their Lordships made clear in Newhaven, one has to look at the actual statutory power in question and determine whether there is incompatibility as a matter of statutory construction. Broad brush generalisations about statutory powers to own land do not meet that standard. I note that at no point in this part of his report does the Inspector seek to address the extent of the powers in the relevant legislation, some (but not all) of which he had identified at an earlier stage of his report.

(ix)
As to his sub-paragraph (g), this is in truth an argument in favour of departing from Lord Neuberger's and Lord Hodge's insistence that one must address the relevant statutory powers. It can make no difference to their interpretation that it would have been straightforward to erect a sign. Lord Neuberger and Lord Hodge expressly rejected the argument of passive acceptance at [102] of Newhaven.

(x)
I entirely understand and appreciate that the Inspector was taken by the fact that the land had not in fact been used for the statutory powers under which the Claimants possessed it. But that cannot be used as a way of interpreting the statutes in question.

138.
It follows in my judgement that the Inspector's approach to the question of statutory incompatibility was in error, and that it is impossible for this Court to apply section 31 (2) so as to avoid the effects of the failure of SCC to consider the lawfully made objection.

(f) was the conduct by SCC of the meeting which considered the issue fair to the Claimant NHSPS?

139.
I start with the concern raised about the fact that Councillor Hall was Chairman of the Committee. I consider that this is a point of no substance. Councillor Hall was entitled to present his view as ward member to the meeting, which he did after vacating the chair, and having given his representations, he left the meeting. In my judgement he acted with complete propriety, and no complaint can be made of it.

140.
So far as the question of the representations from the two parties are concerned, it has now been established that Dr Bowes' set was circulated in hard copy, but the Claimant's were not. Further,

several members did not receive the latter because the Council's email server junked them. Although I do not thereby seek to suggest that the officers intended that the Claimant suffer any disadvantage, it patently did so, and through no fault of its own, because it was responding to Dr Bowes' late submission.

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141.
While Dr Bowes will, I have no doubt, be more careful in future about adopting too familiar a tone in any future communication on behalf of a client to a statutory authority, and when doing so on his Chambers' notepaper, I do not consider that his conduct here has caused any actual unfairness. He was entitled to send a late submission to SCC in the light of Ms Gilbert's report, and the Claimant was entitled to respond.

142.
Thus, the question is whether the disadvantage caused to the Claimant by the members having Dr Bowes's representations before them but not the Claimant's, caused any actual prejudice which could have affected the decision. In my judgement the decision which it reached, and the reasons it gave, were unaffected by that. I consider that section 31 applies in this case.

(j) Conclusions

143.
I therefore conclude that Ground 5 of the Claim succeeds. The Committee never considered the question of statutory incompatibility, and gave no reasons for rejecting the Claimant's case as an objector. In any event, it is my conclusion that the objection on the grounds of statutory incompatibility was well founded. I reject Grounds 1-3, save insofar as the failure to address the statutory incompatibility issue amounted to a failure to give reasons. I grant permission to apply for judicial review on Ground 4 but dismiss the claim on that ground.

144.
I invited Counsel to make submissions to me in the light of the draft judgment on the appropriate order to be made. There is agreement that the order should be

a.
The Registration of the Leach Grove Wood Town or Village Green of 6th October 2015 be quashed, and

b.
The application for registration shall be re-determined by the Defendant Registration Authority in accordance with the judgement of this Court.

(k) Costs

145.
The Claimant has sought the whole of its costs from the Defendant. The Defendant has resisted an order that it pay all the costs, contending that the Claimant only succeeded on the ground of statutory incompatibility (and a failure to give reasons related to that issue), and that its liability should be limited to one half of the costs.

146.
I agree with the Defendant that the Claimant should not succeed in obtaining all its costs, for the reasons given. However, I do not consider that that means that the proportion awarded should be one half. I doubt that the trial bundle would have been significantly smaller had the arguments been

limited to Ground 5 and to the failure to address this objection. However I accept that the submissions in the case would have taken 1 day instead of the two days' sitting time the argument actually consumed, albeit over three days.

147.
I shall therefore order that the Defendant pay the Claimant's costs, less any costs attributable to the hearing of the argument and submissions lasting more than one full hearing day. The claim for costs will be assessed in default of agreement.

(l) Permission to appeal

148.
Dr Bowes has made a submission that I should grant permission to his client to appeal. He was good enough to submit it in writing after I had sent out the draft judgement. In essence he disputes the arguments advanced in the judgement that the statutory powers under which the land was held would prevent registration, and that there is a compelling reason to grant permission, and/or that an appeal would have a real prospect of success, and/or that the case had a wider importance. The Claimant disputes those grounds.

149.
I do not need to explore all of Dr Bowes' arguments, because I accept that it is a case which meets the test in CPR 52.3 (6)(a)- i.e. his second ground. I therefore grant permission to appeal.

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PLANNING AND REGULATORY COMMITTEE DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX D 2018 COURT OF APPEAL JUDGMENT

8

Neutral Citation Number: [2018] EWCA Civ 721

Case Nos: C1/2016/2585 and C1/2016/3267

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE OUSELEY
[2016] EWHC 1238 (Admin)
MR JUSTICE GILBART
[2016] EWHC 1715 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2018

Before:

Lord Justice Rupert Jackson
Lord Justice Lindblom
and
Lady Justice Thirlwall

- -

Between:	**C1/2016/2585**
R. (on the application of Lancashire County Council)	**Appellant**
- and -	
Secretary of State for Environment, Food and Rural Affairs	**Respondent**
- and -	
Janine Bebbington	**Interested Party**

- -
- -

Mr Douglas Edwards Q.C. and Mr Jeremy Pike (instructed by **Sharpe Pritchard**) for the **Appellant**
Mr Tim Buley (instructed by **the Government Legal Department**) for the **Respondent**
Mr Ned Westaway (instructed by **Harrison Grant**) for the **Interested Party**

And between: **C1/2016/3267**

(1) R. (on the application of NHS Property Services Ltd.)
(2) Surrey County Council

Respondents

8

- and -

Timothy Jones **Appellant**

- -
- -

Dr Ashley Bowes (instructed by **Richard Buxton Environmental and Public Law**)
for the **Appellant**
Mr Jonathan Clay and Mr Matthew Lewin (instructed by **Capstick Solicitors LLP**)
for the **First Respondent**
The Second Respondent did not appear and was not represented.

Hearing dates: 4 and 5 October 2017

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

8

Introduction

1. Did the concept of "statutory incompatibility" defeat an application for the registration of land as a town or village green under section 15 of the Commons Act 2006? That question arises in each of these two appeals.

2. In the first appeal the appellant is Lancashire County Council. The respondent is the Secretary of State for Environment, Food and Rural Affairs, whose inspector, Ms Alison Lea, a solicitor, granted an application under section 15 of the 2006 Act for the registration of land known as Moorside Fields, in Lancaster, as a town or village green. Some 13 hectares in extent, the land is adjacent to Moorside Primary School and is owned by the county council. On 9 February 2010 the interested party, Ms Janine Bebbington, applied to the county council as registration authority to register the land as a town or village green. The county council, as local education authority, objected. The inspector was appointed to determine the application in a "pilot" scheme under the Commons Registration (England) Regulations 2008. She held an inquiry on eight days in September 2014 and July 2015. In her decision letter, dated 22 September 2015, she concluded that four of the five areas shown on the application plan should be added to the register of town and village greens, but that the fifth should not – because its use for lawful sports and pastimes by a "significant number of inhabitants" during the relevant period had not been demonstrated. The county council challenged the registration by a claim for judicial review. That claim was dismissed by Ouseley J. in an order dated 27 May 2016. I granted permission to appeal on 8 May 2017.

3. The appellant in the second appeal is Mr Timothy Jones. The first respondent is NHS Property Services Ltd., a company wholly owned by the Secretary of State for Health, which, by a claim for judicial review, successfully challenged the registration by the second respondent, Surrey County Council, of some 2.9 hectares of land in its ownership at Leach Grove Wood in Leatherhead as a village green. The land adjoins Leatherhead Hospital, and is in the same freehold title. The application for registration was made by Ms Phillippa Cargill on 22 March 2013, with the support of Mr Jones and others. It was opposed by NHS Property Services. The inspector, Mr William Webster, a barrister, held an inquiry on five days in April and May 2015. In his report, dated 9 June 2015, he accepted that a significant number of the inhabitants of the claimed "locality" and a significant number of the inhabitants of the claimed "neighbourhood" had indulged as of right in lawful sports and pastimes on the land for at least 20 years. He rejected NHS Property Services' objection that the land was not registrable on the grounds of "statutory incompatibility". But he found that the claimed "locality" was not a "locality", and the claimed "neighbourhood" not a "neighbourhood", within the meanings of those concepts in section 15 of the 2006 Act. He therefore recommended that the application for registration be refused. At its meeting on 23 September 2015 the county council's Planning and Regulatory Committee rejected that recommendation. The registration was accordingly made, on 5 October 2015. By an order dated 28 July 2016 Gilbart J. upheld the claim for judicial review, concluding that the county council had failed properly to consider the question of "statutory incompatibility". Permission to appeal was granted by the judge. Although the county council took part in the proceedings in the court below, it has not done so before us – because of a "lack of resources", and not because it concedes that it made "any error of law" (its Principal Solicitor's letter to the court dated 28 September 2017).

4. A complete account of the relevant facts is given in the judgments in the court below. I gratefully adopt the narrative to be found there.

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The issues in the appeals

5. In the Lancaster appeal there are five issues for us to decide:

   (1) whether, as Ouseley J. concluded, the concept of "statutory incompatibility" did not apply (ground 4 in the appellant's notice);
   (2) whether the judge was right to endorse the inspector's finding that the county council had not demonstrated that it had held Moorside Fields for educational use (ground 3);
   (3) whether the inspector erred in finding there existed a "locality" for the purposes of section 15 of the 2006 Act (ground 1);
   (4) whether, as Lancashire County Council asserts, the "significant number of inhabitants" of a locality who use the land in question must be geographically "spread" across it (ground 2); and
   (5) whether the inspector erred in finding that the land was used "as of right" (ground 5).

6. In the Leatherhead appeal there are two issues:

   (1) whether Gilbart J. was wrong to conclude that the concept of "statutory incompatibility" applied (ground 1 in the appellant's notice and ground (a) in NHS Property Services' respondent's notice); and
   (2) whether Surrey County Council's reasons for departing from the inspector's finding that there did not exist a relevant "neighbourhood" were adequate (ground (b) in the respondent's notice).

   A further ground in the respondent's notice asserted that the county council's decision to register the land at Leach Grove Wood was "affected" by procedural unfairness. That ground was not pursued separately before us, but was said to be relevant to the argument on ground (b).

The statutory scheme for the registration of town and village greens

7. Section 15 of the 2006 Act, "Registration of greens", provides in subsection (1) that "[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". All three of those subsections apply 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". Subsection (2) applies where "(b) they continue to do so at the time of the application". Subsection (3) applies where "(b) they ceased to do so before the time of the application but after the commencement of this section" and "(c) the application is made within the relevant period", which is defined in subsection (3A) as meaning "(a) … the period of one year beginning with the cessation mentioned in subsection (3)(b)". Subsection (4) is not relevant here.

8

8. In most parts of England, an application to register land as a green is determined by a commons registration authority – usually a county council or unitary authority. But in the "pilot" areas, of which the administrative area of Lancashire County Council is one, applications for registration are determined by inspectors under the 2008 regulations, and no application may later be made to the High Court for rectification of the register of town or village greens under section 14 of the Commons Registration Act 1965.

9. As Lord Hoffmann said in *R. (on the application of Beresford) v Sunderland City Council* [2004] 1 A.C. 889 (in paragraph 2 of his speech), the registration of land as a town or village green can have serious consequences for a landowner. Once land has been registered, rights to continue to use it for lawful sports and pastimes accrue and are vested, as enforceable civil rights, in the inhabitants of the qualifying locality or neighbourhood (see Lord Hoffmann's speech in *Oxfordshire County Council v Oxford City Council* [2006] 2 A.C. 674, at paragraphs 47 to 51). The land will then enjoy the protection of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. The landowner will not be able to use it in such a way as to interfere with the local inhabitants' rights, or build on it, or exclude local inhabitants from it.

Issue (1) in the Lancaster appeal and issue (1) in the Leatherhead appeal – "statutory incompatibility"

10. As Lord Carnwath pointed out in *R. (on the application of Barkas v North Yorkshire County Council* [2015] A.C. 195 (in paragraph 66 of his judgment), it would be wrong to think that "land in public ownership can never be subject to acquisition of village green rights under the 2006 Act". That, he said, "is demonstrated by the "Trap Grounds" case [*Oxfordshire County Council*]", where "[although] the land was in public ownership, it had not been laid out or identified in any way for public recreational use …".

11. In *R. (on the application of Newhaven Port and Properties Ltd.) v East Sussex County Council* [2015] UKSC 7 the Supreme Court held that the general provisions of section 15 of the 2006 Act should yield to a specific provision in section 49 of the Newhaven Harbour and Ouse Lower Navigation Act 1847, which provided that "the trustees shall maintain and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith …", and to subsequent statutory provisions governing the operation of a harbour on West Beach at Newhaven, including section 33 of the Harbours, Docks and Piers Clauses Act 1847, which provided that "… the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods". West Beach had been registered as a village green.

12. In a judgment with which Lady Hale and Lord Sumption agreed, Lord Neuberger and Lord Hodge described the relevant issue as being "whether … section 15 of the 2006 Act cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function to which the land was to be put" (paragraph 24).

13. Having surveyed the English jurisprudence on dedication and prescription, including the House of Lords' decision in *British Transport Commission v Westmorland County Council* [1958] A.C. 126, and the Scots law of positive and negative prescription – in particular, the line of authority including *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623, they

observed (in paragraph 91) that it was "significant … that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes". The concept of "statutory incompatibility", they emphasized, does "not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act" (paragraph 92). They continued (in paragraph 93):

> "93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:
>
> > 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.'
>
> While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act."

They saw "an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour …". The harbour company was "obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act)", and it had "powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order" (paragraph 94). They went on to say (in paragraph 96):

> "96. In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way

> which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

8

There was, they said, "a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green" (paragraph 97).

14. They then referred (in paragraphs 98 to 100) to a number of cases in which the registration as a green of land held by public bodies had been approved by the court – including *New Windsor Corporation v Mellor* [1976] Ch. 380, *Oxfordshire County Council* and *R. (on the application of Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] UKSC 11. In *New Windsor Corporation v Mellor*, "[while] the land had long been in the ownership of the local council and its predecessors, it was not acquired and held for a specific statutory purpose" (paragraph 98). In *Oxfordshire County Council*, "while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility" (paragraph 99). And in *Lewis*, "[it] was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green" (paragraph 100). Those cases, therefore, were readily distinguishable. Lord Neuberger and Lord Hodge went on to say this (in paragraph 101):

> "101. … The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

15. As Lord Carnwath said in his judgment (at paragraph 138), Lord Neuberger and Lord Hodge had proceeded "on the basis that registration of the Beach as a town or village green would make it subject to the restrictions (subject to criminal sanctions) imposed by the 19th century village green statutes". In his view it was "easy to see why such restrictions are likely to be incompatible with future use for harbour purposes, even if that has not proved a problem hitherto". He added (in paragraph 139):

> "139. However, it is to be noted that the supposed incompatibility does not arise from anything in the 2006 Act itself, but rather from inferences drawn by the courts as to Parliament's intentions. In the relevant passage [of his speech in *Oxfordshire County Council*] (para 56), Lord Hoffmann expressed agreement with the courts below on this issue, including by implication my own rather fuller reasoning in the Court of Appeal [2006] Ch 43, paras 82-90. However, he did not see this issue as impinging directly on the question whether the land should be registered. … It was not necessary in that case to consider the issue which arises here: that is, the potential conflict between the general village green statutes and a more specific statutory regime, such as under the Harbours Acts. It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour."

16. In the Lancaster case, Lancashire County Council relied on the analysis of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* in contending that registration of the land at Moorside Fields as a village green was incompatible with the statutory purposes for which it held the land as education authority.

17. In her conclusions on "Statutory Incompatibility", the inspector acknowledged that the principle applied in *Newhaven Port and Properties* "could, in certain circumstances, be applied to land held by a local authority" (paragraph 111 of her decision letter). She said it was "necessary to examine the purposes for which LCC acquired and hold the Application Land, and, if held for a specific statutory purpose, then to consider whether registration of the land as a town or village green would be incompatible with the continuing use of the land for those purposes" (paragraph 112). Having considered the evidence before her, she said (in paragraphs 119 to 122):

> "119. Furthermore, even if the land is held for "educational purposes", I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The School is currently being extended on other land and will, according to Lynn MacDonald [a School Planning Manager for the county council], provide 210 places which will meet current needs. There is no evidence to suggest that the School wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.
>
> 120. Areas C and D are marked on LCC's plan as "Replacement School Site". However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her 5 year planning phase.
>
> 121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.
>
> 122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish to make that provision on the Application Land."

And she concluded (in paragraph 124):

> "124. It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships [in *Newhaven Port and Properties*]. Even if it is accepted that LCC hold the land for "educational purposes", there is no *"clear incompatibility"* between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility."

18. The statutory provisions on which the county council had sought to rely are in the Education Act 1944, the Education Act 1996 and the Education Act 2002. Section 8 of the 1944 Act imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education. Section 13(1) of the 1996 Act, under the heading "General responsibility for education", provides that "so far as their powers enable" a local education authority must secure that "efficient primary education and secondary education … are available to meet the needs of the population of their area". Section 14 requires it to "secure that sufficient schools" are available for providing primary and secondary education (sub-section (1)), and that they should be sufficient in "number, character and equipment to provide for all pupils the opportunity of appropriate education" (subsection (2)). Section 530(1) provides its power compulsorily to purchase any land required for "the purposes of any school …" or "otherwise … for the purposes of [its] functions under [the] Act"; section 531, its power to purchase land by agreement for such purposes. Regulations made under section 542, prescribing the standards to which school premises are to conform, include, in regulation 10 of the School Premises (England) Regulations 2012, the requirement that "[suitable] outdoor space must be provided" for "physical education to be provided for pupils" and for "pupils to play outside". Section 175 of the 2002 Act requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children".

19. Ouseley J. was not persuaded by the argument that those provisions engaged the concept of "statutory incompatibility". He said (in paragraph 76 of his judgment) that "[the] mere fact that the land is owned by a statutory body for an identified statutory function does not mean that use as of right for public recreation is necessarily incompatible with that function". He went on (in paragraph 79) to pose, and answer, three questions. The first question was this: "can [Lancashire County Council] carry out some educational functions on the land if the public has the right to use Areas A-D or any of them for lawful games and pastimes[?]". The answer to that question was: "yes; some educational use can be made of … Areas A-D; open air classes and some supervised or organised recreation are not prevented by public rights of access with reasonable give and take, though they may be inhibited or made less convenient than would be the case without registration as a town green". The second question was: "can [Lancashire County Council] put the land to whatever educational purpose it might want in the future[?]". The answer was: "no[; some] educational uses obviously are prevented, notably the construction of buildings or other uses such as a contractor's compound or for temporary classrooms while maintenance or expansion takes place". And the third question was this: "can [Lancashire County Council] carry out its educational functions if the public has the right to use Areas A-D for recreational purposes[?]". The judge's answer to that question was: "yes[; and] it would still be yes, even if it could make no educational use of

the land at all". In *Newhaven Port and Properties*, he said, "the answer to the latter two questions would have been no, and the answer to the first would have been: yes but only temporarily".

20. It was, in Ouseley J.'s view, the third question "which matters". As that question was "answered in the positive here", there was, he said, "no statutory incompatibility". In his view "[what] is envisaged for a specific Act to be in conflict with the [2006 Act], and to override it by necessary implication, is that the statutory ownership of the land should bring specific statutory duties or functions in relation to that specific land which are prevented or hindered by its use for public recreation after registration". It was "not enough that the duty could be performed on the land in question but could also be performed on other land, even if less conveniently" (paragraph 80), nor "that, after registration, [the county council] could only use the land for a limited range of educational purposes, nor that it might have to look elsewhere for land". Its "general statutory educational functions" could "still be undertaken even if no educational functions could be undertaken on this specific land compatibly with public recreational use". In *Newhaven Port and Properties*, "the importance of the beach to possible future needs of the harbour was obvious". This, said the judge, "highlights the difference between a specific statutory function which requires the use of specific identifiable land, and a general statutory function which can be performed, more or less conveniently without the land in question" (paragraph 81). The "specific purposes for which the Areas were acquired [had] been met elsewhere". The county council "does not need the land for new school buildings now and has no immediate plans to use them for that purpose" (paragraph 82).

21. In the Leatherhead case, the land at Leach Grove Wood had for many years been held by one or another of several public bodies for statutory purposes relating to healthcare, though never itself used for such purposes. In 1948, together with other land, it was transferred by the Trustees of Leatherhead Hospital to the Minister of Health, in 1968 vested in the Secretary of State for Social Services, and in 1969 transferred, with other land, to Surrey County Council. In 1971 it was appropriated to "Education, Health and Social Services", evidently with the intention that it might be developed as a health centre. Remaining undeveloped, however, it was eventually transferred, together with the site of Leatherhead Hospital, to the Surrey Primary Care Trust in 2006, and, in 2013, to NHS Property Services (see paragraphs 18 to 34 of Gilbart J.'s judgment).

22. NHS Property Services contended before Gilbart J., as it had before the inspector, that the concept of "statutory incompatibility" precluded registration of the land as a village green. Gilbart J. set out the relevant statutory provisions, their origins and their evolution.

23. At the time of the application for its registration, the land was owned by the Surrey Primary Care Trust. By section 83(1) of the National Health Service Act 2006, as enacted, primary care trusts were under a duty to provide, or to secure the provision of, primary medical services in their area. On the dissolution of Surrey Primary Care Trust in 2013, the freehold title of the land was transferred to NHS Property Services, which had been created by the Secretary of State for Health under his power in section 223(1) to "form … companies to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act". The NHS body for which NHS Property Services holds the land is the Surrey Downs Clinical Commissioning Group.

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24. Following the amendment of the National Health Service Act 2006 by the Health and Social Care Act 2012, functions previously exercised by the Secretary of State acting through a primary care trust fell to be exercised by a clinical commissioning group. The principal statutory duties of a clinical commissioning group are in section 3(1) of the National Health Service Act 2006, as amended:

> "(1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility –
>
> (a) hospital accommodation,
>
> (b) other accommodation for the purpose of any service provided under this Act,
>
> (c) medical, dental, ophthalmic, nursing and ambulance services,
>
> (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the group considers are appropriate as part of the health service,
>
> (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the group considers are appropriate as part of the health service,
>
> (f) such other services or facilities as are required for the diagnosis and treatment of illness."

25. The inspector described the land (in paragraphs 65 to 71 of his report) as woodland that had had little management, which was crossed by tracks and attractive for walking with or without dogs, and for children's play. In January 2013 NHS Property Services had put up a notice on the land, on which it was stated that this was private land, that the public had permission to enter it on foot, but that that permission could be withdrawn at any time.

26. The issue of "statutory incompatibility", as the inspector saw it, was "whether land held for the statutory purposes of the NHS falls within the same category as land held by a statutory undertaker for the purposes of its operations such that, consistently with the decision in [*Newhaven Port and Properties*], the land in this instance would not be registerable as a matter of law" (paragraph 175(a)). He preferred the submissions made on behalf of Mr Jones (paragraph 175(b)). He accepted that the fact that the land formed part of the same freehold title as the hospital site "should not mean that it must be treated as part of the working hospital site when, as a matter of fact, it plainly is not and never has been" (paragraph 175(c)). Pointing to paragraph 101 of the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties*, he said that NHS Property Services' case "would in practice emasculate the provisions of the 2006 Act when it came to land held by public bodies for specific statutory functions". This, he thought, could not have been Parliament's intention (paragraph 175(d)). In *Newhaven Port and Properties* there had arisen "an obvious and irreconcilable clash as between the conflicting statutory regimes" (paragraph 175(e)). He went on to say (in paragraph 175(e) and (f)):

> "(e) … The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

> (f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has [sic]) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being. … [In] *Barkas* at [66] Lord Carnwath had explained that land in public ownership is not outside the 2006 Act and to suggest that any land held for purposes inimical to TVG rights would be outside the 2006 Act would be absurd, not least as it might give rise to unnecessary speculation and debate about what the landowner's future intentions were for the land in contrast to the wholly proper analysis which, in my view, arises from *Newhaven* which focuses on the specific duty or duties which are imposed on a landowner (in its capacity as a statutory undertaker) with regard to its holding and management of the land which would clash with registration of the land as a TVG. As indicated, no such conflict impacts on the holding of the land in this instance in the performance of the statutory health functions of the NHS and those bodies through whom they are discharged."

The inspector did not accept that the principle of "statutory incompatibility" applied only to public bodies with no power to hold land for public recreation "since [this] might mean in practice that all or most publicly held land is outside the 2006 Act". He said that "if registration was to have been avoided during the relevant qualifying period in this instance then the answer was permissive signage or making user contentious" (paragraph 175(g)). He concluded therefore that "the doctrine of statutory incompatibility has no application in this case" (paragraph 175(h)).

27. The officer's report for the meeting of Surrey County Council's Planning and Regulatory Committee on 23 September 2015, which recommended that the application for registration be rejected, did not address the question of "statutory incompatibility", nor, it seems, was there any discussion of the question at the meeting.

28. Gilbart J. framed the issue for the court in this way: "given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has [the county council] shown that there was no basis for concluding that there was statutory incompatibility?". In the light of the relevant conclusions expressed by Lord Neuberger and Lord Hodge in *Newhaven Port and Properties*, he said that "[what] matters is whether, as a matter of statutory construction, the relevant statutory purpose is incompatible with registration" (paragraph 128 of the judgment). He accepted that Ouseley J.'s judgment in the Lancaster case was consistent with the conclusions of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* (paragraph 129).

29. As to the statutory powers with which he was concerned, Gilbart J. said it was clear that there was "no general power in any of the relevant bodies to hold land". The defined statutory purposes did "not include recreation, or indeed anything outside the purview of … the purposes of providing health facilities". Asking himself the question "Could the land be used for the defined statutory purposes while also being used as a town or village green?", he said that "the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use" (paragraph 134). It was "very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village

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green". A "hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used". By contrast, said the judge, it was "easy to think of functions within the purview of education, whereby land is set aside for recreation". There was "a specific statutory duty [in section 507A of the 1996 Act] to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities" (paragraph 135). It was "not relevant … that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes" (paragraph 136). In the judge's view, given those conclusions, "there is a conflict between the statutory powers in this case and registration" (paragraph 137). The inspector had not concentrated, as he should have done, on the question of statutory construction, and the county council's decision to register the land was flawed by its committee's failure to consider NHS Property Services' objection on this ground (paragraphs 138 and 139).

30. For Lancashire County Council, Mr Douglas Edwards Q.C. contended that Ouseley J.'s understanding of the concept of "statutory incompatibility" was unjustifiably narrow. He submitted that, where a public authority holds land for the purpose of discharging a statutory function, the land may not be registered as a green if to do so would frustrate the discharge of that function on that land. This concept can apply to "general" statutes as well as to "special" or "local" Acts, such as the one with which the court was concerned in *Newhaven Port and Properties*. There were two requirements: first, that the land had been acquired for a specific statutory purpose or statutory purposes, and secondly, that registration must be incompatible with the performance of that statutory purpose or any of those statutory purposes – though not necessarily all of them – on the land itself. That principle, Mr Edwards submitted, was clearly engaged in the Lancaster case. Registration would make it impossible for the county council to prevent access to the land, or to build on any part of it. The fencing erected to protect children at Moorside Primary School would have to be removed. Any future expansion of the school on to the land would be precluded. The county council's ability to discharge those statutory obligations on the land would now be compromised. Mr Edwards submitted that the reference to "the continuing use of the land for [the] statutory purposes" in paragraph 93 of the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* means use for any of those statutory purposes – whether now or in the future. The fact that the land may in the future be required for those purposes is enough to prevent its registration as a green if registration would give rise to incompatibility with the relevant statutory purposes. That was clearly so here. To hold otherwise, as did Ouseley J., would create serious problems for public authority landowners.

31. Mr Edwards also submitted that the same considerations apply to land held for education purposes by a local education authority as to land owned by NHS bodies. Gilbart J.'s observations to the contrary in the Leatherhead case were incorrect. One could readily envisage NHS bodies, in the exercise of their statutory functions, providing open space for patients and visitors at a hospital. That would be no different, in principle, from land being laid out land for recreation at a school. Neither statutory regime was compatible with the registration of land as a town or village green.

32. The implications of this argument, Mr Edwards submitted, should not be exaggerated. It would not be likely, for example, to prevent registration of land acquired by a "principal council" under section 120(1) of the Local Government Act 1972 for the purposes of "(a)

any of their functions under this or any other enactment" or "(b) the benefit, improvement or development of their area".

33. For NHS Property Services, opposing the appeal in the Leatherhead case, Mr Jonathan Clay adopted Mr Edwards' submissions on the law. He submitted that the "key question" was whether the registration of the land at Leach Grove Wood as a town or village green would be incompatible with its use "by NHS bodies for NHS purposes ([especially] under section 3 [of the National Health Service Act 2006])". He pointed out that NHS Property Services' power to hold land is limited to putting that land at the service of the relevant NHS body – here the clinical commissioning group – to enable it to provide medical services to the public. It had no power to hold land for recreational purposes. Though the land was not being used to provide hospital accommodation, or any other accommodation, service or facility, within section 3(1) of the National Health Service Act 2006, that is irrelevant. It is the only undeveloped land within the site of Leatherhead Hospital that could be used to extend the hospital or to provide other accommodation. This was commended by Gilbart J. (in paragraph 138(vii) of his judgment) as a "prudent husbanding of resources". The judge was therefore right, submitted Mr Clay, to conclude that the statutory purposes for which the land was held and used would be incompatible with registration. This case was unlike those envisaged by Ouseley J. in his judgment in the Lancaster case (at paragraph 81) – "public bodies with general functions which do not specifically or in reality have to be performed on the land in question".

34. In the Lancaster appeal those submissions were countered by Mr Tim Buley for the Secretary of State and Mr Ned Westaway for Ms Bebbington, and, in the Leatherhead appeal, by Dr Ashley Bowes for Mr Jones. All three submitted that Ouseley J.'s conclusions on "statutory incompatibility" were correct; Dr Bowes that Gilbart J.'s was incorrect. Parliament had not created, in the self-contained code for the registration of town and village greens under the 2006 Act, a general exemption from registration for land held by public bodies that is not essential for the discharge of their statutory functions. Had the Supreme Court in *Newhaven Port and Properties* been concerned that registration might conflict with the future exercise of statutory powers, Lord Neuberger and Lord Hodge would not have said what they did in paragraph 101 of their judgment. This understanding of the Supreme Court's decision sits well with its own recent jurisprudence confirming that there is no general exemption from the scheme of the 2006 Act for public bodies owning land (see Lord Carnwath's judgment in *Barkas,* at paragraph 66). It is also consistent with the general tenor of the jurisprudence relevant to the concept of "statutory incompatibility" – including, for example, as Mr Westaway submitted, the decision of the Court of Appeal in *Bishop of Gloucester v Cunnington* [1943] 1 K.B. 101.

35. The legal principles at work here are to be found in the judgments given in the Supreme Court in *Newhaven Port and Properties*. They are entirely clear in Lord Neuberger and Lord Hodge's judgment (in paragraphs 92 to 101), and are amplified by Lord Carnwath's observations in his (in paragraph 139). They can be applied in each of these two appeals, without needing to be further refined or enlarged by this court. Our task, in each case, is to apply them to the relationship between the provisions of the 2006 Act concerning the registration of town and village greens and the statutory powers and duties relating to the land in question.

36. Three general points may be made about the relevant principles, none of them controversial in argument before us. First, it should be remembered that they are the means by which the

court resolves a conflict between two statutory regimes, where Parliament itself has not seen fit to do that – in either regime. They must therefore be exercised with care, and only when the need to do so truly arises. Secondly, they are potentially applicable in all cases where an issue of "statutory incompatibility" is said to arise. They are not confined to cases where powers and duties contained in a private Act of Parliament are said to trump the general provisions for the registration of town and village greens in section 15 of the 2006 Act. Nor – as is clear from the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* (at paragraph 101) – are they confined to the activities of statutory undertakers. They may also be applied in cases where there is said to be a conflict between those provisions of the 2006 Act and statutes providing for the functions of public bodies within a given sphere of responsibility. Thirdly, however, under the statutory scheme for registration there is no blanket exemption for land held by public bodies for the purposes of their performance of statutory powers and duties. Section 15 of the 2006 Act contains no limitation, or exception, for public body landowners. Parliament has had several opportunities to enact such a provision as the statutory scheme has evolved – for example, in the amendments brought about by the Growth and Infrastructure Act 2013.

37. As the Supreme Court stressed in *Newhaven Port and Properties*, when another statutory regime is said to displace the registration provisions of the 2006 Act, the issue will always be one of "statutory construction". Lord Neuberger and Lord Hodge laid emphasis on the land in question being held for "defined statutory purposes" and the 2006 Act not enabling rights to be acquired by the public that are "incompatible with the continuing use of the land for those statutory purposes" (paragraph 93). The inconsistency amounting to "statutory incompatibility" was the inevitable clash between the consequences of registration under the 2006 Act and the harbour company's ability to perform the statutory purposes entailed in operating the harbour, not between the consequences of registration and the possibility of a public body performing on the registered land general functions that might be performed on the land but could also be performed elsewhere. The "statutory incompatibility" was inherent in the potential frustration of the "statutory purposes" themselves. In subsequent passages of their judgment Lord Neuberger and Lord Hodge spoke of "a clear incompatibility between NPP's statutory functions in relation to the Harbour … and the registration of the Beach as a town or village green" (paragraph 97). In their observations about the three cases in which land held by public bodies had been registered as town or village greens, they underscored the point that in those cases the land in question had not been acquired and held for "a specific statutory purpose" likely to be impeded by its registration as a green (paragraphs 98 to 100). And they confirmed that the ownership of land by a public body with "statutory powers that it can apply in future to develop land" was "not of itself sufficient to create a statutory incompatibility" (paragraph 101).

38. In each of the two cases before us the circumstances were, plainly, very different from those in *Newhaven Port and Properties*. In both cases, the statutory powers and duties with which the provisions for registration of greens under the 2006 Act were said to be incompatible were quite different from the statutory regime governing the operation of the harbour on the land in question at Newhaven, which gave rise to what Lord Neuberger and Lord Hodge described (in paragraph 97 of their judgment) as "a clear incompatibility between [the harbour company's] statutory functions in relation to the Harbour … and the registration of the Beach as a town or village green".

39. I think Ouseley J.'s approach to this question in the Lancaster case was essentially consistent with the principles indicated by the Supreme Court in *Newhaven Port and Properties*, and

that his conclusion, in agreement with that of the inspector, was correct. Mr Edwards' submissions to the contrary seem to extend the relevant principles beyond their true scope and to give them an effect that the Supreme Court did not intend – and with potentially far-reaching consequences. Assuming for the moment, as the county council contend, that it had acquired and held the land at Moorside Fields for educational purposes – a contention the inspector could not accept – I do not think this was a case in which the concept of "statutory incompatibility" stood in the way of the land being registered as a green. It seems to me that the statutory powers and duties in the Education Acts on which the county council sought to depend as giving rise to some decisive incompatibility with the 2006 Act, in particular sections 13 and 14 of the Education Act 1996, were materially different from the statutory provisions considered in *Newhaven Port and Properties*.

40. Crucially, as a matter of "statutory construction" there was no inconsistency of the kind that arose in *Newhaven Port and Properties* between the provisions of one statute and the provisions of the other. The statutory purpose for which Parliament had authorized the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with *Newhaven Port and Properties*, there were no "specific" statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible. This was not analogous to the situation referred to by Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* (at paragraph 93), "[where] Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes", and "the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes". It was not a case in which registration would, as Lord Neuberger and Lord Hodge put it (at paragraph 96), "clearly impede", or "prevent" or "restrict" the exercise of any statutory power, or the discharge of any statutory duty, relating specifically to that particular land. It was not akin to the circumstances of *Newhaven Port and Properties*, in which, again as they put it (at paragraph 101), "the statutory harbour authority throughout the period of public user of the Beach held the Harbour for the statutory harbour purposes and as part of a working harbour".

41. The statutory powers and duties relied upon here were general in their character and content, comprising a local education authority's functions in securing educational provision in its area. There was no statutory obligation to maintain or use the land in question in a particular way, or to carry out any particular activities upon it. The basis of the asserted incompatibility between section 15 of the 2006 Act and the provisions of the Education Acts on which the county council sought to rely could only be that the carrying out of its general obligations to provide schools in its area – its compliance with a "target duty" – might be or become more difficult or less convenient, not that it would be prevented from carrying out any particular statutory function relating specifically to the land whose registration as a town or village green had been applied for. There was no statutory duty to provide a school on the land, or to carry out any particular educational activity on it. There were no proposals to develop it for a new school. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a "statutory incompatibility" (see paragraph 101 of the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties*). Nor was the fact of its having been acquired and held for such purposes – if, indeed, it was. The relevant statutory purposes were capable of fulfilment through the county council's ownership, development and management of its property assets as a local education authority

without recourse to the land in question – notwithstanding that, on its own contention, it had owned that land for "educational purposes" for many years. The registration of the land as a town or village green would not be at odds with those statutory purposes.

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42. As Ouseley J. accepted in supporting the inspector's conclusions on this issue, the county council, as local education authority, would still be able to carry out its statutory educational functions if the public had the right to use the land for recreational purposes, and this would also be so even if it could make no educational use of the land itself. Indeed, the judge was able to go further than that. As he said, it would still be possible for some, albeit limited, educational use to be made of the land after its registration as a green. But in any event there was no necessary inconsistency between the two statutory regimes. This was not a case of "statutory incompatibility".

43. In the Leatherhead case it seems clear that Gilbart J. did not consider his approach to the question of "statutory incompatibility" to be different from Ouseley J.'s in the Lancaster case, but congruent with it. However, I am not persuaded that his own conclusion on that question can be reconciled with Ouseley J.'s application of the principles in *Newhaven Port and Properties* (in paragraphs 76 to 82 of his judgment).

44. A similar analysis applies in my view, because the circumstances of the two cases are, in all material respects, parallel. It is not necessary to repeat the same basic points, but they apply equally here (see paragraphs 39 to 42 above). As in the Lancaster case, and for essentially the same reasons, I cannot see why, as a matter of "statutory construction", the court should be compelled to find an incompatibility between the statutory provisions under which the land at Leach Grove Wood was held and its registration as a village green under section 15 of the 2006 Act. There was no inherent inconsistency between the provisions in the statutory regime under which the land was held and the statutory provisions for registration. On a similar analysis, the critical considerations to which I have referred in the Lancaster case were also present here. The two cases are indistinguishable in that respect.

45. The statutory functions on which NHS Property Services relied, and the statutory purposes underlying them, were also general in character and content: the general functions of a clinical commissioning group to provide medical services to the public, and, under section 3(1) of the National Health Service Act 2006, the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities. The registration of the land as a green under section 15 of the 2006 Act would not, in itself, have any material effect on NHS Property Services' function under section 223(1) of the National Health Service Act 2006, to hold land for the NHS Surrey Downs Clinical Commissioning Group. Nor would it prevent the performance by the clinical commissioning group, or any other NHS body, of any of statutory function relating specifically to the land in question. Beyond their general application to land and property held by NHS Property Services, none of those statutory functions could be said to attach in some specific way to this particular land. Parliament had not conferred on NHS Property Services or on the clinical commissioning group, any specific power, or imposed any specific duty, in respect of the land whose registration was sought. There was, for example, no statutory duty to provide a hospital or any other healthcare service or facility on the land.

46. As in the Lancaster case, therefore, the circumstances did not correspond to those of *Newhaven Port and Properties*. The land was not being used for any "defined statutory purposes" with which registration would be incompatible. No statutory purpose relating

specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a "statutory incompatibility". The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land. And again, it is possible to go somewhat further than that. Although the registration of the land as a village green would preclude its being developed by the construction of a hospital or an extension to the existing hospital, or as a clinic or administrative building, or as a car park, and even though the relevant legislation did not include a power or duty to provide facilities for recreation, there would be nothing inconsistent – either in principle or in practice – between the land being registered as a green and its being kept open and undeveloped and maintained as part of the Leatherhead Hospital site, whether or not with access to it by staff, patients or visitors. This would not prevent or interfere with the performance of any of the relevant statutory functions. But in any event, as in the Lancaster case, the two statutory regimes were not inherently in conflict with each other. There was no "statutory incompatibility".

47. It follows that the county council's committee was right to accept and adopt the inspector's conclusion on "statutory incompatibility", which was, I believe, correct as a matter of law.

48. In my view, therefore, on a proper understanding of the concept in the light of the Supreme Court's decision in *Newhaven Port and Properties*, there was no "statutory incompatibility" in either of these cases. I accept the submissions of Mr Buley, Mr Westaway and Dr Bowes on this issue, and reject the arguments of Mr Edwards and Mr Clay.

49. I should add, finally, that this conclusion does not depend on the fact that in both of these cases the risk of registration could have been avoided by preventing or challenging the use of the land by members of the public, or by some clear act of permission. The absence of such action might indicate that a public body owning the land has seen nothing inconsistent between the performance of its statutory functions and the recreational use of the land by members of the public within section 15 of the 2006 Act. But this does not affect the exercise of "statutory construction" involved in determining whether a "statutory incompatibility" has truly arisen.

Issue (2) in the Lancaster appeal – the statutory purposes for which Moorside Fields was held

50. The inspector in the Lancaster case was not satisfied that the land had been held for educational use by Lancashire County Council. In the section of her decision letter headed "The statutory requirements", she said (in paragraph 9):

> "9. In *R v Suffolk County Council, ex parte Steed*, approved by Lord Bingham in *Beresford v Sunderland City Council* it was noted that it was *"no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green"* and that each of the relevant criteria must be *"properly and strictly proved"*. Nevertheless the standard of proof is the normal civil one of the balance of probabilities."

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In the section where she dealt with "Statutory Incompatibility" she considered the documentary evidence produced by the county council (in paragraphs 113 to 116):

> "113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944". The endorsement is dated 12 August 1948.
>
> 114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows "Education Lancaster Greaves County Secondary School".
>
> 115. In addition LCC provided an Instrument dated 23 February 1925 and a letter from LCC to the School dated 1991. The Instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of the land acquired by the Council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the BRP Fields. An acknowledgement and undertaking dated March 1949 refers to the transfer to the County Council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the BRP Fields. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.
>
> 116. At the inquiry LCC provided a print out of an electronic document headed "Lancashire County Council – Property Asset Management Information" which in relation to "Moorside Primary School" records the committee as "E". I accept that it is likely that this stands for "Education". An LCC plan showing land owned by "CYP education" shows Areas A, B and E as Moorside Primary School and Areas C and D as "Replacement School Site". In relation to Areas C and D the terrier was produced, and under "committee" is the word "education". The whole page has a line drawn through it, the reason for which is unexplained."

A footnote to the last sentence of paragraph 116 refers to the county council's suggestion that "it may be the case that pages were crossed out once they had been uploaded onto the electronic system", but adds that "no electronic version was available and there is therefore no evidence that the page has been uploaded". The inspector then stated her conclusions on that evidence (in paragraphs 117 and 118):

> "117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no Council resolution authorising the purchase of the land for

> educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the Council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald … confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.
>
> 118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC's statement that *"the Application Land was acquired and is held for educational purposes and was so held throughout the 20 year period relevant to the Application"* accurately reflects the legal position."

51. Mr Edwards accepted that the burden lay on the county council to demonstrate that the land was held for educational purposes. But he submitted that the inspector was plainly wrong to require the county council to prove so that she could be "sure" – in effect, "beyond reasonable doubt" – that it had held the land for educational purposes during relevant 20-year period. To apply a standard of proof higher than the civil standard – the "balance of probabilities" – was an error of law. The inspector only had to be satisfied it was "more likely than not" that the position was as the county council contended.

52. Mr Edwards submitted that the relevant evidence all pointed to the land having been held by the county council for educational purposes. As the inspector acknowledged, there was "no evidence to suggest [the land] is held for other than for educational purposes". In the absence of evidence showing that a local government process had not been correctly performed, the "presumption of regularity" applied (see, for example, the judgment of Dove J. in *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2016] 1 P. & C.R. 8, at paragraphs 20 to 25, and other decisions at first instance such as *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) and *R. (on the application of Malpass) v Durham County Council* [2012] EWHC 1934 (Admin)). In this case there was no evidence to rebut the "presumption of regularity". If the inspector had applied that presumption, she could only have concluded on the evidence before her that the land was indeed held for educational purposes.

53. But, submitted Mr Edwards, even if the "presumption of regularity" was not engaged here, the inspector had made a basic mistake of fact in concluding as she did. This is even more apparent, he said, from the further evidence that came to light after the inspector's decision – in the form of the county council's contemporaneous minutes. On 5 February 1948, on the recommendation of its Education Committee, the county council resolved that "the Seal of the Council be affixed to … [a] Conveyance from Mr. J. Dilworth of 13.89 acres of land on the south side of Bowerham Road, Scotforth, Lancaster, as a site for a proposed Primary School". On 31 July 1947 the county council's Finance Committee, at the request of its Education Committee, had recommended that applications be made to raise loans of £2,050 for the "Purchase of site and incidental expenses" for "Lancaster Scotforth Moorside proposed Primary School". The 13.89 acres acquired by the conveyance dated 29 June 1948 comprised Areas A, B and E in the application land. Looked at as a whole, Mr Edwards submitted, the evidence left no room for doubt that those three parcels of land were acquired for educational purposes.

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54. Mr Edwards relied on principles confirmed by Carnwath L.J., as he then was, in his judgment in *E and R v Secretary of State for the Home Department* [2004] Q.B. 1044: that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law" (paragraph 66); that such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" – as explained by Lord Slynn in *R. v Criminal Injuries Compensation Board, ex p. A* [1999] 2 A.C. 330 and *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 (paragraph 54); and that the admission of new evidence on such an appeal is subject to the principles in *Ladd v Marshall* [1954] 1 W.L.R. 1489, which "may be departed from in exceptional circumstances where the interests of justice require" (paragraph 91). In this case, Mr Edwards submitted, the mistake of fact was plain and verifiable, and played a material part in the inspector's reasoning. The county council was not responsible for the mistake, having produced ample evidence to the inspector to show the land had been acquired and was held for educational purposes. It could not have foreseen the need to adduce further evidence on this question (see Phipson on Evidence (18th edn.), at paragraph 13-07). The additional evidence, corroborating that presented to the inspector, would have been decisive. Being in documentary form, it was accurate and credible. On the application of *Ladd v Marshall* principles, it ought to have been admitted. But even if those principles were not satisfied, Mr Edwards submitted, this case falls within the exceptional category envisaged by Carnwath L.J. in *E and R*. Admitting it would overcome an obvious injustice to the county council, and would cause no prejudice to the other parties. The county council was now unable to apply to the court for rectification of the register under section 14 of the 1965 Act. To admit the evidence would be consistent with the court's traditional benevolence towards landowners facing expropriation or a substantial diminution in the value of their landholdings, which extends to the registration of town and village greens (see, for example, the judgment of Lady Hale in *Adamson v Paddico (267) Ltd.* [2014] UKSC 7, at paragraphs 33 to 42, and 44, and Lord Bingham's speech in *Beresford v Sunderland City Council*, at paragraph 2).

55. Finally, Mr Edwards submitted that the inspector's finding, against the weight of the evidence, was in any event irrational. There was no reasonable basis, on the evidence before the inspector, for her finding that the land had not been acquired and held for educational purposes.

56. All those arguments were very fully developed before Ouseley J., and were thoroughly, and in my view correctly, considered by him.

57. Having noted that the inspector had referred specifically to the appropriate standard of proof (in paragraph 9 of her decision letter), the judge found it impossible to conclude that she had forgotten that standard of proof when she came to assess the evidence before her. Her use of the word "sure" (in paragraph 118) did not demonstrate that she had. It simply reflected her conclusion that the evidence was too weak to show that the county council had acquired the land for educational purposes (paragraph 43 of the judgment).

58. In the judge's view the "presumption of regularity" did not enable "the purpose of acquisition and continued holding to be inferred from limited use, if it cannot be inferred from the documents" (paragraph 55). He doubted that he would have reached the same conclusion as the inspector on the inferences one could draw from the conveyances and the endorsements on them. He could see "no real reason not to conclude, on that basis, that the

acquisition was for educational purposes". This conclusion was reinforced by the evidence showing "the property, after acquisition, … managed by or on behalf of the Education Committee" (paragraph 57). The inspector's reasoning permitted a different conclusion, but did "not impel it as clearly as is required for her conclusion to be held irrational" (paragraph 60). Her approach had been on the basis that no resolutions relating to acquisition had been produced "despite proper endeavours to find them …". She was therefore "not prepared to assume that resolutions in relation to acquisition had existed". This "was entirely a matter for her, and cannot come close to legal error" (paragraph 61). There were no resolutions to demonstrate the "appropriation" of the land for educational use, and "the history of the uses of the land for educational purposes could not assist the inference that they must have existed" (paragraph 62). The inspector had found that only areas A and B were currently performing any educational function. Land acquired in 1948 had not been put to the form of educational use specifically envisaged for it, Area E not at all in nearly 70 years, and land acquired in 1961 had still not been put to such use in the following 55 years (paragraph 63). The inspector had not erred in law in concluding as she did (paragraph 64).

59. The judge was also unable to accept Mr Edwards' submission that the additional evidence was admissible. It failed the first test in *Ladd v Marshall*. It could have been obtained with reasonable diligence, the county council having "judged that it had sufficient evidence on a point which it knew was in issue and for which it needed evidence, and so searched no further". As the inspector had considered the county council's case on "statutory incompatibility" on the basis that the land was held for educational purposes, the new evidence could have had "no important bearing on the ultimate outcome of her decision, unless [she] erred in law in her approach" to that issue (paragraph 53 of the judgment). The judge also considered the possibility of error of fact enabling a departure from the principles in *Ladd v Marshall* in exceptional circumstances, as this court envisaged in *E and R*. He accepted that the inspector's mistake, if it was a mistake, was "one of existing fact". He was sure that, "faced with the evidence", she "would have concluded that the land had been acquired for educational purposes". But "she might not have been persuaded that the land, or all of it, was still held for that purpose throughout the 20 years, in view of the use or rather absence of educational use made of it". The county council was "responsible for the mistake if mistake it be", and the mistake would only have been material if the inspector was wrong on the question of "statutory incompatibility" (paragraph 54).

60. In my view the judge was right to reject the argument that, in weighing the evidence before her as to the acquisition and holding of the land, the inspector failed to apply the correct standard of proof. Her self-direction as to the standard of proof, in paragraph 9 of her decision letter, was clear and impeccable: "the standard of proof is the normal civil one of the balance of probabilities". This was the only reference she made to the standard of proof.

61. The submission that she applied a more demanding standard when she came to consider the evidence hangs on a single word – "sure" – in the second sentence of paragraph 118. I think this is to attach a false significance to her use of that word, in its context. On a fair reading of what she said about the county council's evidence in paragraphs 113 to 117, she was clearly of the view that it was inadequate and unconvincing. The conveyances to which she referred in paragraphs 113 and 114 made "no mention of the purposes for which the land was acquired". As "none of [the] documentation" she mentioned in paragraph 115 "[related] directly to the [land]", she did "not find it of particular assistance". The terrier for Areas C and D to which she referred in paragraph 116 had an "unexplained" line drawn through the page. The county council's case, as she recorded it in paragraph 117, was that the documents

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it had produced were "clear evidence" of the land being held for educational purposes, and that "no further proof is necessary". It was this case she found herself unable to accept, for the reasons she gave: first, the lack of any resolution of the county council authorizing "the purchase of the land for educational purposes or appropriating [it] to educational purposes"; second, the fact that the conveyances did not show the purpose for which the land had been acquired; and third, the inability of the county council's School Planning Manager to express an opinion about "the detail of [its] ownership of the land". These deficiencies in the evidence led her to conclude, in paragraph 118, that the "information with regard to the purposes for which the [land] is held by [the county council]" was "unsatisfactory".

62. When she went on to say it was "not possible to be sure" that the county council's assertion as to the land having been acquired for educational purposes and held for those purposes throughout the 20-year period "accurately reflects the legal position", she was, I think, simply confirming her conclusion that the county council had not produced "clear evidence" to demonstrate that. She was not neglecting the standard of proof to which she had earlier, and accurately, referred, or now elevating it above the civil standard. She was saying, in effect, that the county council had failed to satisfy the relevant standard of proof – the civil standard. As Mr Buley submitted, she would have had in mind that any relevant documents related to the county council's own affairs and would have been in its own possession. Having had the opportunity to provide relevant material in committee reports, minutes, correspondence and other documents, and having apparently done its best to put everything of relevance before her, the county council had left her unconvinced of the assertions it made. The evidence did not show that the land had been held for educational purposes for the relevant period. That was all.

63. As the judge recognized, the answer to this difficulty for the county council does not lie in the "presumption of regularity". It would of course have been lawful for the county council to have acquired and held the land for educational purposes. That is not in doubt. But it is not the same thing as saying there was a legal requirement for the land to be acquired for such purposes. The "presumption of regularity" operates where the issue is whether the act of a public authority has been done regularly and properly. It is not a substitute for clear evidence that the act was done for a particular purpose. In the absence of evidence to demonstrate the purpose for which the county council had acquired and held the land, there was nothing to which the "presumption of regularity" could attach. The inspector was not obliged to find that the land had been held for educational purposes on the basis of the county council's assertion that it had.

64. The inspector's conclusions were not irrational. Different conclusions might have been reached on the county council's evidence. I accept that, as did the judge. But this is not enough to demonstrate perversity in the conclusions that were in fact reached. The inspector's misgivings in the light of the evidence before her were understandable, her assessment properly reasoned, and her conclusions well within the bounds of reasonable judgment.

65. The challenge to the judge's exercise of his discretion against admitting the further evidence is, in my view, unsustainable. I cannot fault the approach he took. He applied the principles in *Ladd v Marshall*, and found that in this case they were not satisfied. He was right to do so. The additional evidence could have been obtained with "reasonable diligence". The material was all in the county council's possession, and could have been produced in evidence before the inspector. And it would not have made a difference to the outcome of the application for

registration, because the inspector considered the question of "statutory incompatibility" on the basis that the land had indeed been acquired and held for educational purposes, concluding – rightly, in my view – that the county council's argument on that issue must also be rejected. I would also uphold the judge's application of the exceptional approach in cases of mistake of fact indicated in *E and R*. Responsibility for the alleged mistake lay with the county council – though it should be noted that neither Mr Edwards nor Mr Pike, who represented the county council both in this court and before Ouseley J., appeared at the public inquiry. In any event, the mistake itself could only have been material if the inspector's conclusion on the question of "statutory incompatibility" was wrong, which, in my view, it was not.

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Issue (3) in the Lancaster appeal – a "locality"?

66. Section 22 of the 1965 Act provided for registration where inhabitants of a "locality" could show a customary right to use land for lawful sports and pastimes. The words "or of any neighbourhood within a locality" were added by the Countryside and Rights of Way Act 2000, and retained in section 15 of the 2006 Act. In *Oxfordshire County Council*, Lord Hoffmann observed (in paragraph 27 of his speech) that the expression "[any] neighbourhood within a locality" was "obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries" (see also the judgment of Sullivan J., as he then was, in *R. (on the application of Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin), at paragraphs 81 to 85). In *Adamson v Paddico (267) Ltd.* [2012] 2 P. & C.R. 1 this court recognized that a "locality" was not as flexible a concept as a "neighbourhood" (see the judgment of Carnwath L.J., at paragraphs 51 to 55). In a passage of his judgment on which both sides sought to rely in argument here, Carnwath L.J. said this (in paragraph 62):

> "62. … I accept that, where one has a historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. However where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link."

67. In the Lancaster case Ms Bebbington relied on the Scotforth East Ward within the area of Lancaster City Council as the relevant "locality" for the purposes of section 15(3)(a), or, failing that, as a "neighbourhood" within that "locality". The county council accepted that an electoral ward is capable in principle of being a "locality" for the purposes of section 15 of the 2006 Act, but contended that the Scotforth East Ward could not be a "locality" because of a boundary change in 2001. Before then, the ward had extended further to the south and had incorporated the University of Lancaster. In 2001 the old ward was abolished and a new Scotforth East Ward was created, excluding the university. The inspector noted that "[although] the [City of Lancaster (Electoral Changes) Order 2001] uses the structure of abolishing existing wards and creating new ones, the abolition and creation were simultaneous when the Order came into effect and there is no time within the relevant period when a locality known as Scotforth East Ward did not exist" (paragraph 17 of the decision letter). She found that the Scotforth East Ward had "been in existence throughout the relevant period and the change in boundary of the ward to remove the University, does not

seem … to have altered the identifiable community of Scotforth East" (paragraph 21). She concluded that the Scotforth East Ward was a "qualifying locality" (paragraph 31).

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68. In the court below, as before the inspector, the county council argued that the Scotforth East Ward could not be a "locality" under section 15 of the 2006 Act because it had not been in existence throughout the relevant 20-year period and had only come into being in a legal sense in 2001. Rejecting that argument, Ouseley J. concluded (in paragraph 25 of his judgment) that the inspector had dealt with this question as one of "fact and degree", and had found, in effect, that the population of Scotforth East Ward "in whatever form, was the same identifiable community, with or without the University" – a "common sense and practical approach" of the kind one sees in *Bremner v Hull* (1866) L.R. 1 C.P. 748 and *R. v Hundred of Oswestry (Inhabitants)* (1817) 6 Maule and Selwyn 1278. The inspector was entitled to find that the present Scotforth East Ward was "the continuation of a sufficient part of the former Ward for continuity to remain between the two, by whatever means the change or interruption was brought about" (paragraph 28).

69. Mr Edwards put forward the same argument before us. An administrative area, such as an electoral ward, could not be relied on as a qualifying "locality" under section 15 if it had not existed, in the same form, throughout the relevant 20-year period. Scotforth East Ward had not existed, or at least had not existed in the same form, throughout that period. It could not be, said Mr Edwards, that the "locality" – or part of it – to which rights become attached upon registration can either come into existence or be modified in its extent during the qualifying period for the application. Ouseley J.'s conclusion on this question could not be reconciled with what Carnwath L.J. said in paragraph 62 of his judgment in *Adamson v Paddico*. The "locality" relied upon here was clearly not an "historic district to which rights have long become attached". It had come into being only after the beginning of the relevant 20-year period. *Bremner v Hull* and *Hundred of Oswestry (Inhabitants)* – to which Ouseley J. referred – were cases in which long-standing customs had already been established. They did not concern changes in the extent of an administrative area while rights were still becoming established. The statutory scheme, Mr Edwards submitted, requires an applicant to show continuous use by the inhabitants of a "locality" that has existed in the same form of "legal entity", and whose boundaries have remained "substantially unchanged" throughout the relevant period (see, for example, the judgment of Patten L.J., with whom Carnwath and Sullivan L.JJ. agreed, in *Taylor v Betterment Properties* [2012] 2 P. & C.R. 3, at paragraph 63). If the "locality" could change during that period, it would be impossible to judge whether that requirement had been met. This would go against the principle to which Lord Hope referred in his judgment in *Lewis* (at paragraph 71): "… an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other". But in any event, submitted Mr Edwards, the inspector did not identify the relevant "baseline" against which the existence of a qualifying "locality" was to be assessed.

70. I am unable to accept that the county council's appeal can succeed on that argument. As Mr Buley and Mr Westaway submitted, the crucial question here is whether the fact that the boundaries of Scotforth East Ward had been changed during the relevant 20-year period meant, in itself, that a period of use beginning before and continuing after the date of the boundary change could not be relied upon, regardless of the degree of continuity between the ward as it was and the ward as it then became. Mr Edwards' submissions, if correct, would have radical consequences. Very minor boundary changes could stop time running during the relevant 20-year period. Well-founded applications for registration could fail for boundary

changes of no real significance. It is necessary here to look at the reality. Was there, or not, a continuous, identifiable locality in existence throughout the relevant 20-year period, notwithstanding the boundary changes? This, I think, is the relevant point to be considered, in the light of what Carnwath L.J. said in paragraph 62 of his judgment in *Adamson v Paddico*.

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71. I share Ouseley J.'s understanding of that passage in Carnwath L.J.'s judgment as referring to events during the 20-year period prior to registration, rather than the position after registration – as Mr Edwards contended. But I also agree with Ouseley J. that even if Carnwath L.J. was considering only the effect of a change in the extent of a locality after a green had been registered, there is no reason in principle why a change in boundaries in the course of the relevant 20-year period should preclude registration, whereas the same change after registration should be regarded as leaving the rights unaffected (paragraph 23 of Ouseley J.'s judgment). The statutory concept of a "locality" must surely have the same meaning and significance both before and after registration. Carnwath L.J. referred to the concept of an "identifiable community" remaining in existence. The sense of this, as Ouseley J. emphasized (in paragraph 24 of his judgment), is that the community in question must not have significantly changed. The context in which Carnwath L.J. said what he did was the need to identify a relevant "locality" during the period of 20 years in which the land had been used in such a way as to give rise to a right of registration. This is confirmed by his reference to a locality which had not existed "in any legal form" until after the 20-year period had begun.

72. In my view the inspector's approach and conclusions were correct in law. They were consistent with what Carnwath L.J. said in paragraph 62 of his judgment in *Adamson v Paddico*, and with long established principles in authority relevant to changes in administrative boundaries – for example, *Bremner v Hull* and *Hundred of Oswestry (Inhabitants)*. Whether the boundary changes resulting in the formation of the new Scotforth East Ward were significant or not was classically a matter of fact and degree for her. She did not describe the question in that way, but it is plain from the relevant parts of her decision letter that this was how she dealt with it. And she was entitled to find and conclude as she did. The boundary changes themselves, and the simultaneous abolition and re-creation of Scotforth East Ward, did not preclude the ward's legal existence as a "locality" for the relevant 20-year period. So long as it had existed in some clearly identifiable form throughout, the mere fact that its boundaries had been adjusted in that period would not, of itself, be enough to prevent its existence as a coherent and continuous "locality".

73. Mr Buley also submitted, as he did to Ouseley J., that even if it were arguable that the boundary change in 2001 had prevented Scotforth East Ward from being a relevant "locality" throughout the relevant 20-year period, the inspector would inevitably have found there had been a constant "neighbourhood" within that ward throughout the relevant period. Ouseley J. did not find it necessary to reach a conclusion on this argument. But he doubted that he would have refused to quash the inspector's decision had he been persuaded that her approach to the existence or otherwise of a "locality" was misconceived (paragraph 30 of his judgment). I think he was right. The inspector was not invited to consider the application for registration on the alternative basis of a "neighbourhood" comprised in the Scotforth East Ward as it was after the boundary changes, and made no findings on that basis. Though the question is academic if my conclusions on this issue are right, I also agree with the judge on this point.

Issue (4) in the Lancaster appeal – a geographical "spread" of users?

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74. Before the inspector in the Lancaster case the county council argued that it was necessary to show a geographical "spread" of users throughout the "locality" relied on, and that there was an insufficient "spread" of users throughout the Scotforth East Ward to justify registration on the basis of that ward as a "locality". The inspector said she had "heard no evidence from the inhabitants of some areas of [the locality]" (paragraph 31). But she did not accept that a geographical "spread" of users over the "locality" was a legal requirement.

75. Mr Edwards pointed to the requirement in section 15(3) of the 2006 Act that a significant number of the inhabitants "of any locality", or "of any neighbourhood", had to be shown to have used the land in the prescribed way, not a significant number of the inhabitants merely of "a part of any locality", or "a part of any neighbourhood". Without this requirement, he submitted, there would be a potential disparity between the geographical "spread" of the inhabitants whose use had led to the acquisition of rights over the land and those who would enjoy the benefit of the rights acquired. Parliament cannot have intended that. It would offend the principle of "equivalence" emphasized by Lord Hope in *Lewis*. To recognize the need for there to be a "spread" of inhabitants across the whole "locality" would be consistent with Sullivan J.'s understanding of the concept of a "significant number" favoured in *R. v Staffordshire County Council, ex parte McAlpine Homes Ltd.* [2002] 2 P.L.R. 1 (at paragraph 71) – 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". This does not require the court to read words into section 15. The concept of a "significant number" of inhabitants has a spatial as well as a numerical sense. There did not have to be an even spread of users throughout a "locality" or "neighbourhood", but a reasonable distribution of users across that area. This would be a matter for a registration authority to judge – just as it had to consider whether the number of users was a "significant number".

76. Ouseley J. rejected this argument. He acknowledged (in paragraph 33 of his judgment) that there may well be some "mismatch" between "the area whence came the actual users who established the rights" and "the area to which the rights would attach after registration". But he could not see what purpose would be served by preventing registration if a "spread" of users could not be shown. This was not a test Parliament had chosen to adopt in enacting section 15 of the 2006 Act (paragraph 34). Nor was it supported by any decision of the court (paragraphs 35 to 38). Comments made by some inspectors suggesting the existence of such a test did not have the force of authority (paragraph 39).

77. Here too I agree with the judge, essentially for the reasons he gave.

78. As Mr Buley submitted, there is no reason to think that Parliament intended in this respect to change the law as it was under the 1965 Act, whose corresponding provisions (in section 22) did not include the requirement for a geographical "spread". If such a requirement had been intended, one would have expected it to have been provided expressly, as was the requirement for there to be a "significant number of users" within a "locality" or "neighbourhood". In the absence of any such express provision, I can see no need to add a gloss to that requirement stipulating also a "spread" of users. And in my view it would be wrong to do so. This would introduce a further, non-statutory, criterion for registration, which would be highly subjective, uncertain and liable to produce inconsistency – whether or not it was implicit that the spread must be "even" or "uniform". A "locality" may be a small

area or relatively large. However large it is, inhabitants who live near the green for which registration is sought are more likely to use it than those who live further away. The requirement for use by a "significant number of inhabitants" is not rendered "meaningless" by that, as Mr Edwards argued. And once again, there is no breach of the "principle of equivalence". That principle is not offended by the lack of a "geographical spread" of inhabitants who have used the land, any more than it is by the fact that some inhabitants of the "locality" will acquire rights over the land even though they themselves have not actually used it, or done so for a period of 20 years.

79. Other attempts to persuade the court that such a requirement ought to be inferred have failed. Conclusions similar to Ouseley J.'s were reached by Patterson J. in *R. (on the application of Allaway) v Oxfordshire County Council* [2016] EWHC 2677 (Admin) (at paragraphs 69 to 73). In *Adamson v Paddico* ([2011] EWHC 1606 (Ch)) Vos J., as he then was, said this (at paragraph 106):

> "106. … I was not impressed with [counsel's] suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives me to such an illogical and unfair conclusion. …".

80. I would endorse that view. To similar effect was an observation made by H.H.J. Behrens, sitting as a deputy judge of the High Court, in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch) (at paragraph 90) – which was not doubted by the Court of Appeal in that case ([2010] EWCA Civ 1438]) – that it "cannot … have been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users".

Issue (5) in the Lancaster appeal – use "as of right"?

81. The concept of use "as of right" meaning "as if it were by right" – in contradistinction to "of right" or "by right" – was explained by Lord Neuberger in *Barkas* (at paragraph 14). In a later passage he agreed with Lord Carnwath "that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use … , it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land". In his view it was "very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years" (paragraph 24).

82. This, however, is not a case of that kind. The county council had never allocated the land at Moorside Fields for public use. The contention here was that the inspector failed to grasp the significance of evidence that members of the public using the land had been challenged and controlled by teachers at the school, and, in particular, that this evidence showed that any unchallenged or uncontrolled use had been by permission.

83. On the question of whether the use of the land had been "by force", the inspector found that such signs as had been put up "did not render use of the land "vi"" (paragraph 85 of the

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decision letter). The only part of the land whose use by members of the public had been challenged was Area B. The inspector concluded that "the landowner's actions would not have conveyed to a reasonable user that their use of Area B was contentious", and that "use of the Application Land was not by force" (paragraph 98). As to "Precario – implied permission", having considered the county council's submission that members of the public "were excluded when the landowner wished to use the land for his own purposes" (paragraph 104), she said this (in paragraph 105):

> "105. I do not agree with this submission. There is no evidence that the School had a policy of excluding users on a systematic basis and there is no evidence that the occasional challenge by a member of staff, to, for example, teenagers on quad bikes, demonstrated to members of the public that access depended upon the School's or anyone else's permission. To the contrary, I agree with the Applicant that the general impression is one of peaceful co-existence. Furthermore, on the occasions when there was a conflict between use by the School and by members of the public, there is evidence that rather than asking people to leave, staff asked people to put their dogs on leads or keep to the perimeter, or even abandoned lessons."

and (in paragraph 110):

> "110. In this case the landowner has failed to "do something". The evidence of occasional challenge and the need to pay for various activities at a School fair are insufficient to show to the reasonable onlooker that a right to exclude was being exercised. The presence of a dog waste bin on Area B and the occasional laminated notice made by the children at the school indicating that people should clean up after their dogs do not take matters any further. I conclude that this is not a case where the landowner had given the inhabitants implied permission to use the land and accordingly, use of the Application Land was not precario."

84. Mr Edwards submitted that if a landowner is to decide whether he should resist the use of his land by members of the public, he must be able to know that a right is being asserted. When such use has been permitted, it cannot have been "as of right", and land cannot be registered as a green unless its use had been "as of right" throughout the relevant 20-year period. If a landowner controls the use of his land, or temporarily excludes others from it to enable him to use it for his own purposes, he may be taken impliedly to have given permission – as, for example, in *Newhaven Port and Properties*, where controls exerted through bye-laws had given rise to an implied permission (see also the speech of Lord Bingham in *Beresford v Sunderland City Council*, at paragraph 5). Here, Mr Edwards submitted, the evidence demonstrated that the use of the land was being regulated by the county council, and was therefore permissive and not "as of right". The inspector was wrong to conclude otherwise. In finding the land had been used "as of right", the inspector had taken account of irrelevant matters and her conclusion was perverse. She accepted (in paragraphs 96 and 105 of her decision letter) that during the relevant 20-year period there had been occasions when members of the public had been asked by staff at the school to leave Area B, or to keep to the "perimeter" of the land, or to put their dogs on leads. Mr Edwards submitted that this demonstrated an "implied permission" to use the land when its use by members of the public was not resisted, and was enough to demonstrate that such use had not been "as of right" (see the judgment of David Richards L.J. in *Winterburn v Bennett* [2017] 1 W.L.R. 646, at paragraphs 35 to 41). The county council did not have to put up signs, or adopt a "policy" for

resisting trespass. But in any event the inspector did not deal with the implications of the restrictions on the use of the land by members of the public to which she had referred.

85. Ouseley J. rejected that argument. Having referred to relevant authority, including *Barkas*, *Newhaven Port and Properties* and *Lewis*, he said it was clear that the question of implied permission and the significance of the challenges to use of the land had been "fully considered". It was for the inspector to judge whether those challenges reflected "give and take" and "responses to poor behaviour by certain members of the public". Her decision was rational. It did not turn on any contentious issue of law as to whether a licence had been explicitly communicated. Mr Edwards' submissions had not grappled with the "inaction" of the school, and the county council, despite "the known activities of the public over 20 years". There had been "no signing of note requiring behaviour of a certain sort, no policy requiring incidents to be reported, no vigorous reaction by the head teacher or [the county council] itself". All this, said the judge, can "properly be seen as acquiescence" (paragraph 94 of the judgment).

86. I agree. The question of whether the use of the land could lawfully be considered to have been "as of right" – "nec vi, nec clam, nec precario", as illuminated in this context by Lord Hoffmann in *R.* v. *Oxfordshire County Council, ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 (at p.350) – depended on the inspector's findings of fact on the evidence. Unless her approach was demonstrably wrong in law, the issue was a question of fact and judgment for her. She did not misdirect herself on the law. As Ouseley J. held, she was entitled to find that the occasional challenges made by school staff to members of the public did not call into question their use of the land in principle, but were, in fact, merely an attempt to accommodate conflicting uses. Overall, she was entitled to find, on the evidence, that the position was "one of peaceful co-existence". That was her critical finding on this question. The argument that she fell into error is, in truth, a disagreement with her findings of fact and the conclusions to which she came in the light of those findings. Her findings of fact are not shown to have been inaccurate or incomplete, nor were her conclusions on the evidence perverse, or otherwise unlawful.

Issue (2) in the Leatherhead appeal – were Surrey County Council's reasons adequate?

87. Regulation 36(3)(a) of the Commons Registration (England) Regulations 2014 provides a duty to give reasons when an application for registration of a green has been "granted or a decision … made to give effect to a proposal, in whole or in part …". Under regulation 9(2) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, in force at time of the decision in the Leatherhead case, the notice of decision issued by the registration authority had to include, when the application for registration was rejected, the reasons for that decision. But if the application was successful, there was no explicit duty to state reasons.

88. The inspector said (in paragraph 118 of his report) that the land lay "roughly in the middle of the claimed neighbourhood" and was "a cohesive feature, but possibly the only one within the claimed neighbourhood". He went on to say (in paragraph 119) that he had "found it very difficult indeed to identify separate neighbourhoods within the town (in other words, where the characteristics of one area distinguish it from surrounding areas) …". When he came to consider the claimed neighbourhood (in paragraph 177) he said:

"177. Neighbourhood

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(a) The term 'neighbourhood' is an ambiguous term. It may mean *'the vicinity'* of a place or person (see e.g. *Stride v Martin [1897] 77 LT 600*) but it may also refer to an area that is recognisable as having a degree of coherence such that people would recognise it as being separate or different from the areas immediately surrounding it. It is, in this sense, that the term 'neighbourhood' is used in the 2006 Act. It seems plain to me that a neighbourhood must be understood as meaning a cohesive area which is capable of meaningful description in some way. But beyond that it has no particular requirement, and whether the claimed neighbourhood is made out is a question of fact.

(b) In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression, and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is not a neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

(c) The residential properties comprised a mix of styles and ages and there was nothing in the way of facilities (that is, with the exception of the land itself) serving predominantly the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve (or rather served in the case of St Mary's Primary School) a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such [as] a small parade of shops with a post office, licenced premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of those features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses, when asked to cast their mind to it, considered that their neighbourhood was simply the area in their own particular vicinity or where their friends mainly lived. I also think that most of the applicant's oral witnesses were unduly influenced by being presented with App/1 in their support of the claimed neighbourhood.

(d) It was also significant that a number of the applicant's witnesses took the view that the neighbourhood should in fact have been more extensive than claimed. In other words, there was no unanimity amongst the applicant's witnesses that App/1 was the true neighbourhood. … For instance, more than one witness was puzzled as to why the church was not included within the claimed neighbourhood (whereas the church hall on the other side of the road was) which struck me as a bizarre omission. … .

(e) Lastly, this neighbourhood has no name. That is not a necessary requirement, but if there is historical cohesiveness in respect of an area, one might expect it to have acquired some form of collective description.

(f) I have also borne in mind that when Parliament amended the Commons Registration Act 1965 to permit registrations to take place by reference to *'a neighbourhood within a locality'* it intended to make it easier to register TVGs, and did so by allowing them to be registered by reference to a concept that was not precise either as to definition, or as to boundary (see *Oxfordshire* per Lord Hoffmann at [27]). However, notwithstanding this, my conclusion for the reasons I have set out above (i.e. because the area does not have sufficient individual cohesiveness or community identity) is that the claimed neighbourhood is not a 'neighbourhood' within the meaning of the 2006 Act.

(g) It seems to me that if Parliament had intended that a neighbourhood should be interpreted to mean the area in which the recreational users reside, then it would have said so. Moreover, whilst I accept that the bar is set low in the *Leeds Group* litigation, having been to the area in this case and heard the evidence, I take the view that, as a matter of fact and degree, the applicant has fallen well short of what is required to be proved in order to satisfy the neighbourhood element."

The inspector therefore recorded as one of his findings of fact (in paragraph 178(e)) that "the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act". And his recommendation (in paragraph 178(f)) was that "[because] the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG … the application to register … should be rejected".

89. That recommendation was supported in the Commons Registration Officer's report for the meeting of Surrey County Council's Planning and Regulatory Committee on 23 September 2015. Having quoted parts of paragraph 177 of the inspector's report, the officer advised the members (in paragraph 20):

> "20. Village Green status is acquired over land where 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. The evidence provided with this application, and the subsequent investigations, show that this criteria has not been met."

90. Before the meeting the parties sent further representations to the county council on the concept of "neighbourhood". The representations submitted by Dr Bowes for Mr Jones were before the committee when it met. It was accepted by the county council before Gilbart J. that the representations made on behalf of NHS Property Services by their solicitors, Capsticks, were not. Capsticks' representations sought to rebut Dr Bowes', urging the committee to adopt the inspector's conclusions on the "neighbourhood" issue.

91. The minutes of the committee meeting record that the local member, Councillor Hall, spoke. He is recorded as having said that he "[knew] the area well" and that "the green space gets a lot of public use"; that "an area does not need to have shops to be considered a neighbourhood"; that the area had "sheltered housing, a scout hut and other community facilities"; and that "[the] area is a cohesive community and has proved the green space is used". The "[key] points raised during the discussion" were recorded:

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> "1. The Commons Registration Officer introduced the report and informed the Committee that a neighbourhood must have some coherence to be acknowledged. …
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> 2. The Principal Lawyer explained that the Commons Act 2006 was specific about the criteria which need to be met in order for a piece of land to be granted Village Green status. However, the terms locality and neighbourhood are not defined. Case law has developed which must be considered when seeking to define the terms. The Inspector had found that there was little to differentiate the claimed neighbourhood from the surrounding area and little to suggest cohesiveness. …
>
> 3. Members felt that an area did not require a particular type of building to be considered a neighbourhood. It could be considered that way if residents wish it to be. It simply required a sense of place. It was pointed out that many recent developments were not built with shops but this should not mean that they could not become a neighbourhood or locality. Members queried whether the Inspector's judgement would result in other urban areas being rejected as neighbourhoods, with only rural areas being judged to have met the necessary criteria. Members highlighted that the plans indicated that there was an infant school, recreation ground, allotment and parking area within the claimed neighbourhood. The Chairman countered that different people will have different definitions of neighbourhoods and that the Inspector had used case law to come to his conclusion.
>
> 4. It was noted that the application had met all the other criteria set by the Commons Act 2006.
>
> 5. It was noted that the land owner would not be able to develop or sell the land if it were to gain village green status.
>
> … ."

The committee's resolution, by a majority of six votes to four, was to reject the officer's recommendation and to approve the application to register the land as a village green "for the following reason":

> "Notwithstanding the Inspector's view, Members formed a different impression. Having considered all the evidence before them they came to the view that the criteria laid down by the Commons Act 2006 had been satisfied by the applicant."

92. Gilbart J. acknowledged that the county council was not under a statutory duty to give reasons for its decision, and that it was necessary to look to the European Convention on Human Rights and common law to ascertain whether such a duty existed (paragraph 96 of the judgment). He held that the giving of reasons was "required to achieve compliance with Article 6 of [the Convention]" (paragraph 100). In the light of relevant authority, including the decision of the House of Lords in *R. v Secretary of State for the Home Department, ex parte Doody* [1994] 1 A.C. 531 (in particular, the speech of Lord Mustill at p.565), there was also a duty to give reasons at common law – at least where, "as here, the landowner has made objections, and done so in the context of a statutory duty on the [registration authority] to consider them" (paragraph 107). As to the standard of reasoning required, he concluded – again in the light of familiar authority, including the decision of the House of Lords in *South*

Buckinghamshire District Council v Porter (No.2) [2004] 1 W.L.R. 1953 (in particular the speech of Lord Brown in paragraphs 24 to 36) – that "in a [2006 Act] case the standard must be that the losing party knows why they lost and what the legal justification was for doing so". This, he said, "will include the reasons why a case submitted in accordance with the Regulations was rejected" (paragraph 111).

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93. The judge was satisfied that the county council's committee did address "the central question", which was whether the "neighbourhood" had the "quality of cohesion looked for in [*Cheltenham Builders Ltd.*]" (paragraph 115). He acknowledged (ibid.) that the concepts in this area of the law are "not ones of firm and precise definition", and (in paragraph 116) that "[the] cohesion of a "neighbourhood" is not something which can be assessed by using some recognised technique". As the court had made clear in *Cheltenham Builders*, cohesion was "essentially a matter of impression" (ibid.). The committee's approach could not be criticized. It had considered the inspector's assessment, but had then made its own, which it preferred. Whether there existed a "neighbourhood" was, said the judge, "very much a matter of impression where elected members could have just as much expertise as the inspector". The members were not required "to go through all of his reasoning, nor the various events at the inquiry", but only "to address the "neighbourhood" question as it stood before them, and the arguments for and against the Applicant's case" (paragraph 117).

94. On the question of fairness, it had been submitted to the judge on behalf of the county council that NHS Property Services' letter responding to Dr Bowes' post-inquiry representations on behalf of Mr Jones raised nothing new, and the committee's decision would have been no different had it been taken into account (paragraph 91 of the judgment). The judge accepted that. In his view the committee's decision, and its reasons, were "unaffected" by the applicant's submissions not being before it, and the court's duty under section 31(2A) of the Senior Courts Act 1981 applied (paragraph 143).

95. Before us, Mr Clay again submitted that the members' tersely stated reason for rejecting the inspector's conclusion on the existence of a relevant "neighbourhood", a conclusion endorsed by the officer in her report, was inadequate. Given the significance of the registration of land as a town or village green, the standard of reasoning required was elevated – the more so in this case, because registration would impede the possible extension of the hospital. The members were entitled to differ from the inspector and the officer, but in doing so they could not rely on the inspector's and officer's reasoning (cf. the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 106, at paragraph 7). In this case the inspector had concluded that the evidence given in support of registration was "well short" of demonstrating the cohesion required to establish the existence of a "neighbourhood". If the committee was to disagree with that conclusion it had to explain why, in clear terms – rather than simply stating that they had "formed a different impression". Only the post-inquiry representations of the applicant for registration were before the committee; those of NHS Property Services were not. In these circumstances it was imperative that the county council's reasons should show that the application had been fairly determined. It had to come to grips with the inspector's "evidence-based findings", and it did not do that.

96. In this appeal the defence of the county council's reasons fell to Dr Bowes. Adopting the county council's argument, which had prevailed in the court below, he submitted that the judge's approach was right. He emphasized the judge's conclusion, based on ample authority, that the assessment of whether or not a "neighbourhood" exists for the purposes of

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section 15 of the 2006 Act does not call for "some recognised technique", but is "essentially a matter of impression". As Sullivan J. said in *Cheltenham Builders* (in paragraph 85 of his judgment), the registration authority has to be satisfied that the area said to be a "neighbourhood" has "a sufficient degree of cohesiveness". The county council's reasons did not have to be stated at length. They did not have to deal specifically with each of the inspector's reasons in paragraph 177 of his report. They were addressed to parties who knew what the issues between them were and what the evidence and arguments at the inquiry had been (see Lord Brown's speech in *South Bucks District Council v Porter,* at paragraph 26). There was no substantial prejudice to NHS Property Services. They were not left in doubt as to why they had lost, or, in particular, as to why their contention that a relevant "neighbourhood" did not exist in this case had been rejected.

97. I agree with the judge that, in the particular circumstances of this case, the county council was under a duty at common law to give reasons for its decision to register the land, though no such duty arose under statute – and whether or not this was also necessary to achieve compliance with article 6 of Human Rights Convention. For the judge, this conclusion was reinforced by the fact that one effect of registration of land as a town or village green is to deprive the landowner of the freedom to use it for any purpose inconsistent with its use as a green, and another is the possibility of criminal sanction for the interruption of its use for recreation (paragraphs 98, 99 and 104 of the judgment). As the judge recognized, the force of those considerations is not reduced by the "anomaly" that under the 2014 regulations there is a duty to state the reasons for a decision to register as well as a decision not to register, whereas under the 2007 regulations there is not (paragraph 106). And, as he said, it is the greater where there are objections to the registration, and the landowner himself has objected (paragraph 107).

98. The judge did not have the benefit of this court's decision in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71, or the still more recent decision of the Supreme Court in *Dover District Council v CPRE Kent* [2017] UKSC 79, upholding the Court of Appeal's decision in that case ([2016] EWCA Civ 936) and endorsing its approach in *Oakley* (see the judgment of Elias L.J., at paragraphs 61 and 62). As Lord Carnwath said in his judgment in *Dover District Council* (with which Lady Hale, Lord Wilson, Lady Black and Lord Lloyd Jones agreed), a "principal justification" for imposing a duty to give reasons in *ex parte Doody* was "the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review" (paragraph 51). In *Oakley*, the proposed development's "significant and lasting impact on the local community" was seen as one of the factors giving rise to the local planning authority's duty to give reasons (paragraph 52). As Elias L.J. also pointed out in *Oakley* (in paragraph 62 of his judgment), the duty to give reasons was consistent with the United Kingdom's obligations under the Aarhus Convention (see Lord Carnwath's judgment in *Walton v Scottish Ministers* [2012] UKSC 44, at paragraph 100). Though planning law is a creature of statute, Lord Carnwath stressed that "the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law". In *ex parte Doody* "[fairness] provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision" (paragraph 54).

99. Although those observations related to the decision-making of local planning authorities, they also seem apposite in principle in the context of the statutory regime for the registration of town and village greens, and for essentially similar reasons. In this context too, the

making of decisions affecting the use and development of land, with significant consequences both for the landowner and for the local community, is governed by a self-contained statutory code. And in this case the application for registration had been contested by a public authority landowner at a non-statutory inquiry, the inspector had supported that objection on a potentially decisive point, his conclusions and recommendation had been supported by the authority's professional officers in their advice to committee, but the members resolved to depart from it. In my view, therefore, the judge's conclusion that in this instance the county council was under a common law duty to state its reasons for its decision may be seen as consistent with the Supreme Court's analysis in *Dover District Council*.

100. But in any event there is no dispute – and I agree – that in this case the county council was under a duty at common law to give reasons explaining why it had decided to grant the application for registration, against the recommendation of the inspector. The contentious issue is whether the reasons given were intelligible and adequate.

101. To be intelligible and adequate, a decision-maker's reasons need not be expressed at length. They can be "briefly stated" (see Lord Brown's speech in *South Bucks District Council v Porter*, at paragraph 36). As Lord Carnwath said in *Dover District Council*, "[where] there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision" (paragraph 41); if a planning officer's recommendation is not accepted by members, "it may normally be enough for the committee's statement of reasons to be limited to the points of difference"; and, adopting the words of Sir Thomas Bingham M.R. in *Clarke Homes Ltd. v Secretary of State for the Environment* (1993) 66 P. & C.R. 263 (at pp.271 and 272), the essence of the duty is whether the information provided by the authority leaves room for "genuine doubt … as to what [it] has decided and why" (paragraph 42). There is no universal standard. The intelligibility and adequacy of the reasons provided will always depend on the nature of the issue they are intended to address. Some issues will be essentially a matter of straightforward judgment on ascertained facts, which is not within the realm of any particular expertise, on which divergent conclusions may reasonably be held, and for which a simply and clearly stated disagreement with an inspector's or officer's conclusions may often be enough. Others will compel a more thorough explanation to demonstrate the decision-maker's grasp of "the key issues" and that a "rational conclusion" has been reached "on relevant grounds" (see paragraphs 66 to 68 of Lord Carnwath's judgment in *Dover District Council*).

102. In this case, like the judge, I can accept that the county council's reasons were, in the particular context in which they were provided, clear and sufficient and not unlawful.

103. The sole issue on which the county council's committee found itself in disagreement with the inspector and the Commons Registration Officer was whether there existed a relevant "neighbourhood" for the purposes of section 15 of the 2006 Act. On every other issue, including "statutory incompatibility", they accepted and adopted the inspector's conclusions, as did the officer. They did not have to explain why they agreed with the inspector on those other issues. It could readily be inferred from their resolution, read in the light of the minutes, that they did agree with him, and that they saw no need to provide any reasons differing from, or expanding upon, the conclusions in his report.

104. The question of whether there existed a relevant "neighbourhood" was not, in any sense, a scientific or technical issue. It was a matter of judgment, which, as the judge said, "was essentially a matter of impression". The determining question, in a word, was "cohesiveness"

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– a distinctly impressionistic and protean concept, which allows ample scope for differences of judgment. Was there, as Sullivan J. put it in *Cheltenham Builders* (at paragraph 85 of his judgment), "a sufficient degree of cohesiveness", or not? This was not an issue whose determination required any particular experience or professional expertise. It did not involve the application of any specific statutory or non-statutory criteria. It did not require the application of any recognized method of assessment. It was a matter on which a registration authority could quite properly differ from an inspector or officer, however strongly held the inspector's or officer's view.

105. The inspector himself acknowledged that the existence of a "neighbourhood" was "substantially a matter of impression". Among the considerations to which he referred were the "character of the residential areas", which did not differ substantially from others in the vicinity, the absence of "community facilities" serving only the claimed neighbourhood, the fact that the church was not included in it – whereas the church hall was – and the fact that it had no name. In his view the area did "not have sufficient individual cohesiveness or community identity" to qualify as a "neighbourhood", and "as a matter of fact and degree", the case for registration was "well short" of satisfying this requirement (paragraph 177 of the inspector's report).

106. The minutes of the committee meeting show that the members' discussion focused on the considerations that had weighed with the inspector. The question of "coherence" was identified by the Commons Registration Officer as the relevant question for them to deal with. The Principal Lawyer advised them that there was no statutory definition of "locality" or "neighbourhood". They were reminded of the inspector's finding that there was little to differentiate the claimed "neighbourhood" from the surrounding area, and little to suggest "cohesiveness". They discussed the physical character of the area, the "sense of place", and the presence within the claimed "neighbourhood" of "an infant school, recreation ground, allotment and parking area". It is clear, therefore, that they were aware of the relevant considerations and deliberated on them. This is not to make the mistake of assuming that the record of the members' discussion contained in the minutes indicates the collective or majority view of the committee as a whole. But it is to recognize that the record of the members' discussion, taken together with the inspector's report, to which the minutes refer, forms a context in which the resolution itself is to be understood. The language of the resolution is also significant. It acknowledges the inspector's "view" on the existence of a "neighbourhood". It expresses the committee's disagreement with that view. It explains the disagreement in terms of the members having "formed a different impression" from the inspector's, which shows that they recognized this was indeed a matter of "impression". And it confirms that their own conclusion – that the statutory requirements for registration were met – was based on their consideration of "all the evidence before them".

107. The committee's "different impression" represented its disagreement with the inspector, in the exercise of its own judgment, on the decisive question of "cohesiveness". That is plain. There is no suggestion, nor could there be, that the members could not reasonably and lawfully conclude as they did on this question, in the light of the evidence that had been before the inspector, and his findings of fact. They were entitled to do so. And in my view the reasons embodied in the resolution, though brief, were, in the circumstances, a clear and sufficient explanation of the committee's decision, which would have been understood both by those who had taken part in the registration process and by the wider public as well. They do not fail to meet the requisite standard of reasons in this particular case. Longer or further reasons were not necessary, given the nature of the issue on which the members were

differing from the inspector. The question for the court is not whether fuller reasons might have been better, but whether those actually provided were intelligible and adequate in the sense of explaining why the decision was what it was. These reasons were. They do not betray, or conceal, any error of law in the county council's approach to establishing the existence – or not – of a relevant "neighbourhood". And no prejudice, let alone substantial prejudice, was caused to NHS Property Services. They cannot realistically complain that they do not know why their objection failed. It failed because the committee formed a different impression from the inspector on the relevant evidence.

108. If, however, the contrary view were taken, I would regard this as a case in which the court should nevertheless decline to quash the registration – because in the circumstances I see no real possibility of the committee's decision being different if it were compelled to state its reasons more fully.

109. Finally, I cannot accept Mr Clay's argument that the committee's decision was vitiated by procedural unfairness. As the judge concluded, the fact that Mr Jones' post-inquiry representations on the existence of a relevant "neighbourhood" were before the committee and those of NHS Property Services in rebuttal were not, was, in the circumstances, of no real significance for the committee's deliberations, or its resolution. NHS Property Services had a fair opportunity to put forward their case on this issue before the inspector, and they plainly did so. If this were a case in which the court had to exercise its duty under section 31(2A) of the Senior Courts Act 1981, again in agreement with the judge, I would uphold the county council's decision. There is, in my view, no reason to think that if NHS Property Services' post-inquiry representations had been before the members, the decision might have been different.

Conclusion

110. For the reasons I have given, I would dismiss Lancashire County Council's appeal in the Lancaster case, and I would allow Mr Jones' appeal and dismiss NHS Property Services' cross-appeal in the Leatherhead case.

Lady Justice Thirlwall

111. I agree.

Lord Justice Rupert Jackson

112. I also agree.

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PLANNING AND REGULATORY COMMITTEE
DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX E 2018 UPDATE TO COMMITTEE

ITEM NO.

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TO: PLANNING & REGULATORY COMMITTEE **DATE:**

BY: HEAD OF LEGAL SERVICES

DISTRICT (S): MOLE VALLEY **ELECTORAL DIVISION:** LEATHERHEAD AND FETCHAM EAST Tim Hall

PURPOSE: FOR INFORMATION

TITLE: APPLICATION FOR VILLAGE GREEN STATUS. LAND AT LEACH GROVE WOOD, LEATHERHEAD

SUMMARY REPORT

The Committee is asked to note the outcome of a judicial review of a decision of this committee regarding an application by Philippa Cargill to register land at Leach Grove Wood, Leatherhead as a Village Green.

The County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 and administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the 2006 Act the County Council is able to register new land as a Town or Village Green (TVG) on application, provided it meets the statutory criteria.

ANNEXE

Annexe A – Commons Register definitive map
Annexe B – Counsel's summary of the High Court's decision

BACKGROUND

On 25 March 2013 Surrey County Council received an application for a new village green for the land of Leach Grove Wood, Leatherhead. The application was made on the statutory basis that:

"*a significant number of 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.*"

An objection to the application was received from NHS Property Services Ltd (NHSPS) in its capacity as freehold owner of the application land. The land is adjacent to Leatherhead Hospital.

A non-statutory public inquiry was held before an experienced independent barrister, sitting as the Inspector. The Inspector's report formed a background paper to the report from the Commons Registration Officer to this committee on 23 September 2015.

In his report, the Inspector advised that, because the applicant had not satisfied the neighbourhood test, the application should be rejected. In his opinion there was not sufficient cohesion to form a neighbourhood.

The view of this committee was that there was sufficient cohesion to form a neighbourhood and the committee decided to accept the application and register the land as a new TVG.

Judicial Review

The NHSPS applied to judicially review the decision of this committee and the case was heard in the High Court in June 2016 before Mr Justice Gilbart.

The issues raised in the case were:

(1) Was the council under a duty to give reasons for its decision?
(2) If so, what standard of reasoning was required?
(3) Did the council give adequate reasons for finding that the criteria were met?
(4) Was the finding that there was a 'neighbourhood' one which the council could reasonably make?
(5) Given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has the council shown that there was no basis for concluding that there was statutory incompatibility?
(6) Was the conduct by the council of the meeting which considered the issue fair to the Claimant NHSPS?

The Judge's decision on each issue was:

(1) There is a duty to give reasons and the reasons given must be of the appropriate standard.

(2) The appropriate standard is, on controversial issues, not just to consider the issues, but to give reasons for the conclusions reached.

(3) In this instance, there was no criticism of the committee's approach to the issue. The committee was required to address the 'neighbourhood' question as it stood before them, and the arguments for and against the case. The Inspector's expertise lay in the law and practice relating to village greens, not in their identification, even assuming that such an expertise could exist. It was very much a matter of impression where elected members could have just as much expertise as the Inspector.

(4) The finding that there was a neighbourhood was undoubtedly a decision which the committee could reasonably make.

(5) There was an absence of any consideration or reasoning relating to the question of 'statutory incompatibility'. This means that where land is held under one statute it may be incompatible with the land being registered as a TVG. The argument was that the land was held by the NHS for health purposes which was incompatible with the land being used for recreational purposes as a TVG. There was statutory incompatibility and for this reason the judicial review was allowed.

(6) Concern was raised about the fact that Mr Tim Hall was Chairman of the Committee. The Judge considered that this was a point of no substance. Mr Hall was entitled to present his view as ward member to the meeting, which

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he did after vacating the chair, and having given his representations, he left the meeting. In the judge's view he acted with complete propriety, and no complaint can be made of his conduct.

So far as the question of the representations from the two parties were concerned, it was established that Dr Bowes' correspondence was circulated in hard copy, but the correspondence of the NHSPS was not. Further, several members did not receive the latter because the council's email server junked them. As a result, the NHSPS suffered a disadvantage because it was responding to Dr Bowes' late submission.

The judge did not consider that Dr Bowes conduct caused any actual unfairness. He was entitled to send a late submission to the committee in light of the recommendation to reject the application, and the NHSPS was entitled to respond.

The question is whether the disadvantage caused to the NHSPS by members having Dr Bowes's representations before them but not the NHSPS's, caused any actual prejudice which could have affected the decision. In Mr Justice Gilbart's judgement the decision which the committee reached, and the reasons it gave, were unaffected by that.

The decision of the Judge was to uphold the application of the NHSPS and to overturn the decision of this committee, due only to the lack of consideration of the legal concept of statutory incompatibility. This meant that the land was not a TVG.

A more detailed background note is provided at Annexe B by the Counsel's junior barrister, Katherine Barnes, which was prepared following the High Court decision prior to the NHSPS appeal to the Court of Appeal.

Appeal to the Court of Appeal

The original applicant had by now moved out of the area and her application was taken over by Mr Timothy Jones. Mr Jones appealed from the decision of the High Court to the Court of Appeal. The appeal was heard in October 2017 and the judgment was published on the 12 April 2018.

The Court of Appeal overturned the decision of the High Court judge on the grounds of statutory incompatibility. Therefore the land is a TVG.

The NHSPS has been ordered to pay the costs of this council defending itself in the High Court. The council did not take part in the appeal.

Application to appeal to the Supreme Court

The Court of Appeal refused the application of the NHSPS to appeal further. However, the council has now received notification that the NHSPS is applying for an extension of time to apply to the Supreme Court itself for permission to appeal further. The decision of the Supreme Court is awaited as to whether it will allow an extension of time and, as to whether it will allow the NHSPS to appeal. If an appeal is allowed, it is unlikely that the decision will be issued for about another two years.

The grounds of appeal are primarily on statutory incompatibility and on the definition of locality and neighbourhood. They are also testing the need for sufficient reasoning

by the decision maker. Thus, as the law currently stands, the original decision of this committee has been upheld but we wait to see what will happen.

CONTACT
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BACKGROUND PAPERS

All papers referred to in the report

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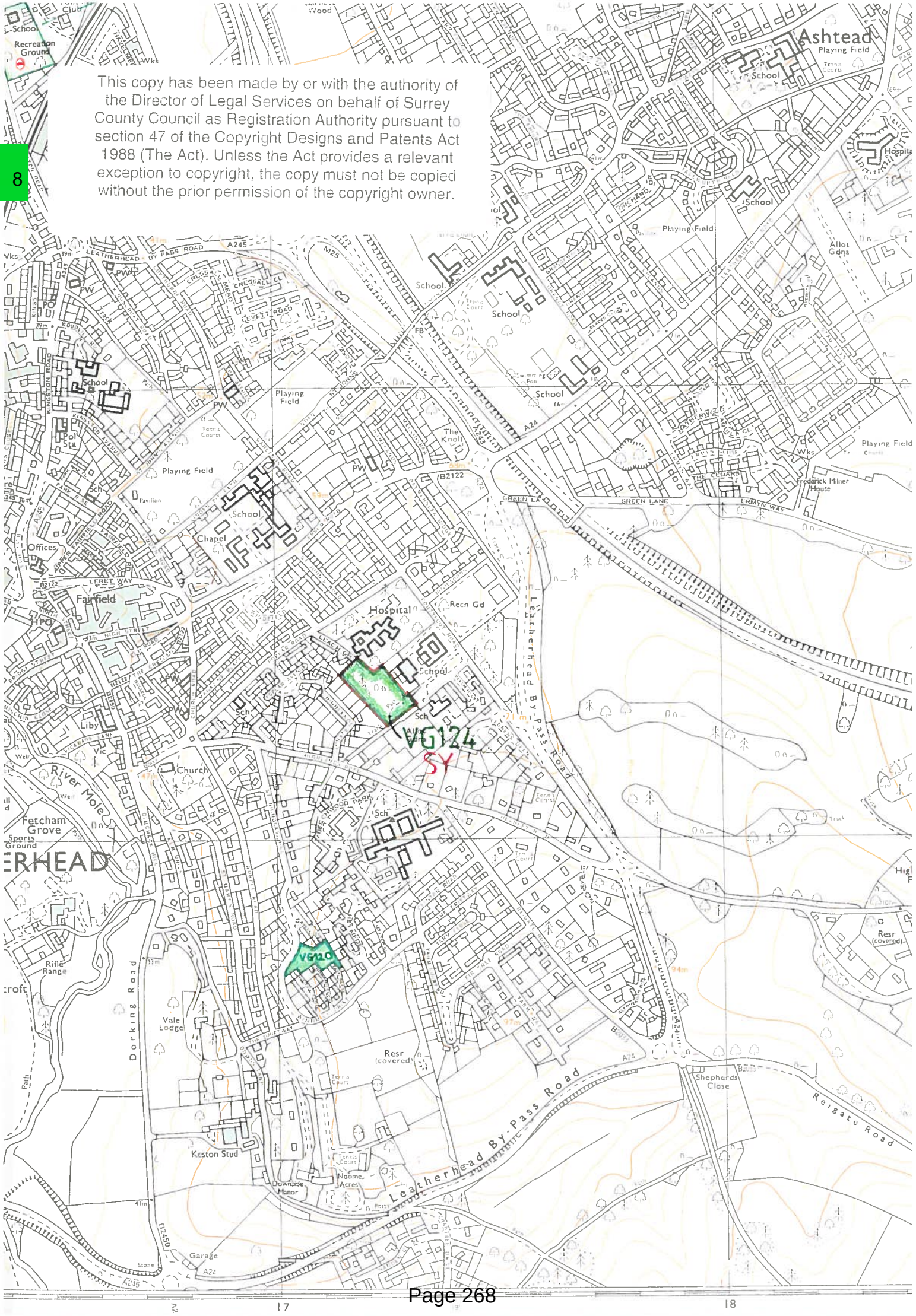

***R (NHS Property Services Limited) v Surrey County Council and Jones* [2016] EWHC 1715 (Admin)**

SUMMARY OF THE ABOVE DECISION OF MR JUSTICE GILBART

Introduction

1. In 2013 Mrs Cargill[1] made an application to Surrey County Council ("SCC") for land known as Leach Grove Wood, Leatherhead, Surrey ("the Land") to be registered as a town or village green ("TVG"). The statutory test for registration is contained in s.15 of the Commons Act 2006 ("CA 2006"). According to this test it is necessary that:

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

2. The owner of the Land, NHS Property Services Limited ("NHSPS"), objected to the application. A non-statutory inquiry was held by an Inspector who recommended to SCC that the application be refused. While he found that there had been the indulgence as of right in lawful sports and pastimes for at least 20 years, the applicant had not identified a "locality" or a "neighbourhood within a locality". However, he rejected the argument of NHSPS that there was a statutory incompatibility between the statutory purposes for which the land was held and registration under s.15 of CA 2006.

3. On 6 October 2015 SCC's Planning and Regulatory Committee ("the Committee") allowed the application to register the Land as a TVG ("the Decision"), concluding that the criteria in s.15 of the Commons Act were satisfied. In particular, the Committee concluded that the "neighbourhood within a locality" test was met. However, the Committee's reasons for granting the application did not address the issue of statutory incompatibility. SCC's reasoning provided:

   "Notwithstanding the Inspector's view, Members formed a different impression. Having considered all the evidence before them they came to the view that the criteria laid down by the Commons Act 2006 had been satisfied by the applicant."

4. NHSPS judicially reviewed the Decision. In his written judgment Gilbart J found that the key issues raised by the challenge were as follows:

   (a) Was SCC under a duty to give reasons for its decision?
   (b) If so, what standard of reasoning was required?
   (c) Did SCC give adequate reasons for finding that the criteria were met?
   (d) Was the finding that there was a "neighbourhood" one which SCC could reasonably make?

[1] Mrs Cahill has since emigrated. Another supporter of the application, Mr Jones, has taken her place in promoting the application and was an Interested Party in the judicial review proceedings.

(e) Given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has SCC shown that there was no basis for concluding that there was statutory incompatibility?
(f) Was the conduct by SCC of the meeting which considered the issue fair to NHSPS?

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Law

Statutory incompatibility

5. In addition to the criteria in s.15 CA 2006 set out above, land may not be registered as a TVG "which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green"[2] (emphasis added).

Powers under which the Land is held

6. Here the Land forms part of an area of land which, in short, is owned by part of the National Health Service ("NHS"). The various statutory powers under which the Land has been held in the past and is currently held are set out at [18]-[33] of the judgment. Gilbart J summarised the position at [34]:

"It follows from the above that at all relevant times, the land has formed a part of the land held by one of the various NHS bodies, and held for defined statutory purposes. There has at no time relevant to the application been a general power to hold the land for anything other than the statutory purposes set out above."

7. These statutory purposes can, very broadly speaking, be summarised as health purposes connected to the NHS such as the provision of: hospital accommodation; medical, dental, nursing and ambulance services; facilities for the prevention of illness, care of persons suffering from illness and the after-care of persons who have suffered from illness.

The duty to give reasons under the TVG Regulations

8. The relevant regulations applicable to SCC are the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("C(RTV) Regs 2007"). Under these regulations, where a registration authority rejects an application it must give reasons for doing so. There is no duty to give reasons where an application is granted.

9. In contrast, the Commons Registration (England) Regulations 2014 ("CR(E) Regs 2014") apply to certain pilot areas which do not include Surrey. Under these regulations there is a duty to give reasons where an application is granted or rejected.

Section 31(2A) Senior Courts Act 1981

10. Section 31(2A) of the Senior Courts Act 1981 ("the SCA 1981") is concerned with the circumstances in which the court must quash a decision if it identifies an error of law.

[2] *R (Newhaven Port and Properties Ltd) v East Sussex CC* [2015] UKSC 7 at [93].

Essentially, a decision should not be quashed if the error of law would not have made a difference to the outcome:

"(2A) The High Court –
(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
If it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Analysis of Gilbart J

Preliminary issue: existence of a lawful locality

11. NHSPS had argued under its ground 2 that the applicant relied on an unlawful locality, a polling district, as the basis for its claimed "neighbourhood within a locality". However, given that it is well established that an electoral ward can be a "locality" in law, and the applicant also put her case on this alternative basis, Gilbart J accepted that the Inspector's Report should be read as finding the relevant locality to be Leatherhead South ward.[3] The key question was therefore "neighbourhood" rather than "locality". As a result, ground 2 was unsuccessful.

Issue (a): Was SCC under a duty to give reasons for its decision?

12. The Judge found that SCC was under a duty to give reasons for its decision in the circumstances.

13. The fact that there is no statutory duty to give reasons when granting an application under the C(RTV)Regs 2007 was not considered to be determinative given that the CR(E)Regs 2014 imposed such a duty in other parts of the country. It was therefore necessary to determine the matter with reference to first principles.

14. The Judge considered the effect of registration of land as a TVG on a landowner and found that it had grave consequences since it would seriously impede the way in which the landowner could use and develop the land in the future. As a result, the effect of registration is a determination of civil rights/obligations under Article 6 of the European Convention on Human Rights such that reasons are required.[4] Gilbart J then went on to consider the position under the common law. He considered that, in accordance with *R v Civil Service Appeal Board ex p Cunningham* [1991] 4 All ER 310, this was one of the scenarios in which fairness requires the giving of reasons:

"In the case of registration, one has the situation of a landowner being at risk of losing his freedom to do as he wishes with his land. In my judgement that demands the provision of reasons, so that he may know whether the decision was made on lawful grounds, and may be able to determine whether he has grounds to challenge it in the courts."[5]

[3] [42(c]; [95].
[4] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.
[5] [104].

Issue (b): If so, what standard of reasoning was required?

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15. SCC had argued before the court that in circumstances such as this, where there is no statutory duty to give reasons, the standard of reasoning is lower than would otherwise be the case. However, Gilbart J was not persuaded by this approach. He found the starting point to be that while reasons can be shortly stated they "must be intelligible and deal adequately with the substance of the arguments advanced"[6] and the "principal controversial issues".

16. It follows that in a TVG registration case the reasons must address:

    (a) whether the applicant for registration has shown that the criteria in s. 15 CA 2006 have been met, and why the tests have been met or not as the case may be;
    (b) in a case where an objection has been made on a ground known to law, whether that objection is or is not well founded, and why it was or was not well founded as the case may be.[7]

17. As for the standard of those reasons, the losing party must know why they lost and what the legal justification was for doing so.[8]

18. In addition, Gilbart J noted that under the C(RTV) Regs 2007 SCC had to decide to proceed to consider the application, and in doing so (a) must consider all objections made by the date when it elects to proceed further, and (b) may consider those received afterwards up to the time it finally disposes of the application.[9] He concluded from this that SCC:

    "had to consider not just the application, but also all the objections made to it at both stages. The Claimant's objection, which included the point about statutory incompatibility, was made at both stages. As it was one of the controversial issues, SCC was bound not just to consider it, but to give reasons for the conclusions it reached upon it."[10]

    Therefore, to be lawful SCC's reasons had to address the question of statutory incompatibility.

Issue (c): Did SCC give adequate reasons for finding that the criteria were met?

19. Although NSHPS had not initially argued that SCC's reasons were inadequate due to their failure to address the question of statutory incompatibility, this was a matter raised by Gilbart J during the hearing. He concluded that this amounted to an "obvious and substantial omission in the SCC reasons". As Gilbart J explained:

[6] [108]; *South Bucks v Porter* [2004] 1 WLR 1953.
[7] [109].
[8] [111].
[9] Regulation 6.
[10] [113].

"At no point is the issue about statutory incompatibility ever addressed. There is not even a case to be made (and none was made to me) that it had been considered but not spelled out in the reasons. The officer's report merely recites the bare conclusion of the IR at [178(c)] and the reasons in the Minutes are entirely silent on the topic. It is not possible to say that the Inspector's view was adopted on this point, because there is not the slightest evidence that it was."[11]

20. However, Gilbart J rejected NSHPS's original argument that the reasons were inadequate because they did not explain adequately the rationale for the Committee's approach to "neighbourhood". The Judge accepted SCC's submissions that the cohesion of a "neighbourhood" is not a matter for experts but is a subjective question on which the Committee was entitled to form a view. He went on:

"In that context, I do not consider that the Committee's approach to the issue can be criticised. It considered the Inspector's assessment, but then made its own, which it preferred. […] [The Inspector's] expertise lay in the law and practice relating to village greens, not in their identification, even assuming that such an expertise could exist. He is not a geographer or an anthropologist considering some technical test applied in field studies to the existence of a neighbourhood. This is not a case where the reporting Inspector officer is an expert in the fields for (for example) highway engineering in a debate about the design of a junction, or retails economics in a case where the extent of pent up demand is in issue […]. The question of whether or not this was a neighbourhood in the sense used in the CA 2006 in not the same kind of question. It was very much a matter of impression where elected members could have just as much expertise as the inspector. They were not required to go through all of his reasoning, nor the various events at the inquiry. What they were required to do was to address the "neighbourhood" question as it stood before then, and the arguments for and against the Applicant's case."[12]

21. Thus, SCC's reasoning given in respect of the "neighbourhood" question was lawful.

Issue (d): Was the finding that there was a "neighbourhood" one which SCC could reasonably make?

22. Given that the Judge agreed with SCC that it is matter of impression whether there is sufficient cohesion for a "neighbourhood" to exist, SCC's approach to determining this issue was entirely legitimate. The Inspector was no more of an expert on this issue than the Committee, and the Committee was entitled to form its own view on the subject.

Issue (e): Given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has SCC shown that there was no basis for concluding that there was statutory incompatibility?

23. Having concluded that SCC's reasons were unlawful for failing to address the question of statutory incompatibility, the Judge went on to apply s.31(2A) SCA 1981. In other words, he considered whether the Decision would have been the same (ie the

[11] [114].
[12] [117].

application would still have been granted) if SCC's error had not occurred. For this to be the case SCC had to show that there was no statutory incompatibility such that the reasons' failure to tackle this point was immaterial. However, this argument did not succeed because Gilbart J identified a statutory incompatibility between the powers under which the Land is held by the NHSPS and use of the Land as a TVG under the CA 2006. Thus, the failure of SCC's reasoning to deal with this question was highly material (to the extent that it was determinative) to the Decision.

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24. The Judge's approach to statutory incompatibility was to examine the leading case on this issue, the Supreme Court decision of *Newhaven Port and Properties Ltd v East Sussex CC* [2015] UKSC 7, in some detail.[13] In *Newhaven* it was held that registration as a TVG was incompatible with the statutory powers governing the land's use as a port. The relevant test with regards statutory incompatibility was explained as follows:

"Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."[14] (Emphasis added).

25. Having studied the relevant passages from *Newhaven* Gilbart J extracted three key principles from that judgment:

(a) one must consider the actual statutory powers under which the land is held;
(b) the fact that in some cases parcels of land belonging to some statutory bodies have been registered does not give rise to a rule that any land held by a statutory body can be registered;
(c) it is not necessary that the land in question is used for a purpose incompatible with use as a village green. What matters is whether, as a matter of statutory construction, the relevant statutory purpose is incompatible with registration.[15]

26. Gilbart J went on to conclude that the recent decision of Ouseley J in *Lancashire CC v Secretary of State for the Environment and Rural Affairs and Bebbington* [2016] EWHC 1238 did not to alter these principles. In that case Lancashire County Council held the land in its capacity as education authority. The relevant question was whether, if the land had been held for educational purposes, there was any incompatibility between those purposes and TVG use (ie recreational purposes). Ouseley J concluded that there was no such incompatibility. In particular, he rejected the argument that the fact that the land was held for very general educational purposes required use of the land.

27. Having stressed the need to approach statutory incompatibility on a case by case analysis, Gilbart J considered the statutory powers under which the Land was held in this case. He pointed out none of the bodies which had held the Land over the relevant

[13] [121]-[127].
[14] *Newhaven* at [93].
[15] [128].

period had a general power to hold land. Rather, land could only be acquired or held if done so for the specific purposes defined in the relevant Acts. These purposes do not include recreation or anything outside the purview of providing health facilities. The Judge went on to draw a contrast between the scenario here and that in *Lancashire*:

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"[I]t is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities – see section 507A Education Act 1996."[16]

28. Therefore, Gilbart J's conclusion was that there is a conflict between the statutory powers in this case and registration of the Land as a TVG. Further, given that the Inspector reached the opposite conclusion and did not apply *Newhaven* as outlined above, the Inspector's approach to the question of statutory incompatibility was wrong in law.

Issue (f): Was the conduct by SCC of the meeting which considered the issue fair to NHSPS?

29. The first of NHSPS's complaints in relation to unfairness was that Cllr Hall should not have been present at the Committee meeting at which the Decision was made given that he had declared an interest in the matter. This argument was made despite the fact that Cllr Taylor took over from Cllr Hall as chairman for this item and Cllr Hall withdrew as soon as he made his representations. Gilbart J was not impressed with the submissions of NHSPS on this point: "In my judgement he [Cllr Hall] acted with complete propriety, and no complaint can be made of it."[17]

30. NHSPS also argued that the proceedings were unfair because Dr Bowes (the applicant's barrister) sent the Committee representations which were taken into account before the Decision was made, while the landowner's response to these submissions (sent by their solicitors, Capsticks) was not. It was also suggested that the fact that Dr Bowes was on first-name terms with certain members was indicative of some sort of unfairness.

31. As became apparent over the course of the proceedings, Dr Bowes' representations were provided to the Committee in hard copy while Capsticks' representations were not. Moreover, the Capsticks' representations were "junked" by the email server of the Council so that various Members did not see them until after the Decision had been taken. In these circumstances the Judge observed that, although officers did not intend for NHSPS to suffer any disadvantage, this was the consequence of what had occurred.

[16] [135].
[17] [140].

32. While Gilbart J advised Dr Bowes to avoid familiar terms of address in similar situations in future, he found that Dr Bowes had not done anything wrong in making written representations to the Committee before it made the Decision – Dr Bowes was entitled to take this course of action and NHSPS was entitled to respond.

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33. It was also necessary to consider the application of s.31 SCA 1981. The question was whether the disadvantage caused to NHSPS by the Committee having Dr Bowes' representations before it but not those of NHSPS actually affected the outcome of the Decision. Gilbart J concluded that it did not; it was highly likely that the Committee would still have allowed registration even if had seen the submissions of NHSPS at its meeting.[18] As a result, there was no basis for quashing the Decision on the ground that it was procedurally unfair.

Conclusion

34. Ground 5 of the claim was successful because the Committee never considered the question of statutory incompatibility and gave no reasons in respect of this issue. Further, this meant it was appropriate to quash the Decision because Gilbart J considered that NHSPS' objection to registration on the ground of statutory incompatibility to be well-founded. However, as explained above, he rejected NHSPS' other arguments: Grounds 1-4.

35. In light of the judgment the following order was made:

    (a) The Registration of the Leach Grove Wood Town or Village Green of 6th October 2015 be quashed, and
    (b) The application for registration shall be re-determined by the Defendant Registration Authority in accordance with the judgment of this Court.

36. As for costs, given that SCC had lost the case overall but succeeded on four of the five grounds of challenge, the Judge ordered SCC to pay NHSPS' costs of the judicial review, less any costs attributable to the hearing of the argument and submissions lasting more than one full hearing day.

37. The Interested Party, Mr Jones, made an application for permission to appeal the Judge's ruling on the statutory incompatibility point on the basis of the draft judgment. Gilbart J granted that application.

15 July 2016

KATHERINE BARNES
FRANCIS TAYLOR BUILDING

[18] [143].

PLANNING AND REGULATORY COMMITTEE
DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX F 2019 SUPREME COURT JUDGMENT

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Michaelmas Term
[2019] UKSC 58
On appeal from: [2018] EWCA Civ 721

JUDGMENT

R (on the application of Lancashire County Council) (Appellant) *v* Secretary of State for the Environment, Food and Rural Affairs and another (Respondents)
R (on the application of NHS Property Services Ltd) (Appellant) *v* Surrey County Council and another (Respondents)

before

Lord Wilson
Lord Carnwath
Lady Black
Lady Arden
Lord Sales

JUDGMENT GIVEN ON

11 December 2019

Heard on 15 and 16 July 2019

Appellant (1) Douglas Edwards QC Jeremy Pike Daisy Noble (Instructed by Sharpe Pritchard LLP on behalf of Jane Turner, Lancashire County Council Legal, Governance and Registrars Service)	*Respondent (1)* Tim Buley QC (Instructed by The Government Legal Department)
	Respondent (2) Ned Westaway (Instructed by Harrison Grant)
Appellant (2) George Laurence QC Jonathan Clay Simon Adamyk (Instructed by Womble Bond Dickinson (UK) LLP (Newcastle))	*Respondent (2)* Dr Ashley Bowes (Instructed by Richard Buxton Solicitors (Cambridge))

Appellant (1):- Lancashire County Council
Respondents:-
(1) Secretary of State for the Environment, Food and Rural Affairs
(2) Janine Bebbington

Appellant (2):- NHS Property Services Ltd
Respondents:-
(1) Surrey County Council Legal Services instructed by Surrey County Council
(2) Timothy Jones

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LORD CARNWATH AND LORD SALES: (with whom Lady Black agrees)

Introduction

1. The principal issue in these two appeals relates to the circumstances in which the concept of "statutory incompatibility" will defeat an application to register land as a town or village green where the land is held by a public authority for statutory purposes. In *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7; [2015] AC 1547 ("*Newhaven*") this court held that the duty under section 15 of the Commons Act 2006 did not extend to an area held under the specific statutes relating to the Newhaven Harbour. We are asked to decide whether the same principle applies to land held by statutory authorities under more general statutes, relating respectively (in these two cases) to education and health services.

2. Although the two appeals raise similar issues, they were dealt with by different procedural routes. The first (Lancashire) is within the area of a "pilot" scheme under the Commons Registration (England) Regulations 2008, under which, where the registration authority (in this case Lancashire County Council - "LCC") has an interest in the land, applications are referred for determination to the Planning Inspectorate (regulations 27-28). The second case (Surrey) was not covered by the pilot scheme. The application was determined by Surrey County Council as registration authority, following a non-statutory inquiry before a barrister appointed by the council.

Modern greens - development of the law

3. As will be seen, in *Newhaven* the issue was described as one of "statutory interpretation". Unfortunately, interpreting the will of Parliament in this context is problematic, because there is no indication that the concept of a modern green, as it has been developed by the courts, was part of the original thinking under the Commons Registration Act 1965. Lord Carnwath reviewed the earlier history, including the Report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd 462) which preceded the 1965 Act, in his judgments at first instance in *R v Suffolk County Council, Ex p Steed* (1995) 71 P & CR 463 (one of the first cases under the 1965 Act), and later in the Court of Appeal in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 ("the *Trap Grounds* case"). As he observed in the latter:

> "51. The concept of a 'modern' class c green, as it has emerged in the cases since 1990, would, I think, have come as a surprise to the Royal Commissioners, and to the draftsman of the 1965 Act. There is no hint of it in the Royal Commission Report, or the Parliamentary Debates on the Bill. The commissioners' terms of reference were directed to sorting out the problems of the past, not to creating new categories of open land, for which there was no obvious need. By this time, of course, there were numerous statutes conferring on public authorities modern powers for the creation and management of recreational spaces for the public."

Lord Carnwath also noted, at para 52, that, as late as 1975, in *New Windsor Corpn v Mellor* [1976] Ch 380 ("*New Windsor*"), all three members of the Court of Appeal (including Lord Denning MR) had thought it natural to read the Act as referring to 20 years "before the passing of the Act" (at pp 391, 395) - an interpretation which would have ruled out the possibility of a modern green being established by more recent use.

4. It was not until the early 1990s that claims were first put forward based on 20 years' use since the 1965 Act had come into force at the end of July 1970 (apparently following the advice of the Open Spaces Society in their publication *Getting Greens Registered* (1995)). When the first case came before the House of Lords in 1999 (*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 - "*Sunningwell*"), no one seems to have argued that the Act was directed to pre-1965 use only. In that case, the House of Lords, led by Lord Hoffmann, adopted a relatively expansive view of the new concept. He drew a parallel with the Rights of Way Act 1932, which he thought had reflected Parliament's view "that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use" and the "strong public interest in facilitating the preservation of footpaths for access to the countryside" (p 359D-E). He commented, at p 359E:

> "… in defining class c town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes."

5. That interpretation of Parliament's thinking would, with respect, have been difficult to deduce from the 1965 Act itself, or from anything said - in Parliament or anywhere else - at the time. However, when the issue came before the House again, in the *Trap Grounds* case [2006] 2 AC 674, Lord Hoffmann was able to claim

implicit Parliamentary support in the debates which preceded the amendments made by the Countryside and Rights of Way Act 2000. As he said, at para 26:

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> "No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the only question raised in debate was whether the locality rule did not make it too difficult to register new village greens."

By then, as he also noted (para 28) the new Commons Bill (the 2006 Act as it became) was before Parliament, providing a further opportunity for legislative reconsideration if thought appropriate. In *Newhaven* [2015] AC 1547, para 18, this fact was cited as a reason for not having given permission to reopen the general approach adopted in the *Trap Grounds* case.

6. As to the attributes of a modern green, the 2006 Act itself, like the 1965 Act which preceded it, is very sparse in the information it gives. Section 1 of the 2006 Act requires each registration authority to maintain a register of town or village greens. Section 15 indicates that any person can apply to register land as a green where, in subsection (1)(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 the period of at least 20 years …"

As to the purpose of registration, section 2(2)(a) states simply that the purpose of the register is "to register land as a town or village green". The Act offers no further guidance as to the interpretation of the section 15 formula, nor as to the practical consequences of registration.

7. An unexplained curiosity is that section 10 of the 1965 Act, which provided that the register was "conclusive evidence of the matters registered, as at the date of registration", is not repeated in the 2006 Act. As things stand the repeal of section 10 has been brought into effect only in the pilot areas. (Section 18 of the 2006 Act, headed "Conclusiveness", which has effect in the pilot areas, does not on its face go so far as section 10.) In the *Trap Grounds* case, Lord Hoffmann had agreed (at para 43) with Lord Carnwath's analysis in the Court of Appeal [2006] Ch 43, para 100, that the 1965 Act "created no new legal status, and no new rights or liabilities other than those resulting from the proper interpretation of section 10". It was on the "rational construction of section 10" that he relied for his view that land registered as a town or village green "can be used generally for sports and pastimes" (para 50),

and was also subject to section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 (para 56). None of the experienced counsel before us was able to offer an explanation for the disappearance of section 10, but none sought to argue that it had made any material difference to the rights following registration. Not without some hesitation, we shall proceed on that basis.

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8. Lord Hoffmann made clear that, following registration, the owner was not excluded altogether, but retained 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" (para 51). That qualification was further developed in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 1; [2010] 2 AC 70 ("*Lewis*"), in which it was held that the local inhabitants' rights to use a green following registration could not interfere with competing activities of the landowner to a greater extent than during the qualifying period.

9. One important control mechanism which emerged from the cases was the need for the use to be "as of right". It was established that these words, by analogy with the law of easements, imported the principle "nec vi, nec clam, nec precario", or in other words "the absence of any of the three characteristics of compulsion, secrecy or licence" (per Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 245, cited by Lord Hoffmann in *Sunningwell* [2000] 1 AC 335, 355). It followed that in practice an owner could prevent use qualifying under section 15 by making it sufficiently clear to those seeking to use the land (generally by suitable notices) either that their use was objected to, or that it was permissive. On the other hand, silent acquiescence in the use, or toleration, did not prevent it being "as of right".

10. More recently (from 25 April 2013) amendments made by the Growth and Infrastructure Act 2013 (embodied in new sections 15A and following of the 2006 Act) have provided some assistance to landowners, first by enabling a formal statement to be made to bring user "as of right" to an end, and secondly by defining certain planning-related "trigger events" which suspend or extinguish the right to apply to register a green. In *Wiltshire Council v Cooper Estates Strategic Land Ltd* [2019] EWCA Civ 840; [2019] PTSR 1980, para 4, Lewison LJ said of these amendments:

> "Ever since the *Trap Grounds* case … the courts have adopted a definition of a TVG [town or village green] which goes far beyond what the mind's eye would think of as a traditional village green. The consequence of this interpretation of the definition is that there have been registered as TVGs: rocks, car parks, golf courses, school playgrounds, a quarry, scrubland, and part of a working port. If land is registered as a TVG the effect of the registration is, for practical purposes, to sterilise

> land for development. This became a concern for the Government, because the criteria for registration did not take into account any planning considerations; and because it was thought in some quarters that applications for registration of TVGs were being used as a means of stopping development outside the planning system."

The 2013 amendments are of no direct relevance to the issues in the present appeal, but they are relied on as showing that Parliament has given specific attention to the balance to be drawn between the rights of the various interests involved.

11. We would draw two main lessons from the historical review. First, whatever misgivings one may have about the unconventional process by which the concept of a modern green became part of our law, the emphasis now should be on consolidation, not innovation. Secondly, the balance between the interests of landowners and those claiming recreational rights, as established by the authorities, and as now supplemented by the 2013 Act, should be respected. Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in *Newhaven* and apply it to the facts of these cases.

The proceedings and the parties

Lancashire

12. The land at issue in the first appeal is known as Moorside Fields, in Lancaster. It lies adjacent to Moorside Primary School and extends to some 13 hectares. It is divided into five areas, referred to in the proceedings as Areas A to E, described (by the planning inspector) as follows:

> "Area A, referred to as the meadow was, until recently, an undeveloped plot of land. It is adjacent to Moorside Primary School (the school) and is currently being used to facilitate the construction of an extension at the rear of the school. Area B is a mowed field, referred to as the school playing field and both it and Area A are currently surrounded by fencing.
>
> Areas C and D border Areas A and B. In the past they have been the subject of mowing tenancy agreements but these ceased in around 2001. They are separated from each other and from Areas A and B by … hedges and in places are overgrown with brambles. Area E, also adjacent to the school, is currently

> overgrown and difficult to access. At some times of the year it contains a pond."

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Like the school the land is owned by LCC, the present appellant, which is both education authority and registration authority.

13. On 9 February 2010 Ms Janine Bebbington, a local resident, applied to register the land as a town or village green. Her application was based on 20 years' qualifying use up to the date of registration, or alternatively up to 2008. LCC, as local education authority, objected. Following a statutory inquiry, an inspector appointed by the Secretary of State (Ms Alison Lea, a solicitor) in a decision letter dated 22 September 2015 determined that four of the five areas (that is A to D, but not E) should be registered under the Act. She excluded Area E because she found insufficient evidence of its use over the 20 year period. LCC has postponed formal registration of Areas A to D, pending the outcome of the judicial review claim.

14. LCC maintains that the land was acquired for and remains appropriated to educational purposes, in exercise of the LCC's statutory powers as education authority. The statutory provisions upon which LCC relied (or now rely) as showing incompatibility were: (1) section 8 of the 1944 Education Act which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment; (2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education; (3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play; and (4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children". (The issue of safeguarding does not appear to have been raised at the inquiry.)

15. The inspector was not satisfied that the land was held for educational purposes (an issue to which we shall return below), but even on the assumption that it was she found no incompatibility:

> "119. Furthermore, even if the land is held for 'educational purposes', I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it

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to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The school is currently being extended on other land and will, according to Lynn MacDonald [a school planning manager for the county council], provide 210 places which will meet current needs. There is no evidence to suggest that the school wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.

120. Areas C and D are marked on LCC's plan as 'Replacement School Site'. However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her five-year planning phase.

121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.

122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish to make that provision on the Application Land."

She concluded (para 124):

"124. It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the

> statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships [in *Newhaven*]. Even if it is accepted that LCC hold the land for 'educational purposes', there is no 'clear incompatibility' between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility."

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16. On the LCC's application for judicial review, the inspector's decision was upheld by Ouseley J [2016] EWHC 1238 (Admin), including her approach to the issue of statutory incompatibility.

Surrey

17. The second appeal relates to some 2.9 hectares of land at Leach Grove Wood, Leatherhead, owned by NHS Property Services Ltd ("NHS Property Services"), a company wholly owned by the Secretary of State for Health. The land adjoins Leatherhead Hospital, and is in the same freehold title. An application for registration under the Act was made by Ms Philippa Cargill on 22 March 2013, with the support of Mr Timothy Jones and others. They relied on use over a period of 20 years ending in January 2013 (when permissive signs were erected on the land).

18. At the time of the application, the land was owned by the Surrey Primary Care Trust. By section 83(1) of the National Health Service Act 2006 primary care trusts were under a duty to provide, or to secure the provision of, primary medical services in their area. The land was held by the Trust pursuant to the statute, for those purposes. On the dissolution of the Trust in 2013, the freehold title of the land was transferred to NHS Property Services, which had been 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 this Act" (section 223(1) of the National Health Service Act 2006). Following the amendment of the National Health Service Act 2006 by the Health and Social Care Act 2012, functions previously exercised by the Secretary of State acting through a primary care trust fell to be exercised by a clinical commissioning group ("CCG") - in this case the Surrey Downs Clinical Commissioning Group. The principal statutory duties of a CCG are defined by section 3(1) of the National Health Service Act 2006; in summary they involve the provision of hospital accommodation and medical services "to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility".

19. Following a non-statutory inquiry, the inspector, William Webster, barrister, in his report dated 9 June 2015, recommended refusal of registration. He rejected the company's objection based on statutory incompatibility (paras 175(d)-(f)). He contrasted the case with *Newhaven* [2015] AC 1547 in which there had been "an obvious and irreconcilable clash as between the conflicting statutory regimes":

> "(e) … The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.
>
> (f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has [sic]) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being."

He also accepted that there had been sufficient qualifying use of the land by local inhabitants for more than 20 years, but he held that it was not in respect of a relevant "locality" or "neighbourhood" as required by section 15. Surrey County Council, as registration authority, did not accept his recommendation, but determined to register the land which was done on 5 October 2015.

20. On the application for judicial review by NHS Property Services, on 13 July 2016 Gilbart J ([2016] EWHC 1715 (Admin); [2017] 4 WLR 130) quashed the registration, holding that the county council had failed properly to consider the question of statutory incompatibility. He had before him the judgment of Ouseley J in the Lancashire case ([2016] EWHC 1238 (Admin)), but distinguished it by reference to the wider powers conferred by the education statutes:

> "134. … It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide

treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.

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135. Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities - see section 507A Education Act 1996.

136. It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there any plans that it should be, but only whether there is incompatibility as a matter of statutory construction. If the land is in fact surplus to requirements, then the use of the [2006 Act] is not the remedy.

137. Given those conclusions, it is my judgement that there is a conflict between the statutory powers in this case and registration."

The Court of Appeal

21. The appeals in both cases, respectively by LCC and the applicants for registration in the Surrey case, were heard together by the Court of Appeal (Jackson, Lindblom and Thirlwall LJJ). In a judgment dated 12 April 2018 ([2018] EWCA Civ 721; [2018] 2 P & CR 15), given by Lindblom LJ, with whom the others agreed, the court upheld the decision to register in both cases. On the issue of statutory incompatibility, he distinguished the *Newhaven* case [2015] AC 1547, for reasons which are sufficiently apparent from the following short extracts from the judgment:

Lancashire

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"40. Crucially, as a matter of 'statutory construction' there was no inconsistency of the kind that arose in Newhaven Port & Properties between the provisions of one statute and the provisions of the other. The statutory purpose for which Parliament had authorized the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with Newhaven Port & Properties, there were no 'specific' statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible.

Surrey

46. As in the Lancaster case, therefore, the circumstances did not correspond to those of Newhaven Port & Properties. The land was not being used for any 'defined statutory purposes' with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a 'statutory incompatibility'. The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land. And again, it is possible to go somewhat further than that. Although the registration of the land as a village green would preclude its being developed by the construction of a hospital or an extension to the existing hospital, or as a clinic or administrative building, or as a car park, and even though the relevant legislation did not include a power or duty to provide facilities for recreation, there would be nothing inconsistent - either in principle or in practice - between the land being registered as a green and its being kept open and

> undeveloped and maintained as part of the Leatherhead Hospital site, whether or not with access to it by staff, patients or visitors. This would not prevent or interfere with the performance of any of the relevant statutory functions. But in any event, as in the Lancaster case, the two statutory regimes were not inherently in conflict with each other. There was no 'statutory incompatibility'."

Was the Lancashire land held for educational purposes?

22. Before we turn to the main issue it is convenient to dispose of a preliminary issue which arises only in respect of the first appeal. For what purposes was the land held? The inspector recorded the evidence on which LCC relied as showing that the land was held for the relevant statutory purposes.

> "113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words 'Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944'. The endorsement is dated 12 August 1948.
>
> 114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows 'Education Lancaster Greaves County Secondary School'.
>
> 115. In addition LCC provided an instrument dated 23 February 1925 and a letter from LCC to the school dated 1991. The instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of the land acquired by the council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the [Barton Road Playing Field (land also owned by LCC, to the immediate west of Areas C and D and separated from them by a shallow watercourse, but accessible from them via a stone bridge and also stepping stones)]. An acknowledgement and undertaking dated March 1949 refers to

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the transfer to the county council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the [Barton Road Playing Field]. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.

116. At the inquiry LCC provided a print out of an electronic document headed 'Lancashire County Council - Property Asset Management Information' which in relation to 'Moorside Primary School' records the committee as 'E'. I accept that it is likely that this stands for 'Education'. An LCC plan showing land owned by 'CYP education' shows Areas A, B and E as Moorside Primary School and Areas C and D as 'Replacement School Site'. In relation to Areas C and D the terrier was produced, and under 'committee' is the word 'education'. The whole page has a line drawn through it, the reason for which is unexplained."

23. The inspector stated her conclusions:

"117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald … confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.

118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that

> LCC's statement that 'the Application Land was acquired and is held for educational purposes and was so held throughout the 20-year period relevant to the Application' accurately reflects the legal position."

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24. In fairness to the inspector, we should note that this issue seems to have been raised rather the late in the day, and was less than fully explored in LCC's submissions before her (see Ouseley J [2016] EWHC 1238 (Admin), para 49, noting Ms Bebbington's evidence as to what took place at the inquiry; the counsel who have appeared for LCC in the court proceedings did not act for it at the inquiry.

25. Ouseley J indicated that, left to himself, he would have been likely to have reached a different view, at para 57:

> "I rather doubt that, confined to the express reasoning in the DL [the decision letter], I would have reached the same conclusion as the inspector as to what could be inferred from the conveyances and endorsements on them in relation to the purpose of the acquisition of the various areas. I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition was put forward; there was no suggestion that the parcels were acquired for public open space. I would have inferred that there were resolutions in existence authorising the acquisitions for that contemporaneously evidenced intended purpose, which simply had not been found at this considerable distance in time. It would be highly improbable for the lands to have been purchased without resolutions approving it. The presumption of regularity would warrant the assumption that there had been resolutions to that effect, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL para 116, which shows the property, after acquisition, to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding."

26. However, he was unwilling to conclude that the inspector's decision was irrational, at para 61:

> "As I read the DL, the fundamental problem for the inspector in the LCC evidence was the absence of what she regarded as the primary sources for power under which the acquisition or

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> appropriation of the land occurred: the resolutions to acquire or to appropriate it for educational purposes. She was entitled to regard those as the primary sources to prove the basis for the exercise of the powers of the authority …
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> she approached her decision, as I read it, knowing what transpired before her, not on the basis that resolutions related to acquisition might well have existed but could not be found at this distance in time, but on the basis that none had been produced despite proper endeavours to find them, endeavours which had nonetheless produced the conveyances, and other related documents. So she was not prepared to assume that resolutions in relation to acquisition had existed. That was entirely a matter for her, and cannot come close to legal error."

The Court of Appeal in substance adopted Ouseley J's reasoning.

27. In this court, Mr Edwards QC for LCC accepts that this issue was one of fact for the inspector. But he submits that her conclusion was unsupportable on the evidence before her, or was vitiated by error of fact (under the principles set out in *E v Secretary of State for Home Department* [2004] QB 1044). For good measure he submits that the courts below were wrong not to admit evidence, discovered after the inquiry, in the form of council minutes from February 1948 recording the resolution to acquire Areas A and B (and E) for a "proposed primary school".

28. He starts from the proposition that the LCC, as a statutory local authority, could only acquire land "for the purposes of any of their [statutory] functions …" (see now the Local Government Act 1972, section 120(1)(a)); and that in normal circumstances the land would continue to be held for the purpose for which it was acquired unless validly appropriated for an alternative statutory purpose, when no longer required for the first (section 122). The inspector, he says, gave no weight to that statutory context.

29. As regards Areas A, B and E, he submits, the evidence before the inspector was quite clear (even without the new evidence). The inspector properly noted that the acquisition had been "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944". However, she failed to understand or give due weight to the significance of that note. As Mr Edwards explains, the effect of section 87 of the Education Act 1944 (headed "Exemption of assurances of property for educational purposes from the Mortmain Acts") was to exempt from the Mortmain and Charitable Uses Act 1888 and related Acts, land transferred (inter alia) to a local education authority, if the land was to be used for educational purposes. (The law of Mortmain dating back to the Statutes of Mortmain in 1279

and 1290, was not finally abolished until 1960.) A copy of the conveyance or other document by which the transfer of such land was made was required, within six months of its taking effect, to be sent to the Education Minister. Section 87(3) provided that a record should be kept of any conveyance sent to the minister pursuant to the section. Accordingly, says Mr Edwards, the reference to the record under section 87(3) should have been treated by the inspector as clear evidence that the original purpose of the acquisition was for educational purposes, even in the absence of a contemporary resolution to that effect. Against that background, the lack of evidence of any competing purpose to which the land might have been appropriated over the subsequent years pointed to the inference that it continued to be held for its original purpose.

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30. As regards Areas C and D, Mr Edwards submits, the indication on the 1961 conveyance of an educational purpose, taken with the references in later documents to its being treated as educational land, and the lack of any evidence of a competing purpose, were sufficient to support the inference, on the balance of probabilities, that education was the purpose for which it had been acquired and subsequently held.

Discussion

31. Although Mr Edwards has accepted that this issue was one of fact for the inspector, that concession needs to be seen in context. The inspector's assessment was one depending, not so much on evaluation of oral evidence, but largely on the inferences to be drawn from legal or official documents of varying degrees of formality.

32. In our view, Ouseley J's approach to the natural inferences to be drawn from the material before the inspector was correct, but he was wrong to be deflected by deference to the inspector's fact-finding role. The main difference between them was in the weight given by the inspector to the absence of specific resolutions, from which she found it "not possible to be sure" that the land had been acquired and held for educational purposes. On its face the language appears to raise the threshold of proof above the ordinary civil test to which she had properly referred earlier in the decision. But even discounting that point, she was wrong in our view to place such emphasis on the lack of such resolutions. Her task was to take the evidence before her as it stood, and determine, on the balance of probabilities, for what purpose the land was held. On that approach, Ouseley J's own assessment ([2016] EWHC 1238 (Admin)) was in our view impeccable. 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: *Edwards v Bairstow* [1956] AC 14, 29.

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33. In respect of Areas A and B, furthermore, there was a clear error of law, in the inspector's failure to appreciate, or take account of, the significance of the reference to section 87(3) of the 1944 Act. This may be because she was given little assistance on the point by LCC at the inquiry. It is less clear why the point, having been clearly raised in submissions in the court proceedings (see Ouseley J, para 44), seems to have been ignored in the subsequent judgments. On any view, that reference, and the inferences to be drawn from it, went beyond a pure issue of fact, and were appropriate for review by the court. In agreement with Mr Edwards we would regard it as providing unequivocal support for the conclusion that the land comprising Areas A and B was acquired for educational purposes. There was no evidence to suggest that it had ever been appropriated to other purposes.

34. In respect of Areas C and D, the evidence is less clear-cut, but we agree with Mr Edwards' submission that it is sufficient, on the balance of probabilities, to support the same conclusion and that, in the absence of any evidence to support any other view, it was irrational for the inspector to reach a different conclusion. Again, we think that Ouseley J's assessment of the facts was the correct one.

35. In these circumstances it is unnecessary to consider whether Ouseley J erred in refusing to admit the new evidence. We note, however, that it does no more than support what was already a strong case in respect of Areas A and B; it does nothing to enhance the case for Areas C and D.

Implied permission

36. We can also deal more briefly with an issue that arises only in respect of the Surrey site: that is Mr Laurence QC's application for permission to argue (for the first time) that the public's use of the land for recreation should be treated as having implied permission from NHS Property Services or its predecessors, thus showing that the use was "by right" rather than "as of right". This, as he accepts, is a departure from *Sunningwell* [2000] 1 AC 335, where it was held that mere toleration by a landowner of the public's use could not be taken as evidence that the landowner had impliedly consented to that use. He seeks to distinguish the position of land that is held for public purposes such as by his client. We quote his printed case:

> "… there is a critical distinction between (i) a private owner (such as the kindly rector in *Sunningwell*) tolerating use of land not held for public purposes - which can provide no evidence of an implied permission - and (ii) a public owner passively

> responding to recreational use in a statutory context which justifies the inference that that response to the public's use of the land is evidence of an implicit permission so long as the permitted use does not disrupt the public authority's use of the land for its statutory purposes. In such a case it is irrelevant that in a non-statutory, private context such a response might be characterised as toleration."

37. He also relies on section 120(2) of the Local Government Act 1972, which authorises land acquired by agreement by a local authority for a particular purpose to be used, pending its requirement for that purpose, for any of the authority's functions, which, he submits, would include recreational use. It can be inferred, accordingly, that any use by the public was permitted under that power, and as such was pursuant to the same kind of public law right, derived from statute, as was held in *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195 ("*Barkas*") and *Newhaven* [2015] AC 1547 to give rise to implied permission.

38. This submission seems to us to face two major difficulties. The first is that no such claim was made before the inspector. As he recorded:

> "174(f) No issue arises on 'as of right'. There were no vitiating features in play which would preclude use as of right and the application land was at no time held by SCC [Surrey County Council] or by any of the various NHS bodies mentioned herein for purposes which conferred an entitlement on members of the public to use the land for informal recreation. For instance, there was no evidence of any overt act or acts on the part of the objector, or its predecessor, to demonstrate that, before January 2013, the landowner was granting an implied permission for local inhabitants to use the wood."

In answer to this, Mr Laurence asserts that the issue is one of law rather than fact. Even if that were so, it would in our view be unfair to all those who took part in the five-day inquiry in 2015 to allow the point to be taken for the first time four years later in this court.

39. However, his main difficulty is that the submission is contradicted by clear authority. In *R (Beresford) v City of Sunderland* [2003] UKHL 60; [2004] 1 AC 889 Lord Walker had accepted the emphasis placed by Mr Laurence himself (appearing on that occasion for the supporters of registration) on "the need for the landowner to do something" (para 78); "passive acquiescence" could not be treated "as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct)" (para 79). Later in the judgment (para 83)

Lord Walker accepted that permission might be "implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers", but he found no evidence in that case of "overt acts (on the part of the city council or its predecessors)" justifying the inference of an implied licence.

40. Nothing in *Barkas* or *Newhaven* undermines the principle that passive acquiescence is insufficient. Mr Laurence's then submission that the land-owner must "do something" remains good law, even if there has been some qualification of the form of communication required to the public. The existence in each case of an overt act of the owner was emphasised in the majority judgment in *Newhaven* [2015] AC 1547, para 71:

> "In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was 'by right' and not 'as of right'. The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case)."

The law remains, as submitted by Mr Laurence in *Beresford*, that passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough.

41. Accordingly we would refuse permission for this additional ground of appeal.

Statutory incompatibility

42. We turn next to the central issue in the case, based on the *Newhaven* case.

The majority judgment

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43. In the judgment of the majority (given by Lord Neuberger PSC and Lord Hodge JSC) the decision not to confirm the registration was supported by two separate lines of reasoning: implied permission and statutory incompatibility. Although the latter was unnecessary for the decision, it was clearly identified as a separate ground of decision (para 74). Lord Carnwath was alone in basing his decision on the implied permission issue alone (para 137), seeing "considerable force" in the contrary reasoning on the latter issue of Richards LJ in the Court of Appeal ([2014] QB 186). No-one has argued that we should regard the majority's reasoning on this issue as other than binding. Accordingly our decision in the present case depends to a large extent on the correct analysis of that reasoning, and its application to the facts of the two cases before us.

44. The operation of Newhaven Harbour had been subject to legislation since at least 1731. At the relevant time the governing statutes included (inter alia) the Newhaven Harbour and Ouse Lower Navigation Act 1847, section 49 of which required the trustees to -

> "maintain and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith …"

and section 33 of the Harbours, Docks and Piers Clauses Act 1847, which provided that, subject to payment of rates -

> "… the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

45. The land owned by the harbour company ("NPP") included an area known as West Beach, described in the judgment as "part of the operational land of the Harbour" (para 8), although not currently used for any harbour purpose. As the judgment explained, at para 9:

> "The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction of the breakwater, accretion of

sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach."

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46. Following an application by the Newhaven Town Council to register the Beach as a town or village green, and the holding of a public inquiry, it was found by the inspector that the beach had been used by residents of the locality for well over 80 years (save during the war periods) for recreation. On that basis the registration authority resolved to register the land. That decision was subject to an application for judicial review, which succeeded before Ouseley J, but was dismissed by the Court of Appeal. Their decision was in turn reversed by the Supreme Court.

The judgment of this court in Newhaven

47. In the part of their judgment directed to the statutory incompatibility issue, Lord Neuberger and Lord Hodge referred to case law on public rights of way, easements and servitudes by way of analogy, adopting a cautious approach (paras 76-90). Nonetheless, they found it did provide guidance. In English law, public rights of way are created by dedication by the owner of the land, and the legal capacity of the landowner to dedicate land for that purpose is a relevant consideration (para 78, referring in particular to *British Transport Commission v Westmorland County Council* [1958] AC 126; see also para 87). Similarly, in the English law of private easements, the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition, which is based on the fiction of a grant by that owner (para 79). The law of Scotland with respect of creation of public rights of way and private servitudes had also developed on the footing that the statutory capacity of a public authority landowner to allow the creation of such rights was a relevant matter. In particular, in *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620 it was held that it was not possible that a public right of way "which it would be ultra vires to grant can be lawfully acquired by user" ([2015] AC 1547, paras 83-84); and in *Ellice's Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 it was held that the commissioners of the canal did not have the power to grant a right of way which was not compatible with the exercise of their statutory duties, and that this also meant that no private right of way or servitude could arise by virtue of user of the land over many years by those claiming such a right of way (paras 85-86). Although the Scots law of prescription had been reformed by statute, Lord Neuberger and Lord Hodge still regarded the historic position as instructive. Their discussion of English law and Scots law in respect of dedication and prescription at paras 76-90 is significant for present purposes, because the reasoning in the cases in those areas regarding statutory incompatibility is general, and is not dependent on the narrower rule of statutory construction that a general provision does not derogate from a special one (generalia specialibus non derogant), to which they also later referred by way of analogy.

48. There follows the critical part of the majority judgment, under the heading "Statutory incompatibility: statutory construction", the material parts of which we should quote in full, at paras 91-96:

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> "91. As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging 'as of right' in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, *McEvoy v Great Northern Railway Co* [1900] 2 IR 325, (Palles CB at pp 334-336), which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.
>
> 92. In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.
>
> 93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: 'does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?' In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not

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enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:

> 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.'

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

94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates: section 33 of the 1847 Clauses Act. NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order.

95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 … - or to encroach on or interfere with the green - section 29 of the Commons Act 1876 … See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann, at para 56.

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

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

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We discuss this reasoning in detail below.

49. Finally in this part of the majority judgment reference is made to cases in which registration of land held by public bodies had been approved by the court: *New Windsor*, the *Trap Grounds* case and *Lewis* [2010] 2 AC 70. The treatment of these cases by Lord Neuberger and Lord Hodge is also significant for present purposes. As regards *New Windsor*, they emphasised that the land was not "acquired and held for a specific statutory purpose", so "[n]o question of statutory incompatibility arose" (para 98). They observed that in the *Trap Grounds* case, though the land was wanted for use as an access road and housing development "there was no suggestion that [the city council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility" (para 99). With respect to *Lewis* they pointed out that "[it] was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green"; hence "[a]gain, there was no question of any statutory incompatibility" (para 100).

50. In relation to each of these cases, Lord Neuberger and Lord Hodge referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. That was the basis on which they distinguished the cases. It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such.

51. Their discussion concludes, at para 101:

> "In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the

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

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Incompatibility - the case for the appellants

52. For LCC Mr Edwards submits that the decision in *Newhaven* is of general application to land held by a statutory authority for statutory purposes, whatever the nature of the Act. He points out that the statutory duties or powers in *Newhaven* were not specific to the beach itself, but rather applied to all of the land acquired and held, from time to time, by NPP and its predecessors for the operation of the Port. NPP had not, within living memory, used the Beach for its statutory harbour purposes. The critical passage in the majority judgment (para 93) refers generally to land -

> "which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes …"

It is not limited to statutory powers directed to a specific location or undertaking. No one has argued that the principle is limited to statutory undertakers, as opposed to public authorities in general. Nor is there any requirement for the land to be in actual use for statutory purposes at the point of registration; it simply has to be held for such purposes. In *Newhaven* the Beach had not been used for harbour purposes nor was there any fixed intention to do so at any particular time in the future (see para 96).

53. In the present case, notwithstanding the inspector's findings, there was, he submits, clear incompatibility with LCC's functions in respect of the land. The effect of registration would be that there accrues a right vested in the inhabitants of Scotforth East Ward to use the land for lawful sports and pastimes of a variety of forms, including walking and dog walking. LCC could not restrict their entry onto the land, including Area B which was at the time of the inspector's decision used as a playing field by the school (see Decision Letter, para 10). Given the statutory safeguarding obligations towards primary school pupils, the use of that area for play could not continue. Any use of the land to provide a new or expanded school would be precluded. In substance, the land would be no longer available in any meaningful sense for use in fulfilment of the LCC's statutory duties as local education authority.

54. Mr Laurence makes similar submissions in respect of the Surrey site, supported in that case by the conclusions of Gilbart J [2017] 4 WLR 130.

Discussion

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55. In our judgment, the appeals should be allowed in both cases. On a true reading of the majority judgment in *Newhaven* on the statutory incompatibility point, the circumstances in each of these cases are such that there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green. This has the result that the provisions of 2006 Act are, as a matter of the construction of that Act, not applicable in relation to it.

56. The principle stated in the key passage of the majority judgment at para 93 is expressed in general terms. The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time-being so held. Although the passage refers to land "acquired by a statutory undertaker", we agree with Mr Edwards that there is no reason in principle to limit it to statutory undertakers as such, nor has that been argued by the respondents. That view is supported also by the fact that the majority felt it necessary to find particular reasons to distinguish cases such as *New Windsor*, the *Trap Grounds* case and *Lewis*, all of which involved local authorities rather than statutory undertakers. Accordingly, the appellants argue with force that the test is directly applicable to the land acquired and held for their respective statutory functions.

57. The reference in para 93 to the manner in which a statutory undertaker acquired the land is significant. Acquisition of land by a statutory undertaker by voluntary agreement will typically be by the exercise of general powers conferred by statute on such an undertaker, where the land is thereafter held pursuant to such powers rather than under specific statutory provisions framed by reference to the land itself (as happened to be a feature of the provisions which were applicable in *Newhaven* itself). That is also true of land acquired by exercise of powers of compulsory purchase. In relation to the latter type of case, the majority said in terms that "the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes" (para 93). On our reading of the majority judgment, it is clear that in relation to both types of case Lord Neuberger and Lord Hodge took the view that an incompatibility between general statutory powers under which land is held by a statutory undertaker (or, we would add, a public authority with powers defined by statute) and the use of such land as a town or village green excludes the operation of the 2006 Act.

58. This interpretation of the judgment is reinforced by the analysis it contains of the English and Scottish cases on dedication and prescription in relation to rights of way, easements and servitudes and the guidance derived from those cases (see paras 76 to 91): para 47 above. It is also reinforced by the way in which Lord Neuberger

and Lord Hodge distinguished the *New Windsor*, *Trap Grounds* and *Lewis* cases: paras 49 and 50 above.

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59. The respondents in these appeals submit that the reasoning of Lord Neuberger and Lord Hodge is more narrowly confined, and depends upon identifying a conflict between a particular regime governing an area of land specified in the statute itself and the general statutory regime in the 2006 Act. In support of this interpretation the respondents point to the highly specific nature of the statutory provisions governing the relevant land in *Newhaven* and to the reference in para 93 to the rule of statutory construction that a general provision does not derogate from a special one (generalia specialibus non derogant).

60. However, for the reasons we have set out above, this interpretation of the judgment does not stand up to detailed analysis. Lord Neuberger and Lord Hodge stated only that "some assistance" could be obtained from consideration of that rule of construction, not that it provided a definitive answer on the issue of statutory incompatibility. In other words, they treated it as a helpful analogy for the purposes of seeking guidance to answer the question they posed in para 93, just as they treated the English and Scottish cases on prescriptive acquisition as helpful. The way in which they posed the relevant question in para 93 shows that their reasoning is not limited in the way contended for by the respondents, as does their discussion of the prescriptive acquisition cases and the local authority cases of *New Windsor*, *Trap Grounds* and *Lewis*.

61. We do not find the construction of the 2006 Act as identified by the wider reasoning of the majority in *Newhaven* surprising. It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect.

62. Lord Hoffmann in *Sunningwell* concluded that it could be inferred that Parliament intended to allow for the creation of new rights pursuant to the 1965 Act by reason of the "public interest in the preservation of open spaces which had for many years been used for recreational purposes", but in doing so he recognised that "[a] balance must be struck" between rights attaching to private property and competing public interests of this character (p 359B-E). It is natural to expect that where a public authority is holding land for public purposes defined by statute which are incompatible with the public interest identified by implication from the 1965 Act, and now the 2006 Act, that balance will be affected. The proper inference as to Parliament's intention is that the general public interest identified by Lord Hoffmann will in such a case be outweighed by the specific public interest which finds expression in the particular statutory powers under which the land is held.

63. As Lord Neuberger and Lord Hodge appreciated, this general point can be made with particular force in relation to land purchased using compulsory purchase powers set out in statute. Such powers are generally only created for use in circumstances where an especially strong public interest is engaged, such as could justify the compulsory acquisition of property belonging to others. It seems highly unlikely that Parliament intended that public interests of such a compelling nature could be defeated by the operation of the general provisions in the 2006 Act.

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64. In construing the 2006 Act it is also significant that it contains no provision pursuant to which a public authority can buy out rights of user of a town or village green arising under that Act in relation to land which it itself owns. That is so however strong the public interest may now be that it should use the land for public purposes. Since in such a case the public authority already owns the land, it cannot use any power of compulsory purchase to eradicate inconsistent rights and give effect to the public interest, as would be possible if the land was owned by a third party. Although section 16 of the 2006 Act makes specific provision for "deregistration" of a green on application to the "appropriate national authority", in relation to land which is more than 200 square metres in area the application must include a proposal to provide suitable replacement land: subsections (2), (3) and (5). This procedure is available to any owner of registered land, public or private; it is not designed to give effect to the public interest reflected in specific statutory provisions under which the land is held. Often it will be impossible in practice for a public authority to make a proposal to provide replacement land as required to bring section 16 into operation. Again, it would be surprising if Parliament had intended to create the possibility that the 2006 Act should in this way be capable of frustrating important public interests expressed in the statutory powers under which land is held by a public authority, when nothing was said about that in the 2006 Act.

65. In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in *Newhaven*, LCC and NHS Property Services can show that there is statutory incompatibility in each of their respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see *Newhaven*, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.

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66. Similar points apply in the Surrey case. Although the non-statutory inspector found against the appellant on the statutory incompatibility issue, the registration authority failed to consider it. Gilbart J was satisfied that, within the statutory regime applicable in that case, there was no feasible use for health related purposes, and indeed none had been suggested. The Court of Appeal took a different view, but largely, as we understand it, on the basis that recreational use of the subject land would not inhibit the ability of NHS Property Services to carry out their functions on other land. We consider that Gilbart J was correct in his assessment on this point. The issue of incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purposes for which the land is held, not by reference to how the land happens to be being used at any particular point in time (again, see *Newhaven*, para 96).

67. As Lady Arden and Lord Wilson take a different view regarding the effect of the majority judgment in *Newhaven*, we should briefly explain why, with respect, we are not persuaded by their judgments. We are all in agreement that the outcome of these appeals turns upon the proper interpretation of the majority judgment in *Newhaven*. We cannot accept their interpretation of that judgment.

68. In our view, although the case might have been decided on narrower grounds, Lord Neuberger and Lord Hodge deliberately posed the relevant question in para 93 in wide terms, specifically in order to state the issue as one of statutory incompatibility as a matter of principle, having regard to the proper interpretation of the relevant statute pursuant to which the land in question is held. That is why the heading for the relevant section of their judgment is "Statutory incompatibility: statutory construction". They say in terms in para 93, "The question of incompatibility is one of statutory construction." Nowhere do they say it is a matter of statutory construction *and* an evaluation of the facts regarding the use to which the land has been put. According to their judgment, the issue of incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the land is held with the rights claimed pursuant to the 2006 Act, not by having regard to the actual use to which the authority had put the land thus far or is proposing to put it in future. We consider that this emerges from the critical para 93, and also from the paragraphs which follow in their judgment.

69. Thus, in para 94 they identify the relevant incompatibility as that between the 2006 Act and "the statutory regime which confers harbour powers on NPP to operate a working harbour". In para 96, it is to that statutory incompatibility that they refer, not to incompatibility with any use to which NPP had as yet put the land in question or might in fact put it in the foreseeable future. As a matter of fact, the Beach had not been used for the applicable statutory purposes. Further, in our opinion, by stating in para 96 that it was not necessary for the parties to lead evidence as to NPP's plans for the future of the harbour "in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and

the use of the Harbour for the statutory purposes to which we have referred", Lord Neuberger and Lord Hodge were seeking to emphasise, contrary to Lady Arden's and Lord Wilson's interpretation of their judgment, that what matters for statutory incompatibility to exist so as to prevent the application of the 2006 Act is a comparison with the relevant statutory powers under which the land is held, not any factual assessment of how the public authority might in fact be using or proposing to use the land.

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70. The same point can be made about para 97, where Lord Neuberger and Lord Hodge said that it was unnecessary to consider evidence about actual proposed use of the land on the facts, since they were able to determine by looking at the statutory powers "that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour [ie to hold under the statutory powers referred to in para 94], and the registration of the Beach as a town or village green". Their discussion at paras 98 to 100 of *New Windsor*, the *Trap Grounds* case and *Lewis* supports the same conclusion. In each of those cases the relevant land had been held for a very long period without actually being put to use which was inconsistent on the facts with use as a town or village green and without any proposal that it should be put to such use. The implication from what Lord Neuberger and Lord Hodge say about them is that if it had been shown that the land was held for specific statutory purposes which were incompatible with registration under the 2006 Act, that would have constituted statutory incompatibility which would have prevented registration. Their treatment of these cases cannot be reconciled with Lady Arden's and Lord Wilson's proposed interpretation of their judgment. We do not think that para 101 can be reconciled with that proposed interpretation either. In that paragraph Lord Neuberger and Lord Hodge contrast a case in which a public body might have statutory purposes to which it could in future appropriate the land (but has not yet done so) with the situation in *Newhaven* itself, where in the relevant period NPP held the Beach "for the statutory harbour purposes and as part of a working harbour" (ie under the statutory regime referred to in para 94). In our view they were there emphasising that what matters for a statutory incompatibility defence to arise is that the land in question should be held pursuant to statutory powers which are incompatible with registration as a town or village green. Nor, with respect, do we think that Lady Arden and Lord Wilson have offered any good answer to the points we have made at paras 61 to 64 above.

71. We also consider that the reading of *Newhaven* proposed by Lady Arden and Lord Wilson would undermine the very clear test which Lord Neuberger and Lord Hodge plainly intended to state. Instead of focusing on the question of the incompatibility of the statutory powers under which the relevant land is held, Lady Arden and Lord Wilson would introduce an additional factual inquiry into the actual use to which the authority is putting the land or proposes to put the land in the foreseeable future. Thus, Lady Arden and Lord Wilson would adopt from the English case of *Westmorland* [1958] AC 126 a test of what use could reasonably be foreseen for the land in question, even though Lord Neuberger and Lord Hodge say

nothing to support that in the relevant part of their judgment. They refer to both English and Scottish cases on prescriptive acquisition as being relevant to their assessment of the correct approach to be adopted in interpreting the 2006 Act, and in each case only by way of broad analogy, as they explain at para 91. The Scottish cases they cite do not employ any such test as in the *Westmorland* case and are consistent with the clear principled test, based on statutory construction, which we understand Lord Neuberger and Lord Hodge to have laid down.

Future use

72. Finally, for completeness, we should mention briefly an issue which does not strictly arise within the scope of the appeals, but has been the subject of some discussion. That is the question whether, notwithstanding registration, there might be scope for use by the appellants of the land for their statutory purposes. This arises from a suggestion put forward in Lord Carnwath's minority judgment in *Newhaven*. He noted that in the *Trap Grounds* case it had not been necessary to consider the potential conflict between the general village green statutes and more specific statutory regimes, such as under the Harbours Acts. He said, at para 139:

> "It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour."

73. Mr Edwards, supported by Mr Laurence, seeks to build on that tentative suggestion, taken with the principle of "equivalence" adopted in the *Lewis* case [2010] 2 AC 70. As he submits, the Supreme Court accepted that there should be equivalence between the use of the land for lawful sports and pastimes in the qualifying period (in that case subject to concurrent use as a golf course) and the extent of rights vested in local inhabitants after registration. That approach was taken a stage further by the Court of Appeal in *TW Logistics Ltd v Essex County Council* [2019] Ch 243, holding that the 19th century statutes, as applied to a registered modern green, are not to be construed as interfering with the rights of the landowner to continue pre-existing uses so far as not inconsistent with the uses which led to registration (per Lewison LJ, paras 63-82).

74. This is not a suitable occasion to examine the scope of the principle of equivalence, so far as it can be relied on to protect existing uses by the landowner. *Lewis* was a somewhat special case. Lord Brown was able to draw on "[his] own experience both as a golfer and a walker for over six decades" (para 106) to attest to the feasibility of an approach based on "give and take" in that particular context. The same approach may not be so easy to apply in other contexts, and as applied to

other forms of competing use. Permission has been granted for an appeal to this court in *TW Logistics*. That may, if the appeal proceeds, provide an opportunity for further consideration of this difficult issue. In any event, those cases were concerned with actual uses by the owners, not with potential uses for statutory purposes for which the land is held, as in the present cases.

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75. In view of our conclusion that the land in each appeal should not have been found to be capable of being registered under the Act, the issue of what uses might have been open to a statutory owner if it were so registered does not arise, and we prefer to say no more about it on this occasion.

Conclusion

76. For these reasons we would allow the appeals in both cases.

LADY ARDEN: (partly dissenting)

Identifying the difference of view

77. My views differ from those of Lord Carnwath and Lord Sales on these appeals in an important respect. My conclusion is that the question of incompatibility between two sets of statutory provisions (on this appeal, the provisions of the Commons Act 2006 ("the 2006 Act") and the statute authorising the holding of land by the public authority in question) involves an assessment of the facts as well as a proposition of law. The fact that a public authority holds land for statutory purposes which are incompatible with the use of the land as a town or village green ("TVG"), is not of itself sufficient to make the land incapable of being registered under the 2006 Act as a TVG. It must be shown that the land is in fact also being used pursuant to those powers, or that it is reasonably foreseeable that it will be used pursuant to those powers, in a manner inconsistent with the public's rights on registration as a TVG. That requirement in my judgment follows from *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547. References in this judgment to public authorities exclude public authorities which are subject to a statutory duty to carry out a particular function on specified land, identified by statute, where such land is sought to be registered as a TVG. Such authorities are outside the scope of this judgment.

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Identifying the correct approach to questions of statutory inconsistency

78. As a matter of constitutional principle, courts must approach the statute book on the basis that it forms a coherent whole. That means that, when interpreting legislation, courts must, in the absence of an indication of some other intention by Parliament, strive to ensure that the provisions work together and apply so far as possible to their fullest extent, such extent being judged according to the intention of Parliament demonstrated principally in the words used. (We have not been shown any other admissible evidence as to Parliament's intention, such as ministerial statements in Hansard.) The courts cannot simply decline to enforce parts of a statute because there may be a conflict with some other statute. It has to be shown that the part sought to be disapplied is irreconcilable with another part of it. If the two can stand together there is no statutory irreconcilability or inconsistency: compare, for example, *The Tabernacle Permanent Building Society v Knight* [1892] AC 298. One statute cannot be said to be incompatible with another if the two statutes can properly be read together. So, the test is: can the two statutes in question properly be interpreted so that they stand together and each has the fullest operation in the sense given above?

79. In *Newhaven*, as I shall demonstrate by reference to the majority judgment in that case in the next section of this judgment, the point was that there was a risk that the statutory undertaking's working harbour would be stymied in its operations if the Beach was held to be a TVG. It was not a case where a statutory authority has acquired land for a statutory purpose but, at the time of the proposed registration as a TVG, it is not likely that the land will be used for that purpose in the reasonably foreseeable future.

Newhaven and the limits of this Court's decision in that case

80. The judgments in *Newhaven* in my judgment should be approached on the basis that they are consistent with the principles explained in para 78 above, even though the members of this Court in that case did not articulate them. This court should read their decision, if this can properly be done as a matter of statutory interpretation, as leading to the result that where public authority ownership of land and registration as a TVG can co-exist, that course will be available. As a matter again of constitutional principle, land should not be relieved of the burden of an Act of Parliament having (so far as relevant) unqualified application if there is an alternative, properly available interpretation which will lead to the two enactments in question standing together.

81. On timing, the question whether there is any conflict between public authority powers and TVG legislation must be determined as at the date when the application for registration is made. At that point in time, the public authority may

be holding land it has acquired under statutory powers for a particular purpose for which it is not yet required. It is not required to apply the land for that purpose and it may decide not to do so and for example to sell the land or use it for some other purpose. Moreover, even while holding the land for a particular purpose, the local authority may be using it for another purpose because it is not required for the statutory purpose for which it is appropriated at that point in time (Local Government Act 1972, section 120(2)).

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82. The factual scenario in *Newhaven* was different: the harbour company was already in operation and the beach was liable to be involved in its then current trading operations. The case shows that incompatibility is not a purely legal matter depending on the existence of statutory powers which if exercised would be inconsistent with use of the land as a TVG. It is necessary on the facts to be satisfied that that is likely to occur after registration. It requires a real-world assessment of the situation. The court is not precluded from looking at the facts subsequent to the acquisition of the land any more than the determination as to the reasonableness of a landlord's refusal to give a consent under a lease is restricted to the facts known to the parties at the date of the lease (see *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180).

Interpreting the decision of this Court in Newhaven

83. In the *Newhaven* case, the harbour company ("NPP") had a statutory duty to maintain a harbour. The dispute concerned a tidal beach in one part of the harbour which as it happened was no longer operational. The Beach had been used for the past 80 years or so by members of the locality. The issue with which these appeals are concerned is the issue in that case as to whether the Beach could be registered as a TVG. This court held that the land in issue, namely the Beach, could not be registered as a TVG.

84. In *Newhaven*, Lord Neuberger and Lord Hodge jointly gave the leading judgment. The other members of the Supreme Court agreed with them. Lord Carnwath also wrote a concurring judgment. On these appeals, Lord Carnwath and Lord Sales examine the leading judgment in detail. They conclude that Lord Neuberger and Lord Hodge held that, where a person applies to register as a TVG land which is held for statutory purposes which would be inconsistent with the land also being TVG, the land is not capable of being so registered, and that the question is purely one of statutory construction. Thus, Lord Neuberger and Lord Hodge formulated the relevant question as, at para 93:

> "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is

> held for statutory purposes that are inconsistent with its registration as a town or village green?"

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85. Having stated that question, Lord Neuberger and Lord Hodge immediately answered it by the following sentence: "In our view it does not." In that sentence, the word "it", as I read it, refers to section 15 itself.

86. The next sentence in the judgment of Lord Neuberger and Lord Hodge states (also at para 93):

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

87. That sentence makes it clear that Lord Neuberger and Lord Hodge regarded "use" as a critical issue. That clearly involves fact. Moreover, the expression "continuing use" also makes it clear that they regarded the operations of NPP as constituting use which was being perpetuated and that that was so even though the tidal beach which was in issue was in a part of the harbour which was not itself being used.

88. It is further clear from that sentence, in my judgment, that the Supreme Court was not considering the question what would happen if the relevant use had never started or if the relevant land had become surplus to the obligation or power to carry out any particular activity which had been imposed by Parliament. We have not been shown any statutory requirement that a public authority should regularly consider the need for any land and if thought fit dispose of land which is not required for some purpose for which it was acquired, so it may end up holding land for which it has no further need.

89. The local authority could voluntarily appropriate the land to some other purpose but, if it fails to reconsider the use for which it acquired land, or appropriates it to some other use, it is likely that the only basis on which the local authority's decision or omission to act could be challenged would be on the basis that its decision attained the standard of irrationality, which is a high standard for an applicant to have to meet. Under the judgment of Lord Carnwath and Lord Sales, that land would remain immune from the accrual of rights leading to registration as a TVG even though there would not in fact be any irreconcilability between registration and the statutory power for which the land was conferred. It is not clear

what on this basis would happen if the local authority accepts that the original purpose is spent and after the application is made decides to appropriate the land to some other statutory purpose.

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90. Furthermore, in *Newhaven*, para 96, Lord Neuberger and Lord Hodge held:

> "96. In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

91. It follows that they regarded it as important that the harbour in question was a "working harbour" and that there was a risk of a clash between the registration of the Beach and the use of the harbour for the statutory purposes. They considered that registration would inhibit the use of the adjoining quay to moor vessels. It would prevent the harbour authority from dredging the harbour in a way which affected the enjoyment of the Beach and restrict its ability to alter the existing breakwater. So, I deduce from that paragraph that Lord Neuberger and Lord Hodge also regarded it as important that there was factual evidence establishing the continuing use and the impact of registration on that use. There had to be real, not theoretical, incompatibility.

92. Lord Neuberger and Lord Hodge continue at the end of that paragraph to observe:

> "All this is apparent without the leading of further evidence."

93. The word "further" confirms that the preceding analysis involved a consideration of the evidence on the ground. In fact the further evidence appears to have been evidence as to plans to upgrade the harbour and use it as a container terminal: see the judgment of Ouseley J in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2012] 3 WLR 709, para 127.

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94. In para 97, Lord Neuberger and Lord Hodge continue by summarising further matters on which the harbour company relied, but it was not necessary in the light of the conclusion in para 96 to consider those matters. It is to be noted that in para 97, Lord Neuberger and Lord Hodge refer to an incompatibility between the proposed TVG registration and the statutory functions of NPP, which they add:

> "continues to operate as a working harbour"

This is an express reference to the state of fact. It would clearly have been material if the harbour company held the land but had ceased its statutory functions.

95. In paras 98 to 101, Lord Neuberger and Lord Hodge refer to previous leading cases to show that the question of statutory incompatibility had not previously had to be considered. But, importantly for my interpretation, they conclude that (at para 100):

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

So, in a case concerned with future use, the court must consider if the statutory purpose would be "likely" to be impeded, not likely to be impeded if invoked. Lord Neuberger and Lord Hodge clearly envisaged that there would have to be a factual inquiry as to future use and that it would have to be shown that TVG registration would be likely to impede the exercise of those powers. Lack of impediment can logically be shown either by showing that the local authority has acquired the land for purposes (eg recreational purposes) which are not inconsistent with registration as a TVG, or by showing that there is no realistic likelihood of the land being used for the purposes for which it was acquired.

96. In addition, at para 101 of their judgment, Lord Neuberger and Lord Hodge held:

> "In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user

> of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

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97. In that paragraph, Lord Neuberger and Lord Hodge addressed the question of a future development of the land. The mere power to undertake such development would not itself be sufficient to create a statutory incompatibility. They contrasted that with the position in the *Newhaven* case. Lord Neuberger and Lord Hodge again referred to the evidence that the tidal beach was part of the working harbour.

98. Paragraph 102 dealt with the separate issue of user as of right and para 103 was the summary of the conclusion, which does not take the matter further.

99. For the avoidance of doubt, I agree that this court should apply statutory incompatibility, the concept sought to be employed in *Newhaven*, to determine the question of inconsistency between the provisions of the 2006 Act enabling registration of land in issue on these appeals as TVGs and the statutory provisions, also conferred by public general Acts of Parliament, empowering the acquisition and holding of land by the public authorities in both appeals. However, in my judgment, that concept is as a matter of constitutional principle to be interpreted as I have explained in para 78 above.

Determination of incompatibility where the issue arises from a future use

100. The use relied on by the local authority in the Lancashire case in relation to Areas A and B is, as in *Newhaven*, a current use, and my analysis of *Newhaven* detailed above does not lead to any different conclusion in relation to those Areas from that reached by Lord Carnwath and Lord Sales. I would accept the submission of Mr Douglas Edwards QC, for Lancashire County Council, that in practice the land could not be used by the primary school currently using it when there was unrestricted public access as this would not be consistent with the school's safeguarding obligations: this may be inferred from the fact that the site is currently fenced. Schools are responsible for creating and maintaining a safe environment for their pupils. Mr Edwards' submission on this point was not challenged on these appeals.

101. However, as I shall next explain, where the use is only a use which may occur in the future, my analysis makes it necessary to answer further questions before any conclusion about statutory incompatibility can be reached.

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102. This has a practical impact in relation to Areas C and D in the Lancashire case. Those Areas have never been used for the statutory purpose of education for which they were acquired and are now held.

103. That raises the question, what test should apply if the case is only one of possible future use? Must it be shown that it is simply possible that the land may be used for the statutory purpose or must it be shown that it is reasonably likely or foreseeable that it will be so used? These questions did not directly arise in *Newhaven*.

104. In answering these questions, I have found assistance in the decision of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126, in which a railway company contended that it would have been inconsistent with the statutory powers conferred on it for the public to have a right of way over a bridge spanning the railway line (originally built for private benefit) and that accordingly its predecessor (another statutory company) could not have dedicated it to the public. In *Newhaven*, Lord Neuberger and Lord Hodge cited the judgment of Lord Keith of Avonholm in this case as authority for the proposition that incompatibility with an Act of Parliament is a question of fact, at para 87:

> "In *British Transport Commission* [1958] AC 126, 164-165 Lord Keith of Avonholm commented on Lord Kinnear's opinion in *Magistrates of Edinburgh*, suggesting that it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined at p 166, that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility."

105. The other members of the House also treated it as a question of fact (see Viscount Simonds at p 144, Lord Morton of Henryton at p 149, Lord Radcliffe at p 156, Lord Cohen at p 163 and Lord Keith at p 166). Moreover, they held that, to show compatibility, it was not necessary to show that there were no circumstances in which a conflict could arise. That would make it impossible for members of the public ever to acquire a public right of way over land belonging to the railway company. The House also rejected the argument that a statutory company could not grant an easement over a footpath over its railway. To hold otherwise "would be a grave impediment to public amenity" (per Lord Radcliffe at p 153). It was unlikely on the facts that the railway company would ever need to pull the bridge down.

106. The relevant question was whether a conflict, or incompatibility, was reasonably foreseeable. Thus, Viscount Simonds (at p 144), Lord Morton (at p 149)

and Lord Keith (see p 166) rejected the following test: was it *possible* that land would be used in future for a certain purpose? They considered that the normal statutory burden should apply and be discharged, namely that it should be shown that the use was reasonably likely to occur.

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107. The House considered the question on a current basis and did not decide whether the critical time was the date of dedication or some other date (see for example pp 144-145). At all events it did not seek to determine the question as at the date of the incorporation of the statutory company when its statutory powers were conferred.

108. In my judgment, the test of reasonable foreseeability is the correct test also to apply in this context, ie when asking whether there is incompatibility between registration of land as a TVG and the statutory powers of a public authority in relation to the same land where the relevant use that the public authority might make of the land under those powers is a potential future use which has not yet started.

109. It is said by Lord Carnwath and Lord Sales that this test is not clear. It may not be easy to apply on the facts but that is necessarily so if the law applies a solution which is fact-dependent rather than drawing a bright line as the majority does. Lord Neuberger and Lord Hodge refer to the *Westmorland* case at two points in their judgment. In the light of their conclusion that the evidence as to current use was sufficient it was not necessary for them to consider it in any further detail, but they would not have cited it if they did not approve of its approach. If I am right there is no question of the use of land being stymied by the 2006 Act (cf para 61 above). Circumstances may have moved on and the public authority may no longer require the land it is holding for any particular statutory purpose.

Application of the principles to the facts of the appeals

(1) The Lancashire appeal

110. The issue of future use of the land arises on the Lancashire appeal in relation to Areas C and D. The local authority in the Lancashire appeal did not adduce evidence that it was reasonably likely that these Areas would be used for educational purposes in the future. There had in the past been a plan to relocate a school on this area but that was not proceeded with and there was no substitute. Moreover, those Areas had never been used for educational purposes. Accordingly, as I see it, those plots should have been registered as a village green. The only objection to doing so was one of statutory incompatibility and as I see it, that fails on the facts.

111. The position is different in relation to Areas A and B which are currently used for educational purposes. Importantly, as I read the facts, the sites cannot be registered as TVGs and be school playgrounds at the same time for the reason that this would be inconsistent with the school's safeguarding duty. The school has an obligation to provide outdoor space as a playground under regulation 10 of the School Premises (England) Regulations 2012, and that is its current use. The inspector did not reach any conclusion on the question of the compatibility in fact of the current use of Areas A and B with their registration as TVGs, and she expressly left open the door to further evidence on incompatibility.

(2) The Surrey appeal

112. In the Surrey appeal, the result is different because the site in issue lies immediately next to the hospital. On the basis of my judgment, the correct legal test applying to future use was not applied. There have been no findings of fact as to whether it is reasonably foreseeable that even now the land will be used for the statutory purposes for which it is currently held. In those circumstances, in my judgment, this matter should be remitted to the registration authority for a decision on that issue.

Restrictions on TVG registration in the Growth and Infrastructure Act 2013

113. Lord Carnwath and Lord Sales begin their judgment with an analysis of the development of the law on TVGs since the report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd 462), chaired by Sir Ivor Jennings QC, which led to the Commons Registration Act 1965. Undoubtedly that Act and its successor, the 2006 Act, have led to the registration of TVGs at a more significant level than can have been envisaged by the Royal Commission.

114. Accordingly, it is now an inescapable fact that the actual use of the TVG legislation has, in the light of practical experience and the needs and expectations of local communities up and down the country, eclipsed the original conception of a more limited role for TVG registration. The clock cannot be turned back.

115. Moreover, Parliament has essentially given its approval to that use in later legislation. The Growth and Infrastructure Act 2013 ("the 2013 Act") introduced a package of measures designed to restore the balance between the public and landowners but retaining the same basic system of registration.

116. The three main changes brought about by the 2013 Act in this connection can be summarised, and it will be seen that they were substantial:

(1) The period within which a person may apply to register land as a TVG after the landowner has terminated the use by members of the public without permission has been reduced from three years to one year (2006 Act, section 15(3A) as amended).

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(2) The 2013 Act has inserted a new section 15C into the 2006 Act terminating the public's right to apply to register land as a town or village green after any one of a range of "trigger events" occurs. These include an application for planning permission. The right to apply for registration as a TVG will arise again if a "terminating event" occurs, namely (in the case of an application for planning permission) the planning application is withdrawn, is refused or expires, or the local planning authority ("LPA") does not determine it. (Where the planning application is for a project of public importance under section 293A of the Town and Country Planning Act 1990, the right to make an application to register as a TVG does not arise where the LPA declines to determine it.)

(3) Landowners have a new right to deposit statements with the appropriate registration authority with respect to any land and this will have the effect of terminating any existing or accruing rights to register that land as a TVG (2006 Act, section 15A, as amended). Landowners already had a right to apply to deregister land as a TVG, but comparable land must be offered in exchange (2006 Act, section 16).

117. Lord Carnwath and Lord Sales are right to say that these changes are not directly relevant, and there is no information about any fall in the number of TVG registrations. However, these changes are important. It is open to public authorities to take advantage of these changes (and this is my core answer to the points that Lord Carnwath and Lord Sales make in para 64 above). They show, among other matters, that Parliament did not consider that there should be some special exemption applying in respect of all publicly-held land. That may be a recognition of the fact that public bodies may be holding land which is surplus to their statutory requirements. While many statutes confer a power on statutory bodies to acquire and hold land, we have not been shown any provision requiring the body on which the power is conferred to sell it when it becomes clear that the land is not required or is no longer required for the purpose for which it was acquired. If a public authority took no action to dispose of land it did not need, it might well be difficult to obtain judicial review of its action as irrationality may have to be shown.

118. Moreover, Parliament took no steps in the 2013 Act to revise the conditions for registration for TVGs.

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119. Since circulating the first draft of my judgment I have had the benefit of reading the judgment of Lord Wilson. He agrees with the approach of the Court of Appeal [2018] 2 P & CR 15. I have great admiration for his judgment and that of Lindblom LJ, with which Jackson and Thirlwall LJJ agreed. In particular, I agree with the three general points made by Lindblom LJ in para 36 of his judgment. In a sense my approach might be described as a halfway house between their judgments and that of Lord Carnwath and Lord Sales. The ten judges who have considered the issues on these appeals have unfortunately been very divided. For my own part, I do not consider that the view of the Court of Appeal addresses the effect on incompatibility of the possibility of future use of the sites sought to be registered as TVGs, or the intention of Parliament in such cases. However, if I am wrong on the approach I have taken, I would adopt that of Lord Wilson and the Court of Appeal in preference to that of Lord Carnwath and Lord Sales. Respectfully, their approach results in introducing into the legislation a blanket exemption for public authorities which Parliament has not itself expressly given. Parliament has instead provided all landowners with other measures which they can use to protect their position for the future.

120. Limiting the issue of incompatibility to a "desktop" exercise of considering the statutory powers of the landowner, without reference to the facts on the ground, runs the risk, to borrow Lord Radcliffe's words in *British Transport Commission* at p 153, of "a grave impediment to public amenity." There will potentially be a loss of access by the public to land which they have used for very many years.

Conclusion

121. My approach to statutory incompatibility in my judgment strikes a fairer balance between the public interest in the use of land by the public authority for the appropriated statutory purpose and that of the public who are intended by the 2006 Act to have a right of access to recreational spaces than the approach of Lord Carnwath and Lord Sales. That is my principal answer to the points which they make in paras 61 to 64 and 67 to 71 above and my other responses to those paragraphs appear from this judgment. My judgment does not as suggested in any way involve frustrating the intention of Parliament since the statutory powers under which the public authority holds the land will prevail if it is shown that there is a current use of the land in exercise of those powers, or that it is reasonably foreseeable that such use will occur (se para 77 above).

122. Accordingly, I would hold that the appeal in Lancashire should be allowed in part and that in Surrey the appeal should also be allowed on the basis that the matter

remitted to the registration authority for a determination of the application in accordance with this judgment.

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LORD WILSON: (dissenting)

123. I would have dismissed both appeals.

124. Although I hold each of my three colleagues in the majority in the highest esteem, I am driven to suggest that today they make a substantial inroad into the ostensible reach of a statutory provision with inadequate justification.

125. It is agreed that, in their capacity as education authorities, local authorities, such as the appellant in the Lancashire case, can hold land only for specified statutory purposes referable to education; that health authorities, such as the appellant in the Surrey case, can hold land only for specified statutory purposes referable to health; and that, for example, in their capacity as housing authorities, local authorities can hold land only for specified statutory purposes referable to housing.

126. If public authorities which hold land for specified statutory purposes are to be immune from any registration of it as a green which would be theoretically incompatible with their purposes, the reach of section 15 of the Commons Act 2006 Act is substantially reduced. One would expect that, had such been its intention, Parliament would have so provided within the section. In the absence of any such provision, whence does justification for it come?

127. It comes, according to today's ruling, from the decision of this court in the *Newhaven* case, cited in para 1 above, from which the court would in any event be able to depart if necessary. In my view interpretation of that decision by today's majority is controversial. The claim in para 11 above that their interpretation represents no more than consolidation of the law is unfortunately not one to which I can subscribe.

128. The decision in the *Newhaven* case wrought an exception to the availability of registration under section 15. It is always dangerous to interpret an exception too widely lest it becomes in effect the rule and the rule becomes in effect the exception.

129. In the *Newhaven* case statutes had cast upon the harbour authority, as the owner/operator of the port, specific *duties* in relation to *that particular harbour*; and the operational land of that harbour included that particular beach. An Act of 1847

obliged the authority to maintain and support that harbour. An Act of 1878 obliged it to keep that harbour open to all for the shipping and unshipping of goods and the embarking and landing of passengers. Incidental to these obligations were statutory powers, including one in an instrument of 1991 to dredge the foreshore of that harbour. Were it to exercise its power to dredge the area of the foreshore to the east of the breakwater, the authority would destroy the beach.

130. It is therefore no surprise to read within the joint judgment of Lord Neuberger and Lord Hodge emphasis on the statutory duties cast upon the authority in relation to that particular harbour; no surprise that, in the opening paragraph they described the relevant point of principle as "the interrelationship of the statutory law relating to village greens and other *duties* imposed by statute" (emphasis supplied); and no surprise that, at the outset of the crucial paragraph (namely para 93, set out in para 48 above), in which they set out their reason for allowing the appeal on the relevant point, they stated:

> "The question of incompatibility is one of statutory construction."

131. What did Lord Neuberger and Lord Hodge mean by "statutory construction"? They meant conflict between two statutory regimes. They explained in the same paragraph that, where such conflict existed,

> "… some assistance may be obtained from the rule that a general provision does not derogate from a special one …, which is set out in … *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:
>
> > 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one.'"

In the next paragraph they proceeded to explain that the specific duties conferred by statutes on the authority in relation to that harbour were incompatible with the general provision in the 2006 Act which, on the face of it, permitted registration of the beach as a green and that therefore the general provision had to give way.

132. By contrast, statutory provisions which confer power to acquire and hold land, not there identified, for educational and health purposes, such as are in play in the present appeals, cannot be said to be incompatible with the general provision in the 2006 Act which, on the face of it, permits registration of the respective parcels of land as greens.

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133. No reason for the disapplication of section 15 of the 2006 Act is advanced other than the alleged effect of the decision in the *Newhaven* case. It is in the light of the above circumstances that I would have dismissed the appeals.

134. Let me, however, suppose that my understanding of the decision in the *Newhaven* case is flawed; and that, had I better understood it, its reasoning would extend to the facts in these appeals.

135. Even in those circumstances the majority falls, so I venture to suggest, into error.

136. In *The King v The Inhabitants of Leake* (1833) 5 B and Ad 469 the issue was whether villagers in the fenlands were obliged to repair a road. If it had been dedicated as a public highway, they were obliged to do so. The land on which the road had been constructed was owned by commissioners who had bought it pursuant to statutory powers to drain specified fens and to keep them drained. They had constructed drains on it and, with the excavated earth, had built a wide bank which the villagers had used as a highway for more than 20 years. In the Court of King's Bench the villagers contended that any dedication by the commissioners of the road as a public highway would have been inconsistent with their powers. On behalf of the majority Parke J, later Lord Wensleydale, made clear that the contention should be addressed by means of a practical inquiry on the ground. He said at p 480:

> "The question then is reduced to this, whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?"

The answer was no.

137. The *Leake* case demonstrates that for almost 200 years the law of England and Wales in relation to the capacity of a public authority to dedicate its land as a public highway, or indeed as a public footpath, has been to assess its alleged incompatibility with the statutory purposes for which the land is held on a practical, rather than a theoretical, basis.

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138. Such is made clear in the Opinions of the appellate committee of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126, cited in para 71 above. A railway company was authorised by statute to buy land in Kendal for the purposes of operating a railway and to build bridges across it where necessary. On one of its bridges it built a footpath, which the public had used for more than 20 years. The question was whether, in the light of the limited statutory purposes for which it could hold land, the company could have dedicated the footpath as a public highway. Applying the *Leake* case, the appellate committee held that the answer was to be found by determining whether the use of the footpath by the public was incompatible with the statutory purposes; that incompatibility was a question of fact (p 143); that the test was pragmatic (p 152); that the question was not whether it was conceivable but whether it was reasonably foreseeable that the public use of the footpath would interfere with the company's use of its land in the exercise of its powers for the statutory purposes (p 144); that the burden lay on the company to establish that it was reasonably foreseeable (p 166); and that, by reference to the case stated by the local justices, the company failed to discharge that burden.

139. In para 78 of their judgment in the *Newhaven* case Lord Neuberger and Lord Hodge explained the decision in the *Westmorland* case. In paras 77 and 91 they stressed that, like other decisions which they examined and which related to the acquisition of prescriptive rights under English and Scots law, the decision applied only by analogy to the statutory registration of a green on land owned pursuant to statutory purposes.

140. Nevertheless, in a case in which the objection to registration as a green is cast as incompatibility with statutory purposes, there is in my view every reason to assess incompatibility in accordance with the approach adopted in the *Leake* case and indorsed in the *Westmorland* case.

141. I am convinced that in the *Newhaven* case such was also the view of Lord Neuberger and Lord Hodge, and indeed of Lady Hale and Lord Sumption who agreed with them. I refer to four passages in the joint judgment.

142. First, from para 91:

> "It is … significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes *and continued to carry out those purposes*, where the user founded on would be incompatible with those purposes." (Emphasis supplied)

143. Second, from the crucial para 93:

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

144. Third, the whole of para 96:

> "In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to [the authority's] plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict [the authority's] ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

145. And fourth, from para 101:

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

146. It thus seems clear from the *Newhaven* case that registration of the beach as a green was there precluded as incompatible with the existing use of the land as a working harbour; and that, in the absence of existing use of the land, the public authority needs to adduce evidence. What evidence? Evidence which makes it reasonably foreseeable that public use of the land as a green would in practice interfere with a proposed exercise of the authority's powers in relation to the land for the statutory purposes.

147. It follows that I respectfully disagree with the suggestion in paras 65 and 66 of the judgment of Lord Carnwath and Lord Sales that incompatibility with statutory purposes should be assessed as a theoretical exercise rather than by means of a practical inquiry into interference with the authority's existing or proposed future use of the land.

148. Adopting what I believe to be the correct, practical, approach to the assessment of incompatibility in relation to the present appeals, I agree with the Court of Appeal that neither the education authority nor the health authority has established that public use of its land as a registered green would be likely to be incompatible with its use of it pursuant to its statutory powers. In the Lancashire case the Inspector conducted the requisite practical assessment, which led her to reject the alleged incompatibility; and, like the Court of Appeal, Ouseley J in the Administrative Court found no fault with her reasoning. I discern no ground upon which this court might have concluded otherwise. In the Surrey case the Inspector, while recommending refusal of the application for a different reason later shown to be invalid, also rejected the alleged incompatibility on apparently practical grounds; and the error of law which Gilbart J in the Administrative Court perceived him to have made in assessing it practically rather than as a matter of statutory construction was in my view correctly held by the Court of Appeal to have been no error at all.

149. It was with complete passivity that, for no less than 20 years, these two public authorities contemplated the recreational use of their land on the part of the public. Their simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: *Winterburn v Bennett* [2016] EWCA Civ 482, [2017] 1 WLR 646. In such circumstances it is hardly surprising that they both failed to establish its practical incompatibility with their own proposed use of it.

PLANNING AND REGULATORY COMMITTEE
DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX G 2019 SUPREME COURT ORDER

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IN THE SUPREME COURT OF THE UNITED KINGDOM

11 December 2019

Before:

Lord Wilson
Lord Carnwath
Lady Black
Lady Arden
Lord Sales

R (on the application of Lancashire County Council) (Appellant) *v* Secretary of State for the Environment, Food and Rural Affairs and another (Respondents)

R (on the application of NHS Property Services Ltd) (Appellant) *v* Surrey County Council and another (Respondents)

AFTER HEARING Counsel for the Appellants and Counsel for the Respondents on 15 and 16 July 2019

THE COURT ORDERED that

In R *(on the application of Lancashire County Council) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs and another (Respondents)*

1) The appeal be allowed and the orders made by the Court of Appeal on 12 April 2018 and by Mr Justice Ouseley in the Administrative Court (Planning Court) on 27 May 2016 and 14 June 2016 set aside

2) The First Respondent's decision of 22 September 2015 be quashed

3) The First Respondent pay the Appellant's costs in the Supreme Court. and 70% of the Appellant's costs in the Court of Appeal and the Administrative Court, the amount of those costs to be assessed on the standard basis if not agreed

4) The time for filing a bill of costs in relation to any of the costs referred to in paragraph 3 above be extended so as to run from 13 January 2020

5) The appeal be allowed

6) The order made by the Court of Appeal on 12 April 2018 be set aside

7) The order made by Mr Justice Gilbart in the Administrative Court on 13 July 2016 be restored, save that paragraphs 1 and 2 of that order be varied so as to read:

"(1) The registration of Leach Grove Wood by the Defendant Registration Authority as a town or village green on 6th October 2015 be quashed, and the Defendant's decision of 23rd September 2015 to register that land as a town or village green be similarly quashed, and

(2) The application for registration shall be re-determined by the Defendant Registration Authority in accordance with the judgement of this Court."

8) In relation to the costs in the Court of Appeal the Interested Party pay the Claimant the sum of £10,000 within 35 days of the date of this order.

9) There be no order for costs in the Supreme Court.

Louise di Mambro.

Registrar
11 December 2019

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