THE COMMONS ACT 2006: SECTION 15

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

INSPECTOR'S REPORT

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

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

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

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

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

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

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

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

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

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

THE LAND

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

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

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

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

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

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

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

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

THE LAW

19. Section 15 of the Commons Act 2006 states:

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

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

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

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

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

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

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

Lawful sports and pastimes

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

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

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

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

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

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

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

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

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

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

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

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

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

As of right

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Any neighbourhood within a locality' is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries."

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

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

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

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

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

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

Statutory incompatibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) At para 98

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

(b) At para. 99

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

(c) At para 100

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

(d) At para 101

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

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

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

THE APPLICATION AND OBJECTIONS

The application

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

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

The user forms

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

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

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

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

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

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

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

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

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

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

The Objections

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

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

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

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

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

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

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

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

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

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

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

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

Applicant's Response and later objection letters

68. The Applicant submitted a written response to the objections containing a detailed analysis of the various letters of objection. This sought to rebut a number of points made in the objections and, in particular, made the obvious but forceful point that the evidence from teachers and other employees at the school would necessarily be restricted to the times when those persons were working at the school. This response also addressed each of the statutory requirements in section 15.

69. A series of other letters and a petition were also submitted in support of the School's objection in 2014. These, in my view, added nothing of substance to the factual or legal issues.

THE EVIDENCE AND SUBMISSIONS AT THE INQUIRY

The Case for the Applicant

70. In his Opening Statement Mr Stubbs made the following main points.

(a) The Land as clearly identified on the maps shown, was freely available to all the residents of the neighbourhood of Pownall Park, and indeed to anyone wishing to use it

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

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

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

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

Locality and neighbourhood

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

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

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

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

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

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

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

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

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

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

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

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

Whether the usage was "as of right"

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

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

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

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

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

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

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

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

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

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

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

Incompatibility with statutory purpose

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

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

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

71. The Applicant called 11 witnesses including himself.

(a) Susan Lees, 4 College Close, Wilmslow

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

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

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

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

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

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

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

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

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

(b) *Christopher Stubbs, 29 Alton Road, Wilmslow*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) *Pauline Styche, 31 Alton Road, Wilmslow*

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

(i) *Jennifer Broomfield, Carrwood Road, Wilmslow*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(l) Mrs Garrod's objection.

(m) Photographs.

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

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

(p) Two aerial photographs of the Land.

The Case for the Objector

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

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

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

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

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

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

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

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

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

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

(a) Susan Garrod

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

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

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

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

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

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

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

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

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

(b) *Sally Stedman*

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

(c) *Annabelle Eccleston*

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

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

(d) Amanda Bell

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

(e) Colin Shepherd

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

(f) Lisa Woolley

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

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

(g) Melanie Livingstone

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

(h) Karen Millrine

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

(i) Karen McLaughlin

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

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

(j) Susan Albion

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

(k) Leigh Bird

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

(l) Gavin Mendham

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

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

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

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

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

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

(m) Estelle Goodwin

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

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

(n) Janine Smart

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

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

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

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

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

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

78. Written statements were also produced from:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Neighbourhood within a Locality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Incompatibilty of registration with statutory purpose for which land is held

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

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

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

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

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

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

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

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

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

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

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

Further submissions

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

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

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

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

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

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

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

and paragraph 42 which states:-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

82. The Applicant made submissions in response as follows:

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

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

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

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

"General responsibility for education.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS

General

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

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

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

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

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

Preliminary findings of fact

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

91. I do not take the decision in *Goodman* to suggest that the principles applied in *Mann* could never apply to public land – only that the public ownership and the nature and frequency of the activities licensed on the land had to be considered in order to determine whether they amounted to an implied licence.

92. In the present case, the "licensing" of the Round Table to set off fireworks was not specific to the Land and the actual setting off of the fireworks had only occurred on two occasions within a small section of the Land. The public were not excluded from the remainder of the Land. Indeed, the evidence is that several of the residents of Alton Road came out of their houses and onto the Land in order to watch the fireworks. Although it appears that the Round Table supplied local residents with a free pass to the firework display and bonfire, no-one on the Land was required to have a ticket or a free pass in order to be there or to view the display from the Land. The point at which tickets had to be shown or purchased was actually on the edge of the Carnival Field.

93. The use of a small part of the field, again on two or three occasions, during the school carnivals for quad bike riding was again confined to a small area of the field which was cordoned off by bales. The public were not excluded from the remainder of the Land and were not required to buy a ticket in order to enter onto the Land.

94. Considering all these factors, I do not consider that these events were inconsistent with a claim by inhabitants of the local neighbourhood to use the Land "as of right", nor would they have had the effect of making the public aware that the landowner was asserting a right to exclude them from the Land, nor could they reasonably be taken as indicating to the local inhabitants that they were on the Land, either during those events or generally, by permission.

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

Neighbourhood within a locality

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

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

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

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

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

[3] These two points are probably connected.

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

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

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

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

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

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

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

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

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

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

The witnesses for the Applicant

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

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

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

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

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

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

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

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

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

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

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

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

The user forms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Incompatibility for statutory purpose

127. I find

(a) that the Land was acquired in 1938, together with the present site of the School, the allotments, the wooded area and two other plots of land since sold off, by a local education authority, for educational purposes for the purpose of providing a school – albeit not the school which was actually built;

(b) that two plots of land were sold off to the Scouts and to the St Johns Ambulance in 1968 and 1959 respectively;

(c) that the present Gorsey Bank Primary School was built on its present site in the early 1960s and that the school moved into the newly built premises in 1962;

(d) that the Land has been maintained at all material times since 1962 from the school's budget and has actually been used by the School to a greater or lesser degree at all material times up until the present day. I accept the evidence of Mr Mendham, confirmed by the letter from Mr Couchman, as to the usage up until the early 1990s and the evidence of Mrs Garrod and other teachers as to the usage from then until 2009. Mrs Swindells in her written statement confirms that the Land was used occasionally for lessons and outdoor activity but not at playtimes, dinner times or for after-school clubs during her headship which ran from 1991 to 2005.This seems to me to be consistent with the evidence of Mrs Garrod who gave evidence at the inquiry.

128. Land which has been acquired by a local authority for a particular statutory function will continue to be held for that purpose until it is appropriated for a different purpose. An appropriation requires some conscious deliberative process by a local authority; see Local Government Act 1972, s. 122; *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin); *R. (on the application of Malpass) v Durham* CC [2012] EWHC 1934 (Admin).

129. I find that there is no evidence to suggest that the Land has been appropriated for or held for any other purpose. The reference to the Land possibly being reserved for an infant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) At para 101

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

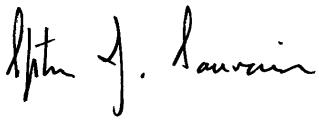
146. In my view registration and use of the Land as a TVG would be incompatible with the statutory purposes for which the Land was acquired and held and for which it had been used during the 20-year period namely the purpose of providing primary school premises pursuant the local education authority's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

Conclusion

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

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

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



Stephen Sauvain Q.C. 8th February 2016

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