STAFFORDSHIRE COUNTY COUNCIL

COMMONS ACT 2006

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS 'THE GREEN' AT CANNOCK ROAD, HEATH HAYES, CANNOCK, STAFFORDSHIRE AS A NEW TOWN OR VILLAGE GREEN

Application number: NVG5

Dated 28 May 2020

INSPECTOR'S REPORT

Preliminary matters

1. I am instructed by Staffordshire County Council ('SCC'), acting in its capacity as commons registration authority which is the responsible authority for determining applications to register land as a town or village green ('TVG').

2. This matter concerns an application to register made as long ago as 2000 under the now repealed Commons Registration Act 1965, section 13, under which the TVG register maintained by the CRA could be amended where any land became what is known as a class (c) green after the last date on which land could have been originally registered (2 January 1970).

3. Accordingly, this application pre-dates even the amendment made to the definition of a TVG contained in section 22(1) of the 1965 Act by virtue of the Countryside and Rights of Way Act 2000, section 98, which came into effect on 30 January 2001. It is plain, in my view, from the Commons Act (Commencement No.2, Transitional Provisions and Savings) (England) Order

2007, art.4(4), that this application must be determined under the old law and not under the provisions of the Commons Act 2006, section 15 (as amended), which came into force on 6 April 2007. In the result, the definition of a TVG to be applied is whether the inhabitants of any locality have indulged in sports and pastimes as of right for not less than 20 years after the initial registration period deadline.

4. The changes introduced by the Act of 2000 (a) removed the need for use to be by predominantly people from the locality; (b) introduced the need for use by a significant number of qualifying inhabitants; and (c) introduced a smaller qualifying area comprising any neighbourhood within a locality. The law to be applied to the current application is therefore more restrictive than that applying to later applications although the fact that these changes do not apply to the current application do not, in my view, have any impact in practice on its outcome.

5. Old law applications are required to be determined under the Commons Registration (New Land) Regulations 1969 (SI 1969/1843)/1843 which provided a simple procedure for such applications. A form of application was to be sent to the CRA (Form 30), of which notice was required to be published, posted on the land and sent to the landowner and other interested parties. Objections had to be sent to the applicant who was given an opportunity to deal with the points which they raised and any grounds on which the CRA considered that prima facie the application should be rejected. No procedure for adjudicating upon the applications and objections was prescribed.

6. I was instructed by SCC to hold a non-statutory public inquiry to enquire into the facts behind the application to register the application land (or 'the land' where the context permits) and to apply the relevant law to those facts in order that I might provide the CRA with a report containing my recommendation on whether the application to register should be allowed or refused.

7. It was necessary to hold a pre-inquiry meeting in Heath Hayes on 19 September 2019 in order to prepare for a public inquiry. Of the two original co-

applicants Mrs Sandie Bowen had died and Mr Derek Baseley was known to be elderly and it was hoped that others would turn up with a view to assisting him on the application. I took the opportunity of explaining the legal position to those attending and Mr Baseley was encouraged to seek assistance as it was explained that there would have to be a public inquiry for which adequate preparations needed to be made to ensure that it ran smoothly as it was known that the objector (namely SCC in its capacity as landowner) would be instructing counsel. A number of local people turned up at the pre-inquiry meeting and it seemed probable that Mr Baseley would get all the help he needed and that others, acting on his behalf, would take over the management of the application. It was made clear that there would be a delay of some 6 months before the inquiry took place in order to give the applicant and those helping him ample time to prepare. It was also put to them that a bundle of documents would need to be prepared by the applicant which would contain witness statements and other documents required in support of the case for registration.

8. Accordingly, on the 20 January 2020 I gave directions for the holding of a public inquiry at the Heath Hayes Community Centre over 4 days starting on 17 March 2020 (CRA/1). My directions contained a note dealing with the applicable legal framework and also sought clarification from the applicant on the extent of the application land. I shall deal with this later. The bundle delivery date was fixed for 10 March 2020. It was known that Ms Samantha Thompson, a local member of Cannock Chase District Council (CCDC) and also a parish councillor (Heath Hayes and Wimblebury Parish Council), would be assisting the applicant when it came to the collection and service of the various inquiry bundles.

9. On 6 March 2020 the CRA authority received the applicant's inquiry bundle but it omitted to include the range of documentation envisaged in my directions. It did though include statements from a Mr Lee Morrall and from a Ms Kate Owen but none of the earlier evidence questionnaires lodged with the application in 2000 were included. Ms Clare Gledhill, acting for the CRA, sent an email to Mr Morrall (who was known to be managing the application at this point) on the same date (CRA/316) explaining that the applicant's inquiry

bundle needed to include the original application and original evidence and any other material on which the applicant intended to rely at the inquiry and that he should also serve three copies of the bundles as per the directions (a copy of which was attached to her email). Mr Morrall was also told that he had until mid-day on 11 March 2020 to make any changes to the bundle that had been lodged which could then be sent by overnight courier to the Inspector in London. Mr Morrall was told that the submitted bundle did not comply with my directions and that this would handicap the proper management of the applicant's case at the inquiry. Mr Morrall was also provided with a link to the Open Spaces Society's website as it was thought that this might assist him in his preparations.

10. On 6 March 2020 Mr Morrall responded by email (CRA/316) to Ms Gledhill's email of the same date as follows:

> It's all weighed in the council's favour. I knew the bundle wouldn't comply and am in London the [sic] weekend so will have to pass it on. However if it comes to a planning application being put forward it will then not be weighted in the property owner's favour and I will fight tooth and nail to save that land.

11. Ms Gledhill responded by email on the same date (CRA/315) and invited Mr Morrell to reconsider his position. It was also put to him that any documentation submitted after 10 March 2020 would only be admitted at the discretion of the inspector. Mr Morrall's response, again by email on the same date (CRA/315), stated as follows:

> Well if the Independent Planning Officer has indeed seen the bundle and decide it is not adequate then I don't personally have any free time to amend it or make copies. I shall contact him in due course to explain.

Nothing further was heard from Mr Morrall. Later, I received very full bundles from the objector and the CRA.

12. By the time of the hearing on 17 March 2020 there was growing concern across the country about the threat of the Coronavirus. It was also plain that the government was actively discouraging large gatherings (indeed, a nationwide lockdown followed on 23 March 2020). It seemed to me to be obvious that there could be no hearing lasting any longer than a single day

when I thought that it might be feasible to hear as much evidence as possible with a view to dealing with the matter thereafter on the basis of the evidence lodged and the parties' written submissions.

13. In the event, neither the applicant nor anyone acting on his behalf attended the inquiry. With two exceptions, no witness or any member of the public attended the inquiry either which, I might add, had been publicised locally in compliance with my directions. The two persons who did attend were Ms Thompson and Philippa Haden (also a member of the Parish Council) and I am grateful to both of them for attending and assisting the inquiry. Indeed, Ms Thompson later wrote to the CRA to say that SCC paid CCDC to cut the grass on the land.

14. The objector was represented by Paul Wilmshurst of counsel who discussed with me his late application to introduce a defence of statutory incompatibility to which I will return later. As there was no applicant present nor any witnesses wishing to give evidence in support of the case for registration, I had no option other than to end the inquiry within around an hour or so of opening proceedings and invited Mr Wilmshurst to submit closing submissions on a later date (which I received).

15. I do not recommend that the CRA should consider restoring the public inquiry for a hearing in the autumn as it seems likely that the applicant has chosen not to engage any further in this process. In my view, it would be prejudicial to the objector to delay matters any further when every indulgence has already been afforded to the applicant and his supporters since the pre-inquiry meeting to enable them to participate fairly in the inquiry process. It is now, I think, high time, after a delay of nearly 20 years, for this application to be determined on its merits and I recommend to the CRA that the matter should be proceeded with on the basis of the evidence as it stands and I am satisfied that this would be possible.

16. References in this report to OBJ/1 and CRA/1 and so on are to page numbers in, respectively, the inquiry bundles of the objector and the CRA which fortunately includes the evidence questionnaires lodged with the application in 2000 and other material correspondence. The bundle prepared for the

surviving applicant by Mr Morrall is not paginated but there is an index in which individual documents are numbered.

Legal framework

17. As previously indicated, we are dealing with the three-part definition of a TVG (usually called classes a, b and c) as it stood before section 22(1) of the 1965 Act was amended which, for these purposes, is as follows:

> land … [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years.

18. One has to look at the various elements of the statute all of which have to be made out to justify registration.

Qualifying locality

19. The term 'locality' is taken to mean a single administrative district known to the law such as a civil or ecclesiastical parish or even an electoral ward of all levels. However, questions arise where the boundaries of a locality have changed within the period of qualifying use. In *Paddico (267) Ltd v Kirklees Metropolitan Council* [2012] EWCA Civ 262 at [62] Carnwath L.J said:

> Where one has an historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community.

In the *Lancashire County Council* case in the Court of Appeal [2018] EWCA Civ 721 at [70]-[72] the court said that there was no reason in principle why a change in boundaries of the relevant electoral ward (which the objector accepted was capable of being a "locality" for the purpose of section 15 of the CA 2006) during the 20-year period should preclude registration provided the community in question had not significantly changed. In other words, as long as the ward had existed as a locality in some identifiable form for the relevant 20 year period, the mere fact that its boundaries had been adjusted in that period would not, of itself, be enough to prevent its existence as a coherent and continuous "locality". The court concluded that the issue was a matter of fact and degree for the inspector whose view it was in that case that the new ward was a continuation of a sufficient part of the former ward for continuity to

remain between the two. On the other hand, substantial boundary changes may have changed the community in question during the 20-year period. Clearly, where the claimed locality had not even come into existence in any legal form until after the beginning of the 20-year period, registration would be impossible (*Paddico (267) Ltd* at [62]).

Use "as of right"

20. The traditional formulation of the requirement that user must be "as of right" is that the use must be without force, secrecy or permission (the so-called "tripartite test") (*R v (Oxfordshire County Council ex parte Sunningwell Parish Council* (2000) 1 AC 335). Forcible use does not require the use of physical force; use of land in the face of resistance by a landowner is forcible use, and not therefore use as of right (*R* (*Lewis) v Redcar and Cleveland BC* [2010] 2 AC 70 at [88]). It follows that use which is contentious and non-peaceable (even if not accompanied by physical force) amounts to use which is forcible.

21. In establishing use as of right the question is whether a party who lacks a legal right has acquired one by qualifying use for the stipulated period. In other words, for use to be as of right it has to be use by a trespasser. However, many open spaces that are used by the public for lawful sports and pastimes are incapable of being registered as TVGs because the public already enjoy rights to recreate on the land such as in the case of formal open space owned by local authorities.

22. In *R (Barkas) v North Yorkshire CC* [2015] AC 195 the land was held under the Housing Act 1985, section 12 of which allows a local housing authority to provide and maintain land for use as recreation grounds for the benefit of those for whom the housing accommodation is provided. The Supreme Court accepted that because the land was held for public recreational purposes the public had a statutory right to use the land for such purposes which meant that the use was by right and therefore not as of right. It is then enough for the land to be held by a local authority for the purposes of public recreation. The position would also encompass a private law right for the public to use land for recreational purposes (for example pursuant to a trust) or where the land was

privately owned but managed by a local authority as public open space (*R (Naylor) v Essex CC* [2015] EWCA Civ 627).

Appropriation of local authority land

23. Mention should also be made of the argument that land owned by a local authority is incapable of being registered as it has been appropriated under statutory powers (section 122 of the Local Government Act 1972) from one use to another which made it ineligible for registration such as where it was to be held for public recreation (*Barkas*). In the past it had been argued that an appropriation for these purposes could be implied from the way in which the authority had managed and treated the land. However this has effectively been trumped by *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin) where Dove J held that an appropriation under section 122 required (as he put it) some conscious deliberative process which meant that an appropriation could not simply be inferred from the way in which the land was used.

Statutory incompatibility

24. The objector raises this point as a defence which arises where there is an incompatibility between the statutory purposes for which the land is held by a public authority with powers defined by statute, including local authorities, and the use of that land as a TVG with the result that the TVG legislation would be inapplicable in relation to it (*R (Lancashire CC v Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58 at [55]-[64]). The test is whether the land has been acquired by the public authority pursuant to its statutory powers, where those purposes would be incompatible with (in the sense that they would be defeated or impeded by) registration of the land as a TVG in which event the land is said to be implicitly unavailable for registration as a matter of statutory construction of the 1965 Act and the CA 2006. This question arises in this case as the land, or at least part of it, was acquired for a road scheme which later came to be abandoned.

Highway land

25. Qualifying use of a public highway (such as where land is a public footpath (PROW)) is constrained by the legal right of the public to use the land as a highway (*DPP v Jones* [1999] 1 AC 240 and can include things done when out walking such as sketching, photographing, picnicking, children playing around, watching nature and taking in the view). In practice, therefore, walking with or without dogs on highway land would be non-qualifying activity.

Qualifying sports and pastimes

26. The expression “sports and pastimes” form a composite expression which includes informal recreation such as walking, with or without dogs, traditional family and children’s play and informal games of football and cricket.

27. Difficulties arise where the predominant recreational use is that involving the use of paths (typically linear tracks around the perimeter or crossing a field) such as would have appeared to a reasonable landowner to be referable to the exercise of existing, or the potential acquisition of new, PROW rather than rights sufficient to support a TVG registration. The matter has been addressed in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [102]-[103] and in *Laing Homes Ltd v Buckinghamshire County Council* [2004] 1 P&CR 36 at [102]-[110]. The guidance in these cases was approved by Lord Hoffmann in the *Oxfordshire* case at [2006] 2 AC 674 at [68].

28. In the *Oxfordshire* case at first instance Lightman J said this at [102]-[104]:

> 102. The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land: see Lord Hoffmann in the *Sunningwell case [2000] 1 AC 335* , 352h-353a and 354f-g, cited by Sullivan J in the *Laing case [2003] 3 PLR 60* , 80, paras 78-81. Recreational

walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).

103. Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e.g., fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.

104. The second scenario is where the track is already a public highway and the question arises whether the user of the track counts towards acquisition of a green. In this situation, the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way, and only as referable to exercise as of right of the rights incident to a green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way …

29. In *Laing Homes* at [102], [107], [110] and [111] Sullivan J noted in relation to dog walking that a dog's wanderings away from a footpath would not suggest to a reasonable landowner that the dog walker was exercising a right to use the land away from the path for recreation.

30. A helpful overview of the *Oxfordshire* and *Laing Homes'* cases is to be found in the TVG report of Vivian Chapman QC in *Radley Lakes* (13/10/2007) at [304]-[305] who said that the main issue in such cases is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or to a right to enjoy recreation over the whole of a wider area of land (i.e. to a village green right). If the appearance is ambiguous, then it shall be ascribed to a lesser right, i.e. a right of way.

31. More recently, in *R (Allway) v Oxfordshire CC* [2016] EWHC 2677 (Admin) at [54], Patterson J confirmed that, if walking use is such as to indicate an emergent right of way, or the use of an actual right of way, then it had to be discounted from being a lawful sport and pastime for TVG purposes.

Sufficiency of use

32. In *Sunningwell* at 357D Lord Hoffmann stated that the user relied on must not be "so trivial or sporadic so as not to carry the outward appearance of user as of right". In other words, if the use is so infrequent that it is hardly noticeable, local people cannot be said to be asserting any kind of right to use the land that is capable, should the landowner choose, of being resisted or licensed.

On what land qualifying use has to take place?

33. The registration authority does not have to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the application land had been used for qualifying purposes for the 20-year period, always bearing in mind that qualifying use will be heavier in some areas than in others (*Oxfordshire* [2004] Ch 253 at [92]-[95]). Where areas of the application land are shown not to have been used the question is whether the whole of the application land is still registrable. One answer to this may be whether the unused areas can be said to be integral to the enjoyment of the land as a whole. On the other hand, the registration authority does have a power to sever from the application those parts of the land where qualifying use may not have taken place, either at all or not for the full period.

Use for not less than 20 years

34. The relevant 20 year period in this case ended, at the latest, on the 24 July 2000 which is the date of the second application which was made in that month.

35. Qualifying use has to be continuous throughout the 20-year period (*Hollins v Verney* (1884) 13 QBD 304). However, temporary interruptions in use are not to be equated with a lack of continuity. It is essentially a matter of fact and degree for the decision-maker to determine whether the whole of the land was been available for qualifying use throughout the 20 year period. In short, the use of land must be continuous in that it must be frequent and without any substantial breaks for more than a de minimis period otherwise it will lack the quality of use necessary to justify registration.

36. In *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 at [71] Patten L.J said this:

> … there must be a physical ouster of local inhabitants from the land and the disruption must be inconsistent with the continued use of the land as a village green. If the two competing uses can accommodate each other (as they did in Redcar (No 2) then time does not cease to run. But here the exclusion was complete and the use of the land for the drainage scheme was not compatible with it remaining in use as a village green. The judge was therefore correct in my view to hold that there had not been twenty years' user of the works site.

In *Taylor* there was an issue arising from the public's exclusion from part of the land (which had been fenced) for around four months and it was found that an interruption of this duration was sufficient to stop time running in relation to such land. The same principle is equally applicable to periods when qualifying use was interrupted at a time or times when use could not have been exercised "as of right".

Procedural issues

37. It remains the law that there is no prescribed machinery for considering an application to register where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory

inquiry and to provide an advisory report and recommendation on how it should deal with the application.

38. In *Regina (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 Waller L.J suggested at [62] that where there is a serious dispute, the procedure of

> conducting a non-statutory public inquiry through an independent expert should be followed almost invariably.

However, the CRA is not empowered by statute to hold a hearing and make findings which are binding on the parties. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However, the registration authority must act impartially and fairly and with an open mind.

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

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

41. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be “properly and strictly proved” (*R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p.111 (Pill L.J) and approved in *R (Beresford) v Sunderland City Council* [2003] UKHL 60 at [2] (Lord Bingham)).

Consequences of registration

42. Registration gives rise to rights for the relevant inhabitants to indulge in sports and pastimes on the land.

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

44. Under s.12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede

> the use or enjoyment thereof as a place for exercise and recreation.

45. Under s.29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any

> disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green.

46. Following registration a landowner is not prevented from using his/her land altogether and retains the right to use it in any way which does not interfere with the recreational rights of the inhabitants, nor, for that matter, can the inhabitants' rights to use the green after registration interfere with the competing activities of the landowner to a greater extent than during the qualifying period (*R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70).

47. Accordingly, it follows under both Acts that development is prevented.

Description of the application land and surrounding area

48. The application land extends to some 2.04 acres or 0.82 ha. It lies between Cannock Road (the A5190) and the rear of properties fronting Hednesford Road (the B4154). The north-west side of the land has a frontage onto Chapel Street. I have visited the land on two occasions: the first after the pre-inquiry meeting on 19 September 2019 and the second after the short hearing on 17 March 2020 when I also drove round the local area.

49. The land has two access points on Cannock Road where there is an earth bund and edging stones running alongside the pavement (apparently travellers occupied the land on two occasions in 2019 when the land had not been properly secured against unlawful incursions). One is through a gap in the bund roughly half way along the road frontage and the other is in the

south-east corner, alongside 92A Cannock Road, which is the start of a PROW (being part of Public Footpath 5 (Heath Hayes & Wimblebury)) running between Cannock Road (where there is a wooden fingerpost at the edge of the pavement) and Hednesford Road.

50. The papers show that on 9 January 2001 SCC made an order the effect of which was to extinguish, with effect from 6 February 2001, the former PROW running between points LK on the plan at OBJ/H8 and to substitute a new way between the points marked ABCDEF on the plan at OBJ/H3. The route of the earlier PROW took it through the land and carried on through a commercial development known as the Chasewood Park Business Centre (CPBC) which comprises a number of lock-up units backing onto properties running along Hednesford Road. The older photos show the PROW crossing the land very clearly and I will return to this later. The diverted PROW follows the boundary with 92A Cannock Road before skirting the southern boundary of the CPBC and changing direction up a narrow track which leads directly into a public car park just off Hednesford Road.

51. At Appendix 1 (App/1) there is an aerial photo of the application land taken on 14 May 2019. The grass is regularly cut by CCDC. This applies to the western portion which is a level, though somewhat tussocky, field. On the western side the land is not maintained at all. For the most part, this area consists of impenetrable scrub and undergrowth and a large number of self-seeded trees although there are places where one might walk through. Elsewhere there are small clearings or dens in the undergrowth where youngsters no doubt congregate. The vegetation in the south-west and north-western corners is quite dense and no or only sporadic use may be occurring in these areas whereas the PROW is obviously being used with some regularity as there is a track in the grass running alongside the southern boundary of the CPBC which turns into a very well-worn track running in the corridor between impenetrable undergrowth on one side and part way along the western boundary of the CPBC on the other.

52. The grassed area on the eastern and southern sides are clearly suitable for walking, with or without dogs, and children’s play but there are no markings or

worn areas on the ground tending to show that the managed areas outside the PROW are in frequent use for informal recreation. As will appear later, at one time parts of the application land contained housing which came to be demolished in the 1990s. In places one can see remnants of this, including clumps of trees which, at one time, would have been located in the rear gardens of these properties. There is in fact one very prominent conifer on the southern side which was no doubt a recent planting when demolition took place but is now a somewhat incongruous feature. There are also a handful of trees on the eastern boundary and a single tree further into the land on its eastern side.

53. One's overall impression is that the ample grassed area is being used by walkers but that such use is not extensive. However, although I have little doubt that the PROW is in regular use the areas covered by trees and heavy undergrowth on App/1 are barely used at all. At any rate, the land (a) at the junction of Cannock Road and Chapel Street, and (b) behind the Methodist Chapel in Chapel Street clearly have the potential for infill development.

54. Looking at the wider area, just to the west of the application land, there is a roundabout where Cannock Road meets Wimblebury Road which runs north (where these two roads meet there is a large public house called the Five Ways Inn which runs back up Cannock Road for some distance). These two roads are no doubt the settlement boundaries on the south and eastern sides of Heath Hayes although there is some recent residential development on the southern side of Cannock Road, including a large ATS motoring accessories retail site, running east to the roundabout. It may be that this spread of development at the eastern end of Cannock Road, which comprises a mix of housing styles, is a former employment site (were it not then it would be something of a curiosity in planning terms). When one looks at the aerial photos for 1984 and 1990 one sees that residential development had in fact taken place on the southern side of Cannock Road at its eastern end in the mid to late 1980s. I also observe some ribbon development within Newlands Lane (whose junction with Cannock Lane lies just to the east of the application land) which also existed in 1981 in view of what one sees in the aerial photo for that year. There is continuing residential development running

westwards along Cannock Road which peters out after the Texaco garage which lies just to the west of the junction of Cannock Road and Chapel Street (which is again shown in the aerial photo for 1981). In the result, there was residential development on both sides of Cannock Road to whom the application land would have been available to those wanting to take a short cut to the shops and other facilities on offer within Hednesford Road, including the primary school. This can be seen in the prints I have been provided for 1999 which, as I find, show a growing community on the southern side of Cannock Road at its eastern end in contrast to what one sees in the aerial photo for 1981 where we see merely ribbon development running east from the petrol station and around into Newlands Lane.

55. If one looks at App/1 one can appreciate the relationship between Cannock Road and Hednesford Road which are linked by Chapel Street. These roads meet at the roundabout just off App/1 on its south-eastern side. Hednesford Road is a busy road passing through the middle of Heath Hayes in a north-westerly direction. Hednesford Road is not only the main shopping area within Heath Hayes but it is also the location of Five Ways Primary School.

Claimed locality

56. By the time of the inquiry, the applicant, through Mr Morrall, was relying on a locality which comprised the whole of the civil parish of Heath Hayes and Wimblebury. A plan received from the objector's solicitor (Ally Brereton) after the inquiry showed that the boundaries of the existing civil parish were the same in 1999. However, in her email dated 15 April 2020, Ms Brereton informed me that the civil parish of Heath Hayes and Wimblebury only came into being with effect from a date in 1988 under the Cannock Chase (Parishes) Order 1987 (1987/2259) (the documents dealing with this, starting with the email, I have numbered OBJ/I37-I43). Mr Morrall's map is, however, very helpful as it not only includes street names but also outlines what he calls the "Old Heath Hayes Original Village Area". The added areas to the north, taking in Wimblebury, and to the west, which broadly extend as far as Eastern Way, Hemlock Way and back down the High Street (but excluding those properties fronting onto this road) running up to Gorsemoor Road. The original

village area is said to have fallen within the boundaries of Gorsemoor Road, Hednesford Road (as far as the Five Ways Primary School) running east to the south of Brickworks Road up to Wimblebury Road and then south to include Cannock Road and the area of development already mentioned to the south of Cannock Road at its eastern end.

57. It seems to me to be obvious that the application land falls within the original village of Heath Hayes (within the area described as the "Old Heath Hayes Parish Ward" on the plan accompanying the revised application at CRA/22) to which the areas of Wimblebury and Hawks Green have been added as a result of boundary changes triggered by the expansion of new development in recent years. I dare say that these areas/villages used to be historically separate but have now merged to form a single enlarged civil parish. It is, I think, probable, on the basis of the evidence available to me and from my own observations, both on the ground and online, that the south-east corner of the enlarged civil parish, once the extent of the original village, remains an identifiable community.

58. At Appendix 2 (App/2) there is an aerial photo of Heath Hayes and Wimblebury. One can clearly see the land in the south-east corner, off Cannock Road, in what used to be the original village of Heath Hayes with Hednesford Road running through it in a north-westerly direction. The location of Five Ways Primary School can also been seen on the aerial image. The main shopping area within the village has probably never changed. It is clearly within the vicinity of the application land and the homes of the witnesses in the old part of the village. Looked at in the round, it is my view that new civil parish (on the basis that its boundaries were altered after 1980) may be treated as a continuation of a sufficiently coherent part of the original village and would also be consistent with the area referred to as the "Old Heath Hayes Parish Ward" in the plan accompanying the revised application.

The application

59. The first TVG application on CR Form 30 is dated 7 July 2000 (CRA/17) whose receipt was acknowledged by the CRA on 18 July 2000 under reference NVG5. The application was not regarded as having been duly made

by the CRA as in para 4 of the application form when asked when the application land became a TVG Mrs Bowen answered 1 July 1980 which date failed to allow for the elapse of 20 years after 1970. Mrs Bowen was accordingly asked to re-submit her application which she did by changing the date of 1 July 1980 to 1 July 2000. The first application was accompanied by the ward plan marked “SEB 1” at CRA/22.

60. The second (or resubmitted) application (CRA/9) is dated 24 July 2000 and was noted as having been accepted by the CRA on 26 July 2000. This application was, I think, accompanied by the same plan marked “SEB 1” (CRA/9-14).

61. On 1 August 2000 the CRA wrote to Mrs Bowen saying that the plan submitted with the second application was not acceptable owing to the scale used (this suggests that the plans accompanying both applications were the same) and another plan was sent to her on which she was asked to identify the application land by means of distinctive colouring.

62. On 9 August 2000 Mrs Bowen sent in a completed plan, again marked “SEB1” (which could well have been the rather confusing plan marked “SEB 1” at CRA/192), which shows a gap or gaps in the central area of the land.

63. On 22 August 2000 the CRA again wrote to Mrs Bowen telling her that her revised plan (CRA/192) did not show clearly the land to which the application related and another plan was sent to her on which she was invited to delineate in red the relevant application land (CRA/191).

64. Mrs Bowen complied with this request and the CRA received an updated plan on 5 September 2000. It could be that the plan she returned is the one at CRA/14 which is uncoloured (having been sent by fax) and is none too easy to follow.

65. The CRA wrote to Mrs Bowen again on 14 September 2000 saying that there were differences in the extent of the land shown on the original large scale ward plan where the application land was shaded red (my copy is uncoloured) and the plan which she had sent to the CRA which was outlined in red

(namely CRA/210). A further copy of the same plan was sent to her on which she was asked to outline in red the boundaries of the application land.

66. Her new plan was received by the CRA on 21 November 2000. However, the plan was still evidently not good enough as, on the same date, the CRA sent her a transparency asking her whether the boundaries shown thereon were correct (CRA/200). The transparency mirrors the image on the plan at CRA/210 and shows clearly that the central portion of the land was being omitted from the application.

67. On 27 November 2000 Mrs Bowen wrote saying that the boundaries shown on the CRA's transparency were indeed correct (CRA/198).

68. On 26 January 2001 the CRA wrote to Mrs Bowen telling her that SCC, in their capacity as owner of the land, objected to her application and she was supplied with their objection statement (CRA/202). Mrs Bowen was told that the CRA intended to appoint an independent inspector to hold a non-statutory public inquiry. She was asked to inform the CRA within three weeks whether she disputed the objection and wished to proceed with her application. If her answer to both these questions was "Yes" then she would be informed of the arrangements for an inquiry in due course.

69. Mrs Bowen replied to the CRA on 14 February 2001 saying that she (and Mr Baseley) wished to proceed with the application and, as she put it, "residents feel strongly that we should retain our village green" (CRA/206).

70. At that point no further step was taken by the CRA until 3 September 2004 (CRA/208) when they wrote to Mr Baseley (and to Mrs Bowen in similar terms) saying that the matter was passing to a new officer and that the file was being reviewed. It was, however, pointed out to him that the amended plan had not been properly exhibited to a fresh statutory declaration which meant that the application was still defective. This was because of the divergence between the original plan and the later approved transparency which needed to be properly exhibited to a new statutory declaration. Mr Baseley was asked to go back to the solicitor who dealt with the original statutory declaration. Mr Baseley was also sent another copy of the agreed

application land plan (CRA/210) which would need to be the basis of any future statutory declaration which, as it seems to me, must have been a copy of the plan returned to the CRA by Mrs Bowen on 21 November 2000.

71. On 16 March 2005 the CRA wrote to Mrs Bowen informing her of the decision in the Court of Appeal in the *Oxfordshire County Council* case [2005] EWCA Civ 175 which, as was suggested, might yet be subject to an appeal to the House of Lords. Mrs Bowen was sent a transcript of the decision and was asked for any comments that she might have. On 24 March 2005 the CRA wrote to Mrs Bowen asking whether she still wished to proceed with her application (I dare say letters in similar terms were sent to Mr Baseley).

72. On 20 June 2006 Mrs Bowen wrote to the CRA asking them to determine the application to register (CRA/214).

73. On 21 September 2006 the CRA wrote to Mrs Bowen saying that they wanted to ensure that "we have the correct map and documentation to complete your application" and a meeting was proposed (CRA/215).

74. The next development on the file was a letter sent to Mrs Bowen dated 28 March 2008 (CRA/216) which returned again to the necessity to ensure that the amended application land plan, although agreed with the CRA, was properly exhibited to a fresh statutory declaration. The letter also indicated that they accepted that, in discussions with the previous case handler, Mrs Bowen had said that she was content to await the outcome of the further appeal in the *Oxfordshire* case and that there had been no urgency in her dealing with an updated statutory declaration with the various documents being executed in the presence of a solicitor. Mrs Bowen was invited to arrange for a valid statutory declaration to be returned to the CRA by 19 May 2008

75. On 14 May 2008 Mrs Bowen duly provided the CRA with a fresh statutory declaration. Unfortunately, the accompanying plan differed from the outline shown on the transparency as it included, as it seems to me, the whole of the land without making provision for the omission of the previously developed central section (see CRA/219). The CRA did not spot this problem. It may

perhaps be added that later amendments to an application may be back-dated to the date of the application which, in this case, would have been 26 July 2000. Moreover, the approach in these cases to amendments is that the regulations should be read in the light of what is intended to be a simple and informal process.

76. On the 30 May 2019 the CRA wrote to the applicants asking whether they wished to proceed with their application (CRA/220 & 227).

77. On 12 June 2019 Mr Baseley's grandaughter wrote to the CRA telling them that Mrs Bowen had recently died (CRA/231).

78. On 30 May 2019 the CRA also wrote to the Parish Council asking whether they would be prepared to take over the application from the surviving applicant as they were anxious to proceed with it as soon as was practicable (CRA/234). The Clerk to the Parish Council responded by email on 4 July 2019 saying that it did not wish to take over the application although it wished to be permitted to make representations to SCC about the future development of the land (CRA/234). The letter closed in this way:

> We do not therefore wish to take on the support of the VGA and would prefer the County Council to dispose of the land with a social conscience.

79. The pre-inquiry meeting followed on 19 September 2019 which was attended by Mr Baseley who is an elderly man and would have needed assistance if the application was to have been properly pursued at a public inquiry.

80. At the pre-inquiry meeting I raised the issue of the extent of the application land and I explained the ambiguity in the documents. Put shortly, we have two options. The first is the land edged red on the plan at Appendix 3 (App/3) which excludes (i) the land between the two red parcels and (ii) a strip of land outside the eastern boundary of the western red parcel in which, in both cases, there used to be dwellings. The parcel in (ii) is no doubt attributable to the fact that a dwelling (94 Cannock Road) was known to have existed on this site as late as 1982 (I deal with this below). App/3 appears to have been Mrs Bowens's preference. The second option is that the application land should be treated as extending to the whole of the undeveloped open space shown on

the plan at Appendix 4 (App/4). This would also be consistent with what is shown on Mr Morrall's plan.

81. It is my recommendation to the CRA that the prudent course now is for the application to be determined on the basis that the whole of the undeveloped open space shown coloured green on App/4 is the application land and I propose to deal with the matter on this basis. It is also helpful that in the gap between the two red parcels shown on App/3 one is able to identify the location of the previously developed land with which I will deal later.

82. Before leaving this section I should mention the very great delay in determining this application which was made nearly 20 years ago which is as long a delay as I have ever come across in dealing with such cases over several years.

83. The application to register has only been pursued with reasonable dispatch by those officers who are now in place. On the face of it, previous officers sat on the application for reasons which can only partly be explained by the need to await the outcome of one or two cases passing through the courts some years ago. Manifestly this is an application which should have proceeded to a non-statutory inquiry many years ago and responsibility for this rests with the CRA. The position now is that the CRA is required to investigate the use of the application land in the period 1980-2000 which is clearly prejudicial to the interests of those who have supported the application in the local community none of whom, as it turned out (with the exception of Samantha Thompson and Philippa Haden), attended the inquiry. It was also disappointing that the Parish Council did not agree to stand in the shoes of the applicants. I am, however, sure that the approach of the CRA on this application is unlikely to be repeated and that outstanding applications will be determined as soon as is practicable.

Ownership and development history

84. The whole of the application land shown coloured green on App/4 is vested in SCC under the amalgamated title number SF424918 (see filed plan at OBJ/E16). SCC acquired various plots in the period 1974-1993 for the Heath

Hayes Link Road (A5190/B4153). Further acquisitions occurred in 2000. Prior to local government reorganisation in 1974, the Urban District Council of Cannock (UDCC) (the predecessor of Cannock Chase District Council (CCDC)) acted as agent for Staffordshire County Council as the highway authority.

85. The acquisition history is very helpfully set out in the statement of Ally Brereton (OBJ/A117), the law officer acting for SCC in its capacity as the objecting landowner.

86. Matters began in 1972 with the acquisition by UDCC of 114 Cannock Road (the conveyance will be found at OBJ/D6 – see land coloured pink on the plan at D8).

87. Land at the junction of Chapel Street and Cannock Road was acquired by UDCC in 1973 (see conveyance at OBJ/D12 – see land coloured pink on the plan at D14).

88. Following reorganisation in 1974, 114 Cannock Road and the land at the junction of Chapel Street and Cannock Road vested (without conveyance) in SCC.

89. 106 Cannock Road was acquired by SCC in 1976 (see conveyance at OBJ/D18 – see land coloured red and blue on the plan at D19).

90. Land having a frontage to Chapel Street adjoining Bourne Methodist Church was acquired by SCC in 1977 (see conveyance at OBJ/D23 – see land coloured pink at D26).

91. 104 Cannock Road was acquired by SCC in 1978 (see conveyance at OBJ/D32 – see land coloured pink on the plan at D34).

92. 112 Cannock Road was acquired by SCC in 1980 (see conveyance at OBJ/D37 – see land meant to be coloured pink on the plan at D39).

93. 94 and 94A Cannock Road were acquired by SCC in 1982 (see conveyance at OBJ/D40).

94. Land at the rear of 104 and 106 Cannock Road was also transferred to SCC in 1982 (see conveyance at OBJ/D44 – see land coloured pink on the plan at D46).

95. 108 Cannock Road was acquired by SCC in 1993 (see conveyance at OBJ/D48 – see land coloured pink on the plan at D50).

96. Highway scheme abandoned in 1994 (OBJ/G2-G5).

97. In 2000 SCC sells land adjoining 23 Chapel Street to Ian and Dawn Cooper (who owned No.23) (see conveyance at OBJ/D52).

98. CCDC transfers numbers 96, 98, 100 and 102 Cannock Road to SCC (see transfer at OBJ/D58 – see land shown edged red on D60).

99. SCC registered with new title number SF424918 on 19 April 2000 (comprising a merger of various title numbers and land previously unregistered). See land certificate at OBJ/E11-E18 and up to date office copies at OBJ/E23-E24.

100. It appears that with the exception of numbers 108, 110 and 112 Cannock Road (which were located in the gap between the two red parcels on App/3), which were demolished in 1996, most of the application land (albeit subject to (i) the presence of the site compound mentioned below in the period 1993-94 and (ii) the demolition of 94 Cannock Road sometime between 1988 and 1990, again as explained below) would have been open space in the period 1980 to 2000. This no doubt explains why Mrs Bowen conceded that a portion of land in the middle of the site had to be removed from the application, consistently with what is shown on App/3.

99. For the sake of completeness, I should perhaps mention various documents contained in the objector's bundle.

100. On 7 March 1982 the County Valuation Officer sent a memo to the County Surveyor dealing with land which was, as I understand it, the responsibility of the Highways Committee and thus held for highway purposes in the Tamworth and Cannock Chase Districts (OBJ/A22). Only part of this document still exists but there is a reference to various unspecified sites which had been cleared (with the exception of 104 and 106 Cannock Road)

which were said to be in “a roughly grassed condition”. There is then a memo dated 5 February passing between the County Surveyor and the County Estates Officer which I can barely read (OBJ/A21) followed by a letter dated 11 February 1988 (OBJ/A18) from SCC’s Estates Department to SCC’s Area Housing Manager asking whether the tenants at numbers 112, 110 and 94 Cannock Road could be rehoused with a view to the subsequent demolition of these properties. There was also an issue with repairs to these premises which could not be justified. The heading to the letter was the A5190/B4154 Link Road.

101. We then come to a letter from the Hednesford Area Housing Office of CCDC to SCC’s Estates Officer dated 5 September 1988 (OBJ/23) confirming that 94 Cannock Road was then vacant and could be “demolished in the near future” (OBJ/A23). CCDS was also said to be taking steps to vacate the tenants of other properties in the area owned by SCC but under the management of CCDC as soon as possible.

102. There is a further memo dated 22 April 1993 from the County Surveyor to the Director of Property Services (OBJ/A25) in which the latter is being informed that the purchase of 108 Cannock Road has been completed. The property was then vacant and the County Surveyor asked whether any decision had been made on the road scheme and whether the property could be let.

103. There is then a helpful approval plan called “Tree Survey at Chapel Lane Site” which identifies a number of trees in the vicinity of the land which were doubtless going to be subject to protection (OBJ/A24). The plan is subject to an endorsement dated 5 July 1995 which noted the approval of the relevant department within SCC for such matters. This plan is useful as it shows that by that stage (i) numbers 112, 110 and 108 had not been demolished, and (ii) that these properties probably had boundary features of some description. That this plan is accurate is borne out by the letter dated 20 March 1996 sent by SCC’s Director of Development Services to the Group Engineer on behalf of the County Surveyor (OBJ/A26) in which the writer confirmed that the tender from H.E. Humphries to demolish the three properties at 112, 110 and 108 Cannock Road should be accepted. There is no reason to suppose that

this proposal was not acted upon within a reasonable time of the letter. It again follows that the App/3 plan correctly omits land which would not justify registration.

104. In terms of the chronology I turn next to the sewerage scheme compound but will deal further with the scope of the application land when I come to the aerial photos taken during the qualifying period.

Heath Hayes Sewerage Scheme – Site Compound

105. Details about this are limited but what is known is that major sewerage works took place in Heath Hayes in 1993-94 (quite possibly to provide new infrastructure for the new development which had sprung up at the eastern end of Cannock to which reference has already been made) which no doubt gave rise to a need for a large enclosed area for parked vehicles and the storage of equipment and plant. On 29 October 1993 SCC's Director of Development Services wrote to B.L Cowen (acting for SCC's Director of Property Services) confirming that he had no objection to the letting of a site on Cannock Road "as a contractors compound" (OBJ/A30). The site in question, comprising 2,304m², is shown on an undated plan at OBJ/A31. The site covered roughly one-half of the eastern red parcel shown on App/3 between CPBC and Cannock Road. There had earlier been a letter dated 14 October 1993 from CCDC's Valuation and Estates Officer to SCC's Director of Development Services which had raised the possibility of a rental by CCDC's Drainage department (as agents for Severn Trent Water Plc) of a site compound on land which was jointly owned by the two authorities on the Cannock Road frontage. The letting was to last for 26 weeks and the rental would be shared.

106. There is no evidence that the sewerage scheme did not take place. If it had it meant that for a period in the region of 6 months in 1993-94 the compound area would have been unavailable for qualifying use. The compound area plan is also very helpful as it is on a plan showing the dwellings at numbers 108, 110 and 112 Cannock Road which, as indicated above, are likely to have been demolished in 1996 (OBJ/A26). If this is right then it meant that for 6 months in 1993-94 the whole of the uncoloured area and roughly half of the

eastern red parcel shown on App/3 (i.e. to the south of CPBC) would have been unavailable for qualifying use. As against this, there is no evidence of any temporary stopping up of the PROW which would have run straight through the compound area (compare the two plans at OBJ/A31 and OBJ/H8) although it seems likely to me that there would have been.

The proposed A5190/B4154 link road

107. At one time, prior to its abandonment, there was a proposal for a link road between Cannock Road and Hednesford Road which would take the route shown on OBJ/C1. It is this road scheme which explains the removal of most of the buildings along the frontages of Cannock Road (i.e. between numbers 112 and 94) and on Chapel Street at the rear of the Methodist Church which includes the whole of the uncoloured land and eastern red area shown on App/3. The land within the western red area on App/3 would not have been required for the proposed road scheme.

108. The proposed road scheme (which went back to the mid-1970s) was abandoned pursuant to a decision of SCC's Highways Committee on 14 March 1994. It meant that land acquired and held for these purposes (comprising some 12 dwellings with land attached) by CCDC and by SCC's Highways Committee was surplus to requirements and the proposal at that time was that it would be disposed of under the direction of SCC's Property Sub-Committee. See reports of the County Surveyor at OBJ/G1-4 and note of the decision of concurrence by the Property Sub-Committee on 2 June 1994 (OBJ/G5). I have since been provided with a report of the Director of Property Services to the meeting of the Property Sub-Committee on 22 June 1994 and the minutes of that meeting. I have added these documents to the objector's bundle at OBJ/I41 to I61. This material discloses that the houses and land belonging to SCC at Cannock Road/Chapel Street were declared surplus to the requirements of the highway authority (following the decision of the Highways Committee on 14 March 1994) following the abandonment of the link road scheme and the Director of Property Services was authorised to dispose of these assets in accordance with normal procedures.

SCC's planning applications

109. There then followed an application by SCC to CCDC on 6 September 1994 (under reference number CH/94/0497) for outline planning permission for residential development on the consolidated 1.08 ha site which included the whole of land coloured green on App/4 (see application and plan at OBJ/F2-F10). By this stage, of course, the land in question was not wholly open space as the dwellings (with their extended rear gardens) at numbers 112 to 108 Cannock Road were not demolished until 1996. See, for instance, the Tree Survey plan at OBJ/F22 which shows a great deal of growth in the south-west corner. A grant of outline planning permission was duly obtained under a decision notice dated 5 July 1995 (OBJ/F23-26) but was never taken forward at that time. On 1 June 1998 SCC applied to CCDC (under reference number CH/98/0326) to renew the earlier outline permission, which application was allowed on 15 July 1998 (OBJ/F33) under a grant which required any application for approval of reserved matters to be made within 3 years but which never occurred. There followed an application by SCC to renew the earlier grant of outline permission (under reference number CH/01/0229) which was again allowed under a decision notice dated 25 July 2001 (OBJ/F40) which also required an application for approval of reserved matters to be made within 3 years. This grant was not proceeded with either. It will be recalled that the application to register the land as a TVG had been made in July 2000 and was obviously prompted by what was thought by local people to be the prospect of imminent development. Matters came to a head for SCC when, having applied yet again for a further renewal of the outline permission on 15 June 2005 (OBJ/F44 – see application plan at OBJ/F49 which again comprised the whole of the land shown on APP/4), permission was refused by CCDC (despite an officer's recommendation that it be approved) under a decision notice dated 24 August 2005 for the reason that the land

> … currently provides a valuable open space for informal recreation purposes in the centre of the village where there is a lack of alternative facilities. The site's development would fail to safeguard the local amenity, including landscaping within the site, contrary to Policy B8 of the Local Plan.

110. A subsequent appeal was dismissed by the Secretary of State under the Inspector's decision letter dated 13 June 2006 (OBJ/F58). The appeal was

always going to be difficult as (i) the earlier outline permission had expired in July 2004 which meant that the proposal could not be said to be the renewal of an existing permission, and (ii) the Inspector was always likely to question whether a detailed assessment would be necessary to determine if and to what extent the land needed to be safeguarded against development as part of the Local Plan process (although I gather that it was not in fact protected open space in the Local Plan).

The aerial photographs

111. The objector instructed Christine Cox of Air Photo Services to provide a report on the aerial photos that might be found showing the land in the period 1980 to 2000. Ms Cox is a well-known expert in the field of aerial photographic interpretation and she is able to access images from data bases that are much superior to those which are commonly found on *Google earth*.

112. She did not attend the inquiry but she has provided an extremely helpful report for the inquiry dated March 2020 which has undoubtedly aided the evidence gathering process. It is within her report that the plans which comprise App/3 and App/4 will be found which were sent to me electronically for inclusion within my report. A copy of Ms Cox's report will be found at OBJ/B. I have been sent the original and it would be better for the members if they had access to the original prints which are vastly superior to the copies in the objector's bundle.

113. Ms Cox has provided us with a number of photos covering eight separate years, namely for 1981, 1984, 1986, 1990, 1991, 1993, 1997 and 1999. She also helpfully provides an overview of what is apparent to her in each of the material photos and she helpfully overlays the areas edged in red on App/3 so that we can see where precisely structures exist on the ground and where tracks are also evident within the application land.

114. Her first image dates back to 1981 where houses, other structures and hedged boundaries can be seen in the uncoloured gap between the two red parcels on App/3. These features must surely comprise numbers 108, 110 and 112. Elsewhere the land has been cleared of buildings although there is

said to be a structure partially within the south-east corner of the western red parcel on App/3. What is interesting about this photo is that with the exception of (i) the buildings/structures and what looks like three separate hedgerows marking the boundaries at the rear of numbers 108-112 Cannock Road (one or more of which could be occupied as there appears to be a car parked adjacent to the fairly wide gap in the hedge and a vehicular track to the road), all of which falls within the gap between the two red parcels, and (ii) the structure observed in the south-east corner of the western red, the remainder of the green land shown in App/4 has been cleared of buildings. In the open spaces there appears to be a great deal of tree and ground cover and a number of tracks the most prominent of which coincides with the PROW running up the central part of the eastern red parcel. There are also tracks within the northern dog leg of the western red parcel and much fainter tracks on the eastern side of the western red parcel within what used to be 114 Cannock Road.

115. The image from 1984 is much clearer. Much of the eastern red parcel in App/3 has been cleared of the dense undergrowth seen in 1981. There is a prominent track running up the central part of this parcel (roughly in line with the PROW) towards the car park off Hednesford Road as well as tracks within the much cleared dog leg running up to Chapel Street behind the Methodist Church. The buildings and structures comprising numbers 108-112 Cannock Road are much clearer, as are the boundary hedgerows at the rear of these properties. Much of the western red parcel on App/3 is heavily wooded.

116. The image for 1986 is very helpful. There are feint tracks in places but a strong main track running up the central part of the eastern red parcel on App/3 with clearly defined exit points into the car park off Hednesford Road and Cannock Road where the main track had forked into two satellite tracks running to both sides of the parcel some 15m in from the pavement (this is dealt with in the evidence of David Adkins – see para 124). The properties at 108-112 Cannock Road are still plainly visible and all three dwellings look as though they are probably occupied (numbers 108 and 110 comprise a semi-detached property).

117. By the time we get to July 1990 there is a well-defined path up the central part of the western red parcel on App/3 with, at its southern end, clear forks off the main path running to either side which is precisely what one would expect in the case of people approaching the field on its southern side from either direction along Cannock Road. The southern end of FP 64 (see OBJ/H8) stops at the southern end of the track, some twenty yards into the field, where it forks east and west at a point where it ended behind buildings, since demolished, which used to have a frontage on Cannock Road.

118. Another point is worth noting in the case of the 1990 photo is that between the date of the photos taken in September 1986 and July 1990 a building had been demolished in the south-east corner of the western red parcel (I believe this to have been the property shown on the photo at OBJ/I36). Indeed, there is an undeveloped strip just outside the eastern boundary of the eastern red parcel on App/3. This building is likely to have been 94 Cannock Road (the house next to it is 92A Cannock Road) whose rear garden will have been returned to grass and incorporated into the open space with the probable felling of some trees running along No.92's western boundary. On the face of it, the eastern edge (and the gap is likely to have been in the region of 4/5m) of the open space off Cannock Road would not have been available for informal recreation until a date unknown between 1986 and 1990. This conclusion is also supported by the fact that by 1990 there is a greater splay on the eastern fork where it runs off the end of the main track. It will, however, be recalled that the Hednesford Area Housing Office of CCDC wrote to SCC's Estates Officer on 5 September 1988 confirming that 94 Cannock Road was in fact vacant and could be "demolished in the near future". It therefore follows that No.94 was demolished sometime in the period September 1986 and July 1990.

119. There is much greater definition when it comes to the first coloured image taken in October 1991. The buildings at 108-112 Cannock Road are still there as are the main and satellite tracks within the eastern red parcel on App/3 where the grass appears to be well-managed. The western parcel seems to have dense tree cover. It is also my impression that there is a feature of some description running alongside the edge of the grassed area and pavement.

There are no obvious tracks within the open space fronting Chapel Street where there appears to be more in the way of vegetation within this discreet parcel.

120. The position in the case of the image taken in March 1993 is much the same as that for 1991 although the western red parcel, whilst mainly overgrown with trees and bushes, contains a small area of grass. It will be recalled that for a six month period sometime after October 1993 there is likely to have been an enclosed compound in the southern area of the eastern red area on App/3 but it came too early for this image.

121. The position in the photo for 1997 has changed in that the buildings at 108-112 Cannock Road have gone although their overgrown gardens remain and it seems very doubtful whether the public are likely to be using this area. Another feature of this image is that instead of a single inverted Y shaped track running through the eastern red parcel shown in the previous photos, there are smaller tracks within and running across parts of the site. There is certainly what appears to be a track running up the eastern boundary with No.92A which then cuts across the field towards the car park midway up the field. Ms Cox considers that these slightly sinuous tracks indicate a lesser frequency of pedestrian use through the southern part of the site and over the boundary of the northern area in contrast to that seen in 1990 and 1993.There are clearer tracks in the northern area with access points into Chapel Street (where there is a gap onto the street) and the car park. One is left wondering whether the changed route of the main track crossing this field had something to do with the presence of a compound for 6 months in 1993-94 which would have occupied a central position in the lower half of the eastern red area.

122. The image for 8 July 1999 shows a number of worn tracks within and across the site and tracking from the south-east access point off the pavement. The most prominent track runs from the south-east corner up the site of No.92A before cutting across the field through the gap on the south-west corner of the CPBC into the norther area of the site with a track running off into the car park. This could be an area for dog-walking but it is probable that there is an entry point into Chapel Street which Ms Cox identified in her image for 1997.

At any rate, the north-western area seems to be getting more overgrown and the south-west area may well even be impenetrable beneath the very dense tree cover.

123. The resolution of the image for 29 July 1999 was unhelpful but was better in the case of the image for 1 September 1999. As before there are tracks within the northern and southern areas both of which are available for informal recreation outside the areas of dense vegetation behind the houses demolished in 1996 and in the south-west corner. The route for walkers between Cannock Road and certainly the car park, if not into Chapel Street as well, is plain enough.

Other documents produced by the Objector

124. It appears that SCC consented to the use of the upper area for a flower festival for four days in July 1990. In my view, nothing turns on this (OBJ/I12).

125. No.108 Cannock Road is known to have been empty in October 1993 (OBJ/13a). Again nothing turns on this as this property was demolished in 1996. We also know that 112 Cannock Road was vacant in July 1995 and that the property had been vandalised (OBJ/I6a).

126. With the exception of one sycamore and one thorn all the trees within the open space coloured green on App/4 (with the exception of the northern area) were subject to a confirmed Tree Preservation Order made on 1 February 2001 (OBJ/I17-33).

127. At OBJ/I35 there is a photo of the sign erected by SCC which stands alongside the pavement in Cannock Road which purports to make user permissive. It is the type of sign that was commonly erected by local authorities on publicly-owned open space after the *Beresford* case reached the House of Lords in 2003. Mr Winks tells us in his statement at OBJ/A124 at paras 23-24 that this sign (and he speaks of “signs” although I have only seen the one) would have been erected after the decision of the Court of Appeal in the *Oxfordshire* case in 2005. Accordingly, signage will not be relevant on this application.

Objector's evidence

128. One starts with the initial Statement of Objection (with appendices) dated 24 January 2001 followed by the Amended Statement of Objection and the same appendices dated 13 September 2019 (OBJ/A37) much of whose contents have already been covered herein. I will deal with the village green defences raised in this document when I deal with counsel's closing submissions. Certain factual issues need to be mentioned. There follows a statement by David Adkins dated 5 March 2020. Mr Adkins is a law officer at SCC who gives evidence on behalf of the objector in relation to the PROW issue.

129. Mr Adkins tells us that Public Footpath 5 (Heath Hayes & Wimblebury) (formerly Public Footpath 64 (Cannock Town)) now running along the eastern outer edge of the open space (as shown on the plan on OBJ/H4) is noted in the order creating it (which was confirmed on 9 January 2001) to have a minimum width of 2m. The width of the former footpath (i.e. FP 64 whose route is shown on the plan at OBJ/H8 running up the central section of the eastern red parcel on App/3 and stopping 15m from the road), which was obviously in existence throughout the whole of the 1980-2000 qualifying period, is not particualised in the DMS dated 1999 (when known as Footpath 5b and extinguished by the diversion order confirmed in 2001 to which reference has already been made). However, Mr Adkins says that this is not unusual although he says that the minimum width of any cross-field path is normally taken to be 1m up to a maximum of 1.8m. He then tells us that the length of the PROW running through the field would have been 77m giving rise (applying a maximum width of 1.8m) to an area of some 138.6m^2 of land within the field which would have had the status of a PROW.

130. We then have an extremely informative statement dated 9 March 2020 from Ally Brereton (OBJ/A118).

131. Ms Brereton deals with the conveyancing history and she covers ground already outlined in this report. Suffice to say, she says that SCC acquired plots of land over the period 1974 to 1993 for the Heath Hayes Link Road

(see plan at OBJ/C1). She then lists the various transactions and their dates and documents are produced. She also confirms that the highway scheme was abandoned in 1994. This was followed by SCC's sale in 2000 of land to third parties with a frontage on Chapel Street and CCDC's transfer (also in 2000) of five plots to SCC all of which fall within the application land. At OBJ/I34 Ms Brereton produces a table showing when the various plots of land were acquired by SCC. These titles are now amalgamated under title number SF424918.

132. Finally we have the statement dated 9 March 2020 of Mike Winks who is employed by SCC as a Strategic Planning Advice Manager. Prior to 2009 he had been employed as a Principal Planning Officer from 1988 (OBJ/A122). Mr Winks kindly attended the inquiry and gave some oral evidence.

133. Mr Winks deals with the attempts made by SCC to develop the application land once the land acquired for highway purposes had been declared to be surplus to SCC's requirements. This is ground which has already been covered in this report.

134. At the inquiry I asked Mr Winks what the legal status of the application land was once the highway scheme had been abandoned in 1994. He told me that once the land had been declared surplus by the Highways Committee the matter would have been referred to the Property Sub-Committee which he said in those days would have ratified the decision of the Highways Committee. Once ratified the land would have been accepted by this committee as their responsibility.

135. It was, however, plain from what I heard from counsel and from Mr Winks at the inquiry that there was no evidence that an express appropriation of the land had occurred under which it might now be held for other non-highway purposes. I was told by Mr Winks that, once declared surplus, the application land would, in practice, have been offered round to other departments of the authority to see whether anyone else wanted it. In the result, the application land was acquired by SCC for highway purposes and there is no evidence that it was ever consciously appropriated under the Local Government Act

1972, section 122, onto other purposes of the authority, a process that could not simply be inferred from the way in which the land was used (see *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin)).

Applicants evidence

136. Accompanying the revised application dated 24 July 2000 are a batch of documents. Firstly, we have a petition containing the signatures and addresses of a total of **295** persons living in Cannock Road, Alston Close, Newlands Lane, Newlands Court, Chapel Street, Gorsemoor Road, Hednesford Road, Langholm Drive, Langtree Drive, Anstey Drive, Lyndhurst Road, Cross Street, School Avenue, Heathlands Close, Green Meadows, Condor Grove, Asquith Drive, The Coppice, Hobart Road, Nicholls Way, Bank Street, Otterburn Close, Eden Close, Langholm Drive, Kent Place, Cromwell Road, Gladstone Road, Boston Close, Van Gogh Close, Thistledown Drive, Hill Street, Langtree Close, Stafford Street, Chichester Drive, Deauvall Way, Carlton Close, Hewston Croft, Brampton Drive, Beacon Way, Wimblebury Road, Kestral Grove, Mill Crescent, Melbourne Crescent, Melbourne Road, Bank Street, Halbridge Close, Greig Court, Hobart Road, Copperkins Road, Kingscroft, Holston Close, Woodpecker Way, Acorn Close, Langtree Close, Wheatlands Close, Asquith Drive, School Lane, Kielder Close, Hobart Road, Brooklyn Road, Cleeton Street, Dorset Road, Picasso Close, Denbury Close, Alnwick Close, Claygate Road, Truro Place, Priory Road and Sweetbriar Way. Although this is a strong petition disclosing a good spread of support within the local community it carries little weight in practice as it tells the CRA nothing about the nature and frequency (including when such user began) with which the application land was being used by these individuals.

137. Secondly, the application was accompanied by a batch of letters from the following addresses:

- various people (10) living at flats at Heath View, Cannock Road
- 194 Cannock Road (1), 105 Cannock Road
- 105 Cannock Road (1)

- 63 Chapel Street (2)
- 92A Cannock Road (1)
- 57 Hednesford Road (1)
- 92 Cannock Road (2)
- 113 Cannock Road (1)
- 53 Chapel Street (1) Total = **20**

138. Thirdly, the applicants lodged a total of 21 evidence questionnaires ("EQ") on (I take it) the then standard form issued by the Open Spaces Society (OSS) from a total of 33 individuals (there were 13 responses in joint names).

139. The majority of those responding to the EQ claim to have used the application land for at least 30 years with only one user for less than 20 years. With I think three exceptions (Emery, Allman and Pritchard) all claim to have been regular users. The main usage typically involves walking, with or without dogs, children's play or just enjoying nature. The application land has always been open and available for access and the common thread running through all the statements is that it would be wrong to develop the site as there is already too much development locally and it would be a serious loss of open space for public recreation.

140. In the revised application it is claimed that various recreational activities take place on the application land (CRA/13). These include walking, berry picking, bicycle riding, walking dogs, children playing, bonfires, kite flying, football, bird watching, observing wildlife, picnicking, rounders and cub meetings. It is claimed that these activities have taken place on the whole of the application land and that the completed EQs "substantiate this". Mrs Bowen's EQ response is at CRA/146. She lived at 109 Cannock Road (indeed, she was born in Heath Hayes) and was a 30 year user. She said that she used the land weekly. In her case she used the land for walking, picking berries, watching the wildlife and playing games with children. She also says that the cubs and members of the Methodist Chapel used the land. Evidently there was also an annual bonfire.

141. Mr and Mrs Baseley's EQ is at CRA/140. Mr Baseley still lives at 111 Cannock Road and his house faces the application land on the south side of the road. They too claim to have used the land for 30 years. They say that they used the land on a daily basis for walking their dog, playing ball with their grandchild and watching the wildlife.

142. As Lee Morrall has helped Mr Baseley to pursue the application it was useful looking at the responses of his parents at CRA/164. The family home was at 83 Cannock Road. They claim to have used the land (latterly around four days a week) for 29 years which, in their case, was for playing ball games, walking, cycling, bird watching and picking berries. In a very helpful addendum letter at CRA/170 Charles Morrall (who sadly passed away in 2019) said that the land was then on sale for development and that he regarded it "as an oasis amidst the busy main roads here". He said that the land is used "by many people walking their dogs, and by children who live nearby". He says that the land has "matured into a nature reserve [and] is a precious habitat for trees, shrubs, birds, and other wildlife, and there is even a bat colony at the rear of the Talbot public house". He goes on to say that the "abundance of wildlife and established vegetation makes the green land left in the village (besides the park) and its centrality to the village makes it an 'ideal' village green'". He thinks "It would serve the community far better if the green was improved – with a couple of benches or features rather than used for yet more building".

143. The bundle lodged by Lee Morrall includes his own EQ responses in a pro forma document provided by the CRA which was completed on 2 March 2020. Mr Morrall is a photographer living in Hednesford. He was born in 1970 and lived with his parents at 83 Cannock Road until he left home in 2000. He said that he was a regular user of the application land after 1977. He said he used the land twice weekly on average and that it was "a pleasant route to the village centre away from traffic". As a child he played there alone or with friends, including meeting up with people on bonfire night (the bonfire in the 1970s to the 1990s was in the inner area close to the chapel – apparently team sports also took place in the same area when the land was more open than it is at the moment). There were also picnics with the family and riding

his BMX bike. He says that his mother and father used the land to “walk to the shops, to enjoy nature, [and the] occasional picnic”. Although his mother is elderly, she still walks on the land often “and greatly appreciates its tranquil nature living on the busy main road”. Nowadays he sees dog walkers and others using the land for recreation, some of whom are known to him.

144. Mr Morrall closes his EQ with some general comments. He says that the application land is the only green space in the village centre. He says that it is also an important natural habitat with protected trees. He cites the fact that Cannock Road is extremely busy. He also considers that there has been much development over the last 30 years and that housing requirements must have been met for “local people and more besides”. He thinks that “building has reached saturation point and the road system is at breaking point”.

145. Kate Owen, a Landscape Manager for Kier Highways who also manages trees and landscape for Highways England in the West Midlands has also provided a useful (albeit undated) statement. She says that she has over 20 years experience in the forestry and landscape sector and is trained in ecology surveying techniques. She also used to live in Cannock Road although she does not say when or where. She says that she has been asked to report on the ecology within the site. She has observed several trees with high bat roost potential and she provides a number of photos dealing with this. She also provides a photo of a large Beech tree which she believes to be in the region of 150-200 years old. In summary, she says that the area is a haven for wildlife and plays an important role in the community. There is a rich bird life and she says that the area provides an important buffer from the queuing traffic along this stretch of road contributing to a reduction in carbon emissions.

146. Mr Morrall’s bundle also includes correspondence from the OSS where they say that any land can be registered as a TVG including “ponds, woods and even land where part of it is inaccessible”. There is correspondence from CCDC informing the inquiry that the whole of the application land is covered by an area TPO 2000/6, with the undeveloped parcel on the corner with

Chapel Street (i.e. the western red parcel on App/3) carrying the designation of a woodland block under which development is bound to be severely restricted in view of its importance to the natural environment. In addition to the foregoing, there is a document entitled: “Save Our Green” written by Ann Hancox dated January 2020 together with comments from three local people in support of the case for registration. Mr Morrall also produces a photo from 2018 of spring bluebells within the woodland block. He also produces 29 photos of the site taken on what seems to have been an overcast day in January 2020, the locations of which are familiar to me following my own visits to the land.

147. Mr Morrall closes with a number of bullet points dated 4 March 2020. My summary of these is as follows:

- The land is the only public green space off the village centre.
- The land contains important habitats and a large variety of trees.
- The land mitigates the impact of passing traffic.
- Heath Hayes has been over-developed and the roads are congested.
- Even land that is inaccessible may be registered as a new green.
- There is an online petition to SCC at *changeorg.com* supporting the case for registration of the application land as a TVG. Phillipa Haden started this petition which, as at 14 April 2020, had, as I saw for myself, been signed by 369 people.

148. Before closing the applicant’s case I should also mention that on 31 March 2020 I received a short statement (and photo) from Philip Lander in support of the case for registration. He gives three main reasons for this (which I paraphrase).

149. First, he says that the land was given (as he puts it) a reprieve by a planning Inspector whom he says wrote to local residents saying that he realised the importance and relevance of the land to those in the locality. Since this time the land has been set aside for public recreation until further notice.

150. Secondly, he contends that the land lies in the heart of the village of Heath Hayes and is the only natural green space left within the village boundaries.

He mentions the bluebell wood on the corner of Chapel Street and Cannock Road, in which area there are a number of trees and shrubs. He says that the area is a haven for wildlife and is regularly used by dog walkers and as a route from Cannock Road to the centre of the old village.

151. Thirdly, Mr Lander makes a number of other general points which I do not need to repeat other than to say that he believes that the land would make an ideal local nature reserve.

The objector's closing submissions

152. In his short, but succinct, submissions Mr Wilmshurst raises the following matters in defence of the application to register.

153. Firstly, he submits that the EQs are limited in their scope and are not assisted either by the absence of oral evidence. He suggests that the application should fail on this basis alone.

154. Secondly, Mr Wilmshurst invites me to consider the evidence of Christine Cox which he says shows two things. First, the tracks on the ground disclose use in the nature of a right of way between distinct points rather than use across the whole of the land for informal recreation. He cites from Lee Morrall's EQ in this respect. Such use along the route of the former right of way would, he submits, have been use by right and thus non-qualifying use anyway. Secondly, he submits that not all of the claimed land would have been available for qualifying use throughout the whole of the relevant period as there were houses on parts of the land which were demolished after 1980. Mr Wilmshurst speaks of this as an interruption but this is not strictly the case.

155. Thirdly, Mr Wilmshurst accepts that the application land was *not* appropriated for housing purposes after the road scheme fell through in 1994. The minutes of the Property Sub-Committee held on 22 June 1994 concurred in the decision of the Highways Committee on 14 March 1994 that various properties at Chapel Street and Cannock Road in Heath Hayes were to be regarded as surplus to the requirements of that committee and should be disposed of. Mr Wilmshurst rightly accepts that the later planning history must be viewed in the context of disposal. The result of all this is that arguments on

use by right pursuant to the *Barkas* principle fall away. These minutes were only sent to me after the hearing.

156. Fourthly, Mr Wilmshurst submits that the application land continues to be held for the purposes of the Highways Act 1980. This has never changed. He submits that as these purposes are incompatible with the use of the application land as a registered green the principle explained in in *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs; R (NHS Property Services Ltd) v Surrey County Council* [2019] UKSC 58 is engaged from which it follows that the application land is not available for registration. Mr Wilmshurst makes these points under this head with accompanying citation from the *Lancashire* case.

- He says that the principle does not depend upon identifying a conflict between a particular regime governing an area of land specified in the statute itself and the general statutory regime in the Commons Act 2006. There seems no reason why the same would be true of the Commons Registration Act 1965 [59].
- *"It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect."* [61]
- Statutory incompatibility is one of statutory construction alone and requires no evaluation of the facts of a particular case. The matter is one of *"principle"* and there is no need to have reference to "*the actual use to which the authority had put the land thus far or is proposing to put it in future"* [68-69]. Mr Wilmshurst says that it does not matter that the highway scheme was abandoned in 1994. The issue is that the land is held for the purposes of the Highways Act 1980 which enables new roads to be constructed (for example see s.24).

157. Fifthly, Mr Wilmshurst then poses the question as to the relevant date at which one assesses statutory incompatibility?

158. He submits that the question can be asked at any time throughout the qualifying period. This is a difficult point on which there is no authority although I doubt whether it even arises on the present facts now that it is accepted that there has been no appropriation. The question now, as it seems to me, is whether the relevant holding power in this instance, which has been a constant, is one which precludes registration as a matter of law following *Lancashire*? Mr Wilmshurst wishes me to treat the principle as synonymous with the usual qualifying criteria which apply on these applications, all of which have to be met in order that registration may be justified when all the relevant legislation is silent on this. I think the point would only be of significance (and only then of limited significance) in this case if there had been an appropriation from an incompatible use to a use which was not incompatible with registration of the land as a TVG but which did not engage the principle in *Barkas.* Mr Wilmshurst also deals with the principle as though it were a material interruption in qualifying use but this is not the case. It is, in my view, a principle of law which operates to exclude certain land from the ambit of the village green legislation at the point in time when a CRA has to determine an application and has nothing to do with interruptions in qualifying usage which operate to stop time running which is a question of fact and degree for the authority.

Discussion

159. The following matters need to be analysed:

- Is there a qualifying locality?
- What matters need to be addressed?
- What weight should be attached to the EQs and other documentary evidence advanced in support of the case for registration?
- What land was available for sports and pastimes in the period 1980-2000?
- What was the nature and sufficiency of the use on the relevant land?
- Was there an interruption in use at any stage?
- Is registration precluded on the ground of statutory incompatibility?

Is there a qualifying locality?

160. Although Mr Morrall relies on a civil parish boundary which only came into being in 1988, it is my view that Heath Hayes and Wimblebury Parish may still be regarded as a qualifying locality for the purposes of the 1965 Act application. I consider that the evidence discloses that the original village of Heath Hayes (within which the application land is located) remains an identifiable community despite its merger with Wimblebury and Hawks Green in 1988 (following *Paddico (267) Ltd v Kirklees Metropolitan Council* [2012] EWCA Civ 262 at [62]). It is, I think, clear that those living in the south-east corner of the new parish would have been the predominant users of the application land and this is unlikely to have been affected by local government reorganisation. I deal with this in paras 56-58 herein.

What matters need to be addressed?

161. Registration may only be justified if the relevant criteria for this are met. The only question here is whether the definition of a TVG as it stood before section 22(1) of the 1965 Act was amended is made out? For these purposes, registration will be justified only where it is established that the inhabitants of any locality have indulged in lawful sports and pastimes as of right for not less than 20 years on the application land. Nothing else will do. It does not matter, for instance, that the application is valuable open space in an area where there may be an acute shortage of similar land; nor will it matter that the land is of environmental significance and/or that it contains thriving habitats. Registration is not subject to any discretion on the part of the CRA (as it will be in planning matters) who are not able to register simply because they think it to be a good thing to do so. What matters is proof of the relevant qualifying criteria all of which need to be made out to justify registration.

What weight should be attached to the EQs and other documentary evidence?

162. I have considered all the written evidence advanced in support of the case for registration. There is, however, an inherent weakness when it comes to the EQs as they fail to deal effectively with the nature of the claimed use or disclose where witnesses mainly walked whilst on the land. This is particularly important in this case as the application land is a pleasant short cut to the

shops and other facilities in Hednesford Road for those living in the south-east corner of the village. I am also sure that if oral evidence had been called counsel for the objector would have asked witnesses whether they mainly used the land as a convenient place of transit to Hednesford Road? It will be recalled, for instance, that Mr Morrall said in his EQ that his mother and father used the land to "walk to the shops, to enjoy nature, [and the] occasional picnic". Mr Lander also alludes to this when he says that the land is used as a route from Cannock Road to the centre of what he calls the old village.

163. I do not suggest for one moment that those completing EQs did so with a view to telling untruths. All of these witnesses used the land and I am sure wanted to convey the impression that they were safeguarding it. I am sure that all of them were attempting to describe matters as they genuinely saw them. However, I always bear in mind that where strong emotions are raised by an application, as was the case here in 2000, memories and recollections may have been unconsciously coloured or distorted and especially where a group of people with a common interest are involved. There is also a risk that where an activity has been carried on in the recent past, it is easy to believe that the activity has been carried on longer and/or more often and/or more continuously than it really has. This is why it is always important for such evidence to be tested by oral evidence and why only limited weight will normally be attached to untested written evidence.

What land was available for sports and pastimes in the period 1980 to 2000?

164. I find that between 1980 until their demolition in 1996 access would not have been available to local inhabitants within the building and garden curtilage of numbers 108, 110 and 112 Cannock Road. The aerial photos show that these properties had overgrown gardens and even after 1996 I consider it unlikely that any meaningful access would have taken place within the footprint of the rear gardens of these properties. Although by 1999 the frontage area of these properties would have been accessible the rear garden areas appear to have become heavily wooded and I doubt very much whether these areas have ever been regularly used for informal recreation. Accordingly, I find that the gap between the red parcels shown on the plan at App/3 (which is, as I find, a

reasonable delineation of the land occupied by these properties) was not land on which qualifying use could have taken place for the full period of 20 years before the application to register was made in 2000.

165. I also find that the uncoloured land in the gap on the eastern side of the eastern red parcel shown in the plan on App/3 would not have been available either for qualifying use prior to a date unknown in the period September 1986 to July 1990 when a building was demolished in the south-east corner of the eastern red parcel. As previously indicated, this building is likely to have been 94 Cannock Road whose rear garden will have been returned to grass and incorporated into the open space with the probable felling of some trees running along No.92's western boundary.

166. For these reasons, the true extent of the available application land should be as delineated on the plan at App/3 and would not have extended over the whole of the vacant open space shown coloured green on the plan at App/4.

What was the nature and sufficiency of the use on the relevant land?

167. I deal firstly with the western red parcel on the plan at App/3. I find that any recreation occurring within this parcel would have been no more than trivial or sporadic at best in the period 1980-2000. The aerial photos between 1981 and 1999 show that the land comprised mainly of trees and bushes and general scrub. Although the eastern side of this parcel was more open than it is now in the first half of the qualifying period (when there is some evidence of feint tracks), by the time we get to 1991 it appears to have become heavily overgrown and is unlikely to have been used to any great extent before 2000. Indeed, by 1999 the area is heavily overgrown. In the result, I find that qualifying use has not been made out in the case of the western red parcel on App/3.

168. I turn next to the lower half of the eastern red parcel. This is the area through which the pre-2001 PROW (formerly Public Footpath 64 (Cannock Town)) (see plan at OBJ/H8) ran up the central section of the field. In my view, it is plain from the aerial photos, particularly those images between 1984 and 1993, that local people were mainly using this parcel as a thoroughfare to

Hednesford Road rather than as a destination for recreation in its own right. The images taken between 1984 and 1993 show a very prominent track running along the approximate route of the PROW passing through the field. The PROW (and Mr Adkins tells us that the minimum width of a cross field path is normally taken to be 1m up to a maximum of 1.8m) was supposed to stop 15m from the road but the photos show that it stopped further back than this where it forked to either side of the field ending at the entry points off the pavement. I do not suggest that in the period 1984-93 local people were not walked outside the PROW and the two smaller tracks leading to the road but I find that this is unlikely to have been significant as if it had been there would be more evidence of this on the ground. What we can see in the photos after 1984 are clear tracks leading between Cannock Road to the car park and the open space off Chapel Street.

169. By the time we get to the images for 1997 and 1999 the central track appears to have gone and is replaced by smaller tracks running up the sides of the western red parcel on App/3 which appear to converge in the gap at the south-west corner of the CPBC where a prominent track runs into the northern area with access points into the car park and Chapel Street.

170. Turning next to the norther area, the position here is mixed. In 1981 this parcel was fairly open and there is evidence of what appear to be two worn tracks, with one of them being a continuation track from the southern area. These tracks have distinct access points leading into the car park and Chapel Street. By 1984 the land is more open but the tracks are still evident as they were in 1986. By 1990 we see visible tracks traversing the area which looks as though it is managed land of some description (it is quite possible that the western section has even been fenced off at this point – note the sinuous track in this area and obvious access points into Chapel Street). As we move into the 1990s the area still appears to be managed. By 1991 there is what appears to be an enclosed parcel close to Chapel Street where the land use looks to be different from the adjoining grassed area. By 1993 there again appears to be an enclosed area with a frontage onto Chapel Street which is quite pronounced in the image taken in 1997. By the time we get to 1999 the position has changed with the northern area appearing to be much more

overgrown than before with the exception of defined tracks running between likely access points.

171. My findings in relation to the southern section of the eastern red parcel on App/3 are these:

(a) Public use of the central linear path (i.e. the PROW) after 1980 until a date unknown between 1993 and 1997 is not qualifying use as the public enjoyed a legal right to use such land for walking.

(b) Public use of the two smaller tracks in the same period running off the southern end of the PROW to the road would have appeared to a reasonable landowner as referable to the exercise of an emergent right of way along these defined routes and not to a right to enjoy recreation over the whole of a wider area of land. Such use would not be qualifying use. It will be recalled from the *Oxfordshire* case at first instance (see para 28 above at [102]) that where the position is ambiguous the inference should generally be drawn in favour of the exercise of the less onerous right (i.e. as a putative right of way) rather than the more onerous right to use the land as a TVG.

(c) Public use of any tracks within the southern area from a date unknown between 1993 and 1997 until 2000 is again liable to have been indicative of emergent rights of way between defined points rather than to a right to enjoy recreation over the whole of a wider area of land. Such use would not be qualifying use.

(d) I find that the predominant use of this area during the qualifying period will have been as a place of transit on foot, with or without dogs, between Cannock Road and Chapel Street and/or Hednesford Road. Any qualifying use is liable to have been generally sporadic or occasional although it is, I think, likely that there will have been times during the year when it would have been more intense but, when looked at in the round, I find that the public's use of a wider area, i.e. outside the tracks, will not have been sufficiently regular to justify registration.

172. My findings in relation to the northern section of the western red parcel on App/3 are these:

(a) Public use of the tracks within this area would have appeared to a reasonable landowner as referable to the exercise of emergent rights of way along defined routes and not to a right to enjoy recreation over the whole of this area. Such use would not be qualifying use.

(b) It is quite possible that a section of this area on its western side was also enclosed, or partially enclosed, for a number of years after around 1990 although this is unlikely to have precluded access onto Chapel Street by those coming from outside the enclosed area.

(c) The predominant use of this area during the qualifying period will have been as a place of transit on foot, with or without dogs, rather than as a destination in its own right for lawful sports and pastimes. Any qualifying use is liable to have been sporadic or occasional although, as before, it is likely that there will have been times during the year when it would have been more intense. However, I find that when looked at in the round the public's use of the northern area, i.e. outside the tracks, will not have been sufficiently regular to justify registration.

Was there an interruption in use at any stage?

173. I find it to have been probable that an area comprising 2,304m² shown on the undated plan at OBJ/A31 was unavailable for qualifying use for a period of 6 months in 1993-94. The site covered roughly one-half (i.e. the lower half) of the of the eastern red parcel shown on App/3. The area would have been used as an area for parked vehicles and the storage of equipment and plant in connection with sewerage works carried out by contractors on behalf Severn Trent Water Plc. There is no evidence that the sewerage scheme described in the correspondence did not take place. The duration of this interruption was more than sufficient to stop time running in relation to such qualifying use as there might have been within the affected area.

Is registration precluded on the ground of statutory incompatibility?

174. I find that during the qualifying period the whole of the application land would have been held (and indeed is still held) for highway purposes by SCC. The application land was, as I find, acquired for the purposes of an intended road

scheme (the proposed A5190/B4154 Link Road) which was abandoned in March 1994. Although the land has subsequently been managed and treated as public open space, it is still held by SCC for highway purposes.

175. Part III of the Highways Act 1980 deals with the creation of new highways, with section 24 empowering the Minister and local highway authorities to construct highways. The section covers all types of highway. Further, Part IV of the 1980 Act deals with the maintenance of highways and Part V deals with the improvement of highways. It is therefore plain that if the land was registered as a new TVG it would clash with the powers conferred on highway authorities under the 1980 Act.

176. I have already indicated that TVG legislation will not extend to land which has been acquired by a public authority pursuant to its statutory powers where those purposes would be incompatible with (in the sense that they would be defeated or impeded by) registration of the land as a TVG (see *R (Lancashire CC v Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58 at [55]-[64]).

177. In *Lancashire* the Supreme Court found that it had been held in *R (on the application of Newhaven Port and Properties Ltd) v East Sussex CC* [2015] AC 1547 that land which was acquired and held by a local authority in the exercise of general statutory powers which were incompatible with the use of that land as a TVG could not be registered as such. The court held that the test of "statutory incompatibility", as stated in *Newhaven*, was not whether the land had been allocated by statute itself for particular statutory purposes but whether it had been acquired for such purposes and was for the time being so held, regardless of how the land happened to be used at any particular point in time.

178. The view of the majority in *Lancashire* was that it would be a strong thing to find that Parliament intended to allow use of land held by a public authority for public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the Commons Act 2006. In my view, it makes no difference to the application of the principle under this head that this

is an application for a new green made under the Act of 1965. The court also doubted whether TVG claims should outweigh the particular statutory powers under which the land was held, a point which carries particular force in relation to land purchased using compulsory purchase powers.

179. In the *Lancashire* case registration of the land was found to be incompatible with the use of the land for education purposes, including use as a school playing field and construction of new school buildings. It was unnecessary for Lancashire to show that the land was currently being used for such purposes, only that it was held for statutory purposes. Similar points applied in relation to the *Surrey* case (with which the appeal in *Lancashire* was heard) where the land was held for the purposes of an NHS Trust. It was held that the issue of incompatibility in that case also had to be decided by reference to the statutory regime and the statutory purposes for which the land was held and not by reference to how the land happened to be used at any particular point in time (see paras [55], [65-66]).

180. I therefore find that Mr Wilmshurst is right when he submits that the application land is unavailable for registration because of the statutory basis on which the land was acquired and is still held. He is also right, in my view, when he says that it does not matter that the highway scheme was abandoned in 1994 and that what matters is how the land is held and whether the purposes of the 1980 Act would be incompatible with the use of the land as a registered green. In my view, there is little doubt that the principle of statutory incompatibility arises in this case and would be a complete defence to the application to register.

Recommendation

181. In light of the above discussion, I recommend that the application to register the application land (comprising the red parcels shown on the plan at App/3) (being application number NVG5) should be **rejected** on the following grounds, namely:-

(a) that the criteria for registration laid down in the 1965 Act have not been satisfied, and

(b) the land is not in any case available for registration as it was acquired for and continues to be held by SCC for the purposes of its statutory powers as a highway authority where those powers would be incompatible with registration of the land as a TVG.

182. Put shortly, under para 181(a) above, in order to justify registration the surviving applicant had to show that the inhabitants of the locality of the civil parish of Heath Hayes and Wimblebury had indulged in lawful sports and pastimes as of right on the application land for a period of at least 20 years before the application was made in 2000 and, in my view, he has failed to do this for the reasons explained.

183. The CRA must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be “the reasons set out in the inspector’s report dated 28 May 2020”.

William Webster

3 Paper Buildings

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Inspector