Neutral Citation Number: 2016 EWHC 1238 (Admin)

Case No: CO/6234/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2016

Before :

MR JUSTICE OUSELEY

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Between :

LANCASHIRE COUNTY COUNCIL	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**
- and -	
JANINE BEBBINGTON	**Interested Party**

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Douglas Edwards Q.C. and Jeremy Pike (instructed by **Lancashire County Council**) for the **Claimant**
Tim Buley (instructed by **Government Legal Department**) for the **Defendant**
Ned Westaway (instructed by **Richard Buxton Public and Envrionmental Law**) for the **Interested Party**

Hearing dates: 21st and 22nd March 2016

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Approved Judgment

MR JUSTICE OUSELEY :

1. Lancashire County Council, the Claimant, owns land known as Moorside Fields in Lancaster. The land is adjacent to Moorside Primary School, and the County Council says that it holds it as local education authority. Ms Bebbington, the Interested Party, applied on 9 February 2010 to Lancashire County Council as registration authority to register this land as a town or village green. As landowner, the County Council objected to the application in April 2013. The Commons Registration (England) Regulations 2008 SI No. 1961 made provision as to how seven "pilot" County Councils, including Lancashire County Council, should deal with applications for registration of land which they owned. The application was referred to the Planning Inspectorate. An Inspector held a public inquiry on various dates in 2014 and 2015. Neither Mr Edwards QC nor Mr Pike, who appear now for the Claimant, represented the County Council at the public inquiry. Her decision, dated 22 September 2015, held that most of the land should be registered but that part should not. That decision can only be challenged by judicial review; there is no provision for a statutory challenge. Lang J refused permission on paper for Lancashire County Council, LCC, to bring judicial review proceedings. I have heard this application as a rolled up renewal hearing and substantive challenge.

2. Mr Edwards QC for LCC challenges the decision on these grounds: (1) registration required at least 20 years' usage as of right by a significant number of the inhabitants of "any locality." This meant an administrative area, and as the administrative area in question had changed during the 20-year period, the relevant period of usage could not be shown; the Inspector had erred in holding that it had been shown. (2) The applicant for registration needed to show that there was a geographical spread of users throughout the locality. (3) The Inspector ought to have found that the land was held for educational purposes and that registration as a town or village green would be incompatible with that statutory purpose, and thus was beyond the scope of the Commons Act 2006. (4) She had also imposed too high an evidential standard on the LCC, in reality requiring it to prove beyond reasonable doubt that the land was held for educational purposes, and ignored the presumption of regularity. (5) The Inspector ought to have concluded on her findings that the LCC had exercised control over the land, and so had given permission for its use; her conclusion that there had been no permission was irrational.

The statutory provisions

3. The Commons Act 2006 s15, so far as material, provides that an application may be made for the registration of land as a town or village green where: "(2)...(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right lawful sports and pastimes on the land for a period of at least 20 years; (b) they continue to do so at the time of the application…". The application was later put forward, without objection, on the alternative basis that, if the use had ceased in 2008, subsection (3) could be relied on since the application was made within the defined relevant period after cessation. Nothing turned on that; the

outcome would have been the same; the 20-year period either ended in 2008 or February 2010. The words "or of any neighbourhood within a locality" were first introduced into the Commons Registration Act 1965 by the Countryside and Rights of Way Act 2000.

The decision letter (DL)

4. I start with the Inspector's description of the land covered by the application.

> "10. Moorside Fields (the Application Land) consists of 5 parcels of land, which throughout the inquiry were referred to as Areas A, B, C, D and E and are shown as such on the plan which accompanied the application. Area A, referred to as the meadow was, until recently, an undeveloped plot of land. It is adjacent to Moorside Primary School (the School) and is currently being used to facilitate the construction of an extension at the rear of the School. Area B is a mowed field, referred to as the school playing field and both it and Area A are currently surrounded by fencing.
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> 11. Areas C and D border Areas A and B. In the past they have been the subject of mowing tenancy agreements but these ceased in around 2001. They are separated from each other and from Areas A and B by the hedges and in places are overgrown with brambles. Area E, also adjacent to the School, is currently overgrown and difficult to access. At some times of the year it contains a pond.
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> 12. To the immediate west of Areas C and D and separated from them by a shallow watercourse known as Burrow Beck, is a further area of land within LCC's ownership known as the Barton Road Playing Field (the BRP Field). Areas C and D are accessible from the BRP Field by crossing a stone bridge or via stepping stones."

5. It was Area E which she held should not be registered because there was insufficient evidence of its use over the 20-year period, largely attributed to its state, rather than to any purpose for which it was held.

6. Areas E and A are adjacent to the school, C is furthest from it. To the west and south west of the application site is a recreation ground. The application site is within a very largely residential area.

7. The site is wholly within what is now Scotforth East Ward of Lancaster city Council. Scotforth West Ward is to its west, John O'Gaunt Ward to the north, and now University Ward lies to the south of Scotforth East Ward. The site is in the northern part of Scotforth East Ward, close to its boundary with John O'Gaunt Ward and rather further from University Ward.

8. Regulation 15 of the 2008 Regulations requires the application for registration to be made on a form provided by the registration authority. The form required the

applicant to state the locality or neighbourhood relied on. The applicant said that the locality was Scotforth East, Scotforth West and John O'Gaunt Wards. The neighbourhoods relied on within that locality were defined and marked on a map in which the application site was just off centre. The Inspector accepted an amendment sought by the applicant, without objection from LCC, so that the application she considered relied on Scotforth East Ward alone as the "locality" and a revised "neighbourhood" plan, which included some postal districts in John O'Gaunt Ward and a small area towards the south within Scotforth East.

Ground 1: the meaning of "locality"

9. The Inspector recorded that, although a considerable amount of the evidence at the Inquiry dealt with the neighbourhood, the Applicant in closing submissions relied primarily on Scotforth East Ward, that is, she relied primarily on the locality; DL [14-16]. The Inspector held that Scotforth East Ward was a qualifying locality for the purpose of s15 of the 2006 Act. It was not in dispute but that an electoral ward could be a qualifying locality. What was in dispute was whether that defined locality had to have existed in the same administrative form for the period of 20 years relied on. The Inspector rejected LCC's argument that that was necessary. Having done so, she then concluded that it was not necessary to consider the evidence and submissions made with regard to the claimed neighbourhood, and only considered whether the requirement was met that a significant number of people from the *locality* had used the land for 20 years. It is clear the Scotforth East Ward which she considered was the Ward as reduced in 2001.

10. Mr Edwards submitted, as LCC had done at the Inquiry, that the law required the locality to retain the same form throughout the 20-year period relied on by the applicant. Although there always had been a ward known as Scotforth East Ward, in 2001 the City wards were abolished and new ones created. At DL [17], the Inspector described the Ward changes in recording LCC's submissions:

> "17. … prior to 2001, Scotforth East Ward extended to the south and incorporated the University of Lancaster. Article 2 of the City of Lancaster (Electoral Changes) Order 2001 (the 2001 Order) abolished the existing City Council wards and created new wards in their pace, including a ward called Scotforth East which excluded the University. Although the 2001 Order uses the structure of abolishing existing wards and creating new ones, the abolition and creation were simultaneous when the Order came into effect and there is no time within the relevant period when a locality known as Scotforth East Ward did not exist. The question therefore is whether the changes to the boundaries of the electoral ward have the effect that it cannot be relied upon for the purposes of section 15 of the 2006 Act…
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> 21…Scotforth East Ward has been in existence throughout the relevant period and the change in boundary of the ward to remove the University, does not seem to me to have altered the identifiable community of Scotforth East."

11. Mr Edwards submits that this approach involved an error of law, and he put considerable emphasis on the fact that the former Ward was abolished; it was not just a matter of boundary changes.

12. The starting point of his argument is *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674. Registration gave to the "relevant" inhabitants, that is the inhabitants of the locality or neighbourhood on which the successful application was based, the rights to indulge in lawful sports and pastimes over the land, and restricted the owner's rights to those which, with some give and take, would not interfere with those rights. Although the required user might be proven by use predominantly by inhabitants of the locality or neighbourhood, registration did not create rights for the public at large, as if it were some local authority park or a highway.

13. It was not in dispute but that "locality" had been given a restricted meaning requiring a recognised ecclesiastical parish or local government area. At [26] in the speech of Lord Hoffmann in the *Oxfordshire* case, he explained that it was argued in Parliament in the debate on what became the Countryside and Rights of Way Act 2000, that "the locality rule" might have made it too difficult to register new village greens. This led to the Government amendment to the 1965 Act by the 2000 Act which added the words "or of any neighbourhood within a locality". This language, he pointed out at [27] was "obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries", to which he had referred in [11]. A neighbourhood could also be within a single locality or overlap a number of localities since it was intended to abolish the kind of technicality which had encumbered the word "locality".

14. That thinking was exemplified in *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931 at 937, where Harman J accepted that the areas for the benefit of which a village green could be registered were all entities known to law, with a defined body of persons capable of exercising the rights, rather than entities unrecognised by the law. These units were boroughs, civil or ecclesiastical parishes, manors, but not two roads. He was aware of no precedent for such a claim. See also *R (Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) [2004] 1 P&CR 36, especially at [134] Sullivan J. *Adamson v Paddico (267) Ltd.* [2012] EWCA Civ 262, [2012] 2 P&CR 1 provided Sullivan LJ with the chance to consider the issue again. The arguments persuaded him that, if he had a clean slate, he would not necessarily have accepted that a "locality" was confined to legally recognised entity. But the introduction of the concept of "neighbourhood" as discussed in the *Oxfordshire* case, above, persuaded him, Patten and Carnwath LJJ that "locality" could not be given a meaning which would in effect be the same as that given to "neighbourhood". That, which would have been the effect of the argument he might otherwise have accepted in pre-amendment days, was not now open to him, since he could not hold that Parliament and the House of Lords had proceeded on a false premise as to the meaning of "locality". See also Carnwath LJ at [51, 52] and [55] especially.

15. *Adamson* was also relied on by Mr Edwards as authority on the question of the significance of changes to the boundaries or existence of the legal entity relied on. Sullivan LJ held [29] that a conservation area was not a defined legal entity for these

purposes, but he went on to say at [30] that as the Conservation Area mooted as a "locality" had not been in existence for the full 20-year period, it could not be relied on, though it appears probable that the geographical area and its buildings had existed throughout that period. At [62], Carnwath LJ, agreeing that the Conservation Area was not a plausible locality and in any event had not been in existence as a designation for the whole 20-year period, said:

> "… I accept that, where one has a historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. However, where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link."

16. None of these issues were dealt with by the Supreme Court [2014] UKSC 14, [2014] AC 1072.

17. Mr Edwards submitted that the fact that the evidence in support of registration had to cover use by a significant number of inhabitants of "the locality" over 20 years, and that the rights attached to the inhabitants of that locality, meant that the locality in question had to remain the same, as defined by its ecclesiastical or local government boundaries, over the whole of the 20-year period. Otherwise there would be uncertainty over who had the rights newly acquired. What if the Ward had been significantly enlarged but for less than the 20-year period: should rights attach to the whole of the enlarged area? The Ward had been abolished and a new one created, albeit simultaneously, resetting the 20-year clock. To the extent that the argument was a technical one, it was mitigated by the introduction of the word "neighbourhood". The Inspector had been wrong to treat what Carnwath LJ said in *Adamson* [62] as meaning that boundary changes did not matter; "attached" referred to an area to which the rights had already accrued, since accrued rights would continue to attach to the former locality.

18. Mr Buley for the Secretary of State contended that what Carnwath LJ had said at [62] in *Adamson* showed Mr Edwards' argument to be wrong, and that it had rightly been rejected by the Inspector. Carnwath LJ was dealing with the identification of the locality during the 20-year period, and not with accrued rights; after registration, a ward with later boundary changes remains a locality, defining those with the benefit of the rights, and there is no reason why the same should not apply before registration. This was not a case in which the defined locality had no 20-year existence, since there had been in reality no more than a boundary change, unlike the Conservation Area. There was sufficient continuity here. Were Mr Edwards right, even trivial boundary changes, or changes irrelevant to the number of users of the locality, would defeat claims to a public use as of right, if based on "locality." No witnesses had come from the area which no longer formed part of Scotforth East Ward.

19. He relied on two cases of suitable antiquity: *Bremner v Hull* (1886) LR 1 CP 748 and *R v Hundred of Oswestry (Inhabitants*) (1817) 6 Maule and Selwyn 61. In the more recent of the two, the customary process for the appointment of churchwardens in the

parish was not invalidated by an Order in Council severing a hamlet from the parish; the rights of the remainder of the parish and the cure of souls was unaffected, and should carry on as before. The older case offers an equally recondite glimpse of the past: a bridge over a river was left unrepaired by the Hundred; one end of it was in a township which had been annexed to the Hundred within legal memory, by a statute of Henry VIII, and the other end had been in the Hundred since time immemorial. The Hundred, before annexation, was obliged by prescription to repair the bridge. The Hundred was still liable, in its present form, to do so. Although the language of the statute was against the defaulting Hundred's argument, two of the judges concluded that notwithstanding the fact that the component parts of the Hundred had changed, the Hundred had still existed from before time immemorial. One judge likened the Hundred to a local government corporation which would retain its legal existence and identity, notwithstanding that parts might change. Mr Edwards sought to distinguish these, not just on the grounds of their particular contexts, but because they concerned established customary rights and not what was necessary during the period when customary rights were being established.

20. Mr Westaway for the Interested Party, adopted Mr Buley's submissions, accepting that the locality had to have been in existence for the 20-year period, but reserving his position should the case go further.

21. Were this issue before a court for the first time, I would have been tempted to conclude that the right approach to "locality" was to identify the "locality" as at the date when the 20-year period ended. This would provide the precise legal administrative or ecclesiastical area. Then it would be necessary to see whether the inhabitants of the geographical area bounded by the administrative or ecclesiastical boundaries had used the land in question in significant numbers throughout the 20-year period. It would be irrelevant whether the area had come into existence 20 years earlier or had existed in precisely the same form or had varied to degrees large or small. I see nothing in the Act which requires the "locality" to have existed for 20 years; the fact that the use by its inhabitants has to have lasted for that period does not mean that its legal definition has to have existed throughout that period. It fulfils its task by defining the area in relation to which significant numbers can be judged and to whom the rights, if registered, attach.

22. I am not sure that *Adamson* is binding on me in that respect since the basis of the decision is that a Conservation Area cannot be a "locality", and what is said about the need for it to exist for the full 20 years is a supplementary reason. What the Court of Appeal said was regarded by it as obvious, however, and I am satisfied that I should give it the weight of a considered view, which I should apply. The contrary was not argued before me, nor is it the approach which the Inspector adopted.

23. I accept Mr Buley's submission that the more natural reading of the language of Carnwath LJ in the passage cited is that he is referring to the position during the pre-registration period, rather than to the position after registration. His reference to "a historic district to which rights have long become attached" reads to me as dealing with rights which have accrued but not been formally recognised. That also makes more sense of the context in which the issue arose. Besides, were he dealing with the position afterwards, the issue would arise as to the effect of exclusion from the area, as opposed to inclusion in it, on the rights previously enjoyed. I cannot help but feel

that he would have addressed that issue if that is what he was dealing with. But even if he were speaking only of the effect of a change in boundaries of a "locality" after the registration of a green, there is no reason why a change in its boundaries before registration should have the potential to preclude registration for want of sufficient continuity, but that such a change after registration should leave the rights unchanged or substantially unchanged.

24. If this case concerned a change in the boundary of a "locality", I consider that the answer to whether or not the change stopped time running would be one of fact and degree. I do not think that Carnwath LJ was simply saying that where, before and after the change, there was an identifiable community, no change would matter, regardless of how different the two identifiable communities were. The word "remain" means that after the change the identifiable community must not be significantly different; it must still be essentially the same community. Were it otherwise, he would effectively have been holding that the locality could change radically, there could be two identifiable but significantly different communities, but the 20-year period would roll on regardless, presumably by reference to the more recent identified community. If that is so, the solution which I would have been tempted to adopt seems more practical and less artificial, but is not the one he adopted.

25. The Inspector in DL [21] seems to me to have considered the matter, in reality but not expressly, as a question of fact and degree. She is saying that although quite a large area of the Ward to the south had been removed, the population of Scotforth East Ward, in whatever form, was the same identifiable community, with or without the University. In my judgment such an approach conforms to the common sense and practical approach found in the *Bremner* and *Oswestry* cases. The change was not significant for the context in which she had to judge it.

26. One aspect of importance in judging that issue, perhaps the crucial one in this context, would be whether a significant number of the inhabitants of the "locality", as changed, could still be said to have used the land in question as of right for 20 years. Otherwise, the numbers of users could be significant by reference to the locality in one form but not in the other, and so there would not have been user by a significant number of inhabitants of the locality for 20 years. Granted she has not, at least expressly, assessed the difference which the removal of the University area had on the population size in relation to which the user had to be judged significant, but LCC did not ask her to undertake any such exercise as part of this argument. She was well-placed to judge on the broad brush basis which I think she adopted that the user from the identifiable community of Scotforth East had been significant in relation to the larger and smaller Wards. I do not think that the continuation of the same name for each of the guises which the area assumed was of significance.

27. The reason why she was not asked to consider the significance of the numbers excised from the new Ward as a result of the changes, is that that was not the real point which LCC wished to make. Its point was the more simple and legalistic one that the Ward she relied on had not been in existence for 20-years; the comparison with the *Bremner* and *Oswestry* cases was inapt since they did not concern the creation of a new entity, but adjustments to ones which plainly continued in existence. Here the Ward had been

abolished and a new one created. That was the key point upon which Mr Edwards' argument came to rest.

28. I cannot accept that the consequence of the form in which the Ward boundaries were re-organised should have so different an effect on the running of the 20-year period from that which would have happened with the more convoluted process of altering existing Ward boundaries. The form chosen had nothing to do with any aim of bringing about the consequences said to flow here. The outcome is exactly the same as it would have been had the University area been excised from the former Scotforth East Ward. The fruitful legalism which this area of law enjoys does not mean that the legalistic answer is right and that all technicalities must succeed. In reality the current Ward is the continuation of a sufficient part of the former Ward for continuity to remain between the two, by whatever means the change or interruption was brought about. The abolition of the one and its replacement was no more significant than would have been an equivalent change wrought by boundary changes. I do not think that the Act requires such a distinction to be drawn, which if drawn would still be sound for far lesser changes than this. All wards were dealt with in the same way, so a change of a street or two would still have had this surprising consequence.

29. Mr Buley also submitted that, if Mr Edwards were right, nonetheless Scotforth East Ward, as truncated and now constituted, and from which the applicant's survey of users showed the users from the Ward came, had always existed as an area. The Inspector would obviously and inevitably have found that that amounted to a "neighbourhood", if she had concluded that it could not in law amount to a "locality", and would therefore still have decided that Areas A-D should be registered as a town or village green. The very strict test for the exercise of the court's discretion not to quash an unlawful decision, as set out in *Simplex GE (Holdings) Ltd. V SSE* (1989) 57 P&CR 306, had been modified by the amendment introducing s31 (3D) into the Senior Courts Act 1981: relief by way of judicial review must be refused "if it appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". That test, submitted Mr Buley was satisfied and relief should be refused, even if there had been an error by the Inspector as alleged by Mr Edwards.

30. If I had found in favour of Mr Edwards' arguments on this issue, I doubt that I would have refused to quash the decision. The basis upon which Mr Buley invited me not to quash it was that it was obvious that the Inspector, if in error on "locality", would simply have switched the current Scotforth East Ward into a neighbourhood and the issue would have become irrelevant. However, whether applying *Simplex* or s31(3D), the Court's task is to examine the position if the error had not been made. It does not follow to the requisite standard that Mr Buley is right as to how she would have dealt with the ensuing issues, if told she was in error. There was no suggestion from the applicant, who heard the issue being argued, that it was irrelevant because the Ward should be a further alternative neighbourhood. Nor did the Inspector suggest such a solution. She has made no alternative finding; yet the point is essential to her decision. The applicant raised a rather different neighbourhood, and then amended it, but not to the effect that the Ward should be the neighbourhood. But nonetheless for the reasons given ground 1 fails.

Ground 2: the spread of users throughout the "locality"

31. Mr Edwards' next ground was that there needed to be a spread of users from throughout the locality, not from part only of the locality. The Inspector had wrongly ruled that to be irrelevant. She considered this issue in [DL 22-30] before rejecting it without considering the evidence on which the submission was based. She was right to do so.

32. As she points out, there is no such requirement in the wording of the Act, and no such additional test is present by necessary implication. It would be a considerable additional hurdle in cases particularly where the locality, a legally defined area, rather than a neighbourhood, was at issue. The test would have had to apply when the rigidities of "locality" were unrelieved by the more flexible "neighbourhood." This case illustrates the point that the area in question may not be readily accessible to all of the area of the "locality" precisely because it has to be legally defined area. It may be toward the edges of such an area, rather than in its population centroid. It would reinforce the arbitrary effect of the boundaries of a locality on what could be registered as a town or village green. The number of users still has to be "significant" in relation to "locality" or "neighbourhood"; the difficulty of meeting that criterion was eased markedly by the introduction of the "neighbourhood," and a similar problem ought not be to introduced in a different guise.

33. Mr Edwards suggested that without a "spread", albeit uneven, throughout the area of the "locality", and the same would apply to a "neighbourhood", there would be a mismatch between the area whence came the actual users who established the rights, and the area to which the rights would attach after registration. So there would be, I agree. That is the inevitable consequence of having to define an area. In the case of a "locality", the scope for mismatch is likely to be the greater than for a "neighbourhood" but that is because of the need to choose a legally defined area. The anomaly of refusing registration because of the absence of a scattering of users throughout the whole area, the relationship of which to the users of the green may itself be quite arbitrary, is much less than rights being attached to all the inhabitants of a locality, some of whom will never use them. If the criterion did not apply to the "locality", it cannot be imported in relation to "neighbourhood". The nature of a "neighbourhood" is of itself likely to mean that this mismatch, if it arises, is not significant. It might mean no more than that the boundaries of the "neighbourhood" are too widely drawn.

34. I do not see what statutory purpose is served by preventing registration on the basis of an absence of spread. Parliament has used the language it has, which does not include "spread" to express the simple requirement. Mr Edwards accepted, to limit the obviously unfair and illogical consequence of his argument, that the spread need not be and could not be expected to be even throughout the area, and that the presence of no more than a scatter of users only in parts of the neighbourhood would suffice. But that scatter of users, as opposed to their complete absence, seems neither to go to the real merits of the case for registration for the proven significant number of users, or to the real avoidance of this supposed mismatch. And it would simply create the issue of deciding what parts of the "locality" or "neighbourhood" the scatter covered or left uncovered.

35. No authority positively supports the contention, although it has been raised in a number of cases. The Inspector rightly rejected the submission that the statutory requirement for a "significant number of the inhabitants of the locality" to use the land meant that there had to be a spread throughout the locality. The phrase used by Sullivan J in *Alfred McAlpine Homes Ltd v Staffordshire County Council* [2002] EWHC 76 (Admin) at [71] that this meant that the number using it had to signify that the land was "in general use by the local community… rather than occasional use by individuals as trespassers" could not be seen as reflecting a statutory requirement for a spread throughout the locality. Mr Edwards focused on the words "general use by the local community" without paying sufficient heed to the context created by the whole passage. This relates to the numbers of users and the frequency of recreational use needed to show the significance of the numbers. It has nothing to do with their place of residence within the locality.

36. Mr Edwards also submitted that support could be found in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch), HHJ Behrens sitting as a Judge of the High Court. This case went to the Court of Appeal, [2010] EWCA Civ 1438, affirming his decision. Mr George Laurence QC had raised the issue of whether, for a locality to be a "locality", it had to be of a sufficient size and situation that a "proper spread of qualifying users" could be found. That argument was rejected, [90]. If the locality were too big, the numbers would not be significant enough, hence the role of the "neighbourhood". Parliament had not intended that both areas should be small enough to "accommodate a proper spread of qualifying users". The argument which was rejected was not the one now raised by Mr Edwards but appears to have been whether users from outside the area showed the area to be too small to be a "locality". Mr Edwards submitted that HHJ Behrens appeared to accept that a spread of users throughout the locality was however required. There would have been no need for the introduction of the "neighbourhood" if the inhabitants of a part only of a locality could satisfy the statutory test.

37. This analysis is untenable. (1) The need for a legally defined area to constitute the "locality" meant that the inhabitants of the locality could suffice if significant in number in the locality; if so, their spread is irrelevant. The relationship between residences of the recreational users of a green to the population of an area legally defined without reference to the spread of those residences will inevitably be arbitrary. (2) The introduction of the concept of the "neighbourhood" recognised that the area of a locality might be too large for the number of users to be significant in relation to the arbitrarily but legally defined area in which the green fell but which had to be chosen as the area against which the significance of the user numbers had to be assessed. Users of a green might come from more than one "locality" depending on the location of the green in relation to population, and be significant only in relation to that purposively defined "neighbourhood" area. (3) HHJ Behrens did not accept or even suggest that a spread of users was required. He rejected the argument in the language it which it was put. The fact that the crucial point of the very different argument which he rejected was not spread within the locality does not mean that he accepted that a spread within the locality was required. He may not have tackled the premise for the argument in dealing with its real point, but that is not a basis for saying that he accepted its premise. Mr Edwards found some encouragement in the Inspector's words that "it is perhaps possible to read the words of HHJ Behrens" in

the way he suggested. Perhaps it is possible, but only as a straw might seem to a drowning man. (4) I note that in the Court of Appeal, Sullivan LJ cited his own words from *McAlpine Homes Ltd*, [31] set out above, without suggesting that they had anything to do with "spread", rather than with the level of user providing notice to the landowner of the rights potentially being asserted.

38. The first instance judgment of Vos J in *Paddico v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch) [25-27] which is what became *Adamson v Paddico*, above and beyond, was also prayed in aid. At [106], Vos J said "in passing" that he was not impressed with the submission of Mr Laurence QC that there was an inadequate spread of users throughout the locality. He would have expected them to be concentrated, as they were, closer to the green in question, with a scattering further away. It would have been "illogical and unfair" for that to have led to the rejection of the application for registration. Later, at [111], he rejected Mr Laurence's "spread or distribution" point. It may not be entirely clear whether that rejection is based on the facts or on the legal irrelevance of the point; indeed, it may have been both. Certainly there is nothing in what Vos J said which could furnish any support for the argument in principle. It would be such a significant criterion that, were it being accepted, I would have expected to see that made abundantly clear. The fact that Vos J considered and rejected that argument on its facts is no sign at all that he favoured it in principle.

39. Mr Edwards contrasted the conclusion of this Inspector with contrary conclusions reached by two other Inspectors, asserting widespread recognition of such a criterion. Their decisions on law carry no authority here. There are Inspector decisions which go the other way. Mr Edwards also referred me to a decision of a judge refusing permission to apply for judicial review in which she had said that this point was arguable.

40. Mr Edwards' submissions thus encompassed all that could be said in favour of the point. But this ground is untenable. The sometimes technical approach to statutory construction which one see in commons cases cannot justify reading such a large criterion into the Act.

Ground 3: the conflict between registration and the statutory purpose for which the County Council held the land

41. There were two related issues before the Inspector: (1) was the land or any part of it held by LCC for educational purposes? If so, (2) would registration as a town or village green be incompatible with those purposes applying the principles in *R (Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] UKSC 7? The former only matters as the foundation of the latter argument. So I take them together rather than as two separate grounds.

(1) The power under which the land was acquired or held

42. The Inspector first considered the basis upon which LCC had acquired and held the land. Mr Edwards submitted that her conclusion that the evidence had not made her sure that LCC had acquired and held the land for educational purposes throughout the period of 20 years, was irrational, and applied too high a standard of proof. The

evidence pointed all one way. He also sought to introduce further evidence. For this purpose, I need to set out what the Inspector said at [DL113-118]:

> "113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944". The endorsement is dated 12 August 1948.
>
> 114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows "Education Lancaster Greaves County Secondary School".
>
> 115. In addition LCC provided an Instrument dated 23 February 1925 and a letter from LCC to the School dated 1991. The Instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of land acquired by the Council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the BRP Fields. An acknowledgement and undertaking dated March 1949 refers to the transfer to the County Council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the BRP Fields. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.
>
> 116. At the inquiry LCC provided a print out of an electronic document headed "Lancashire County Council – Property Asset Management Information" which in relation to "Moorside Primary School" records the committee as "E". I accept that it is likely that this stands for "Education". An LCC plan showing land owned by "CYP education" shows Areas A, B and E as Moorside Primary School and Areas C and D as "Replacement School Site". In relation to Areas C and D the terrier was produced, and under "committee" is the word "education". The whole page has a line drawn through it, the reason for which is unexplained.

> 117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no Council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the Council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald, a School Planning Manager for Lancashire County Council, confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.
>
> 118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC's statement that *"the Application Land was acquired and is held for educational purposes and was so held throughout the 20 year period relevant to the Application"* accurately reflects the legal position."

43. Mr Edwards accepted that the burden was on LCC to show that the land was held for educational purposes. His first submission was that the Inspector applied too high a standard of proof, and that her use of the word "sure" and her approach itself showed that she had required the LCC to prove its contention beyond the balance of probabilities. I disagree. The Inspector referred specifically to the standard of proof in [DL9]; I cannot infer, in the absence of very clear evidence, that she forgot that when she came to the various aspects of her decision. There is nothing in what she said which would justify that inference. The use of "sure" does not show it. Although that word is used, with "satisfied", to express the criminal standard of proof, its use in this context does not demonstrate that error. Nor does her conclusion on the facts themselves warrant the inference that she would have found the LCC case proved on the balance of probabilities. The reference in [DL118] to there being no positive evidence contradicting LCC's assertion that the site had been acquired and held for educational purposes for the whole twenty-year period, simply reflects her judgment that the evidence was too weak for the necessary conclusion to be drawn in LCC's favour.

44. Mr Edwards second submission was that hers was not a rational conclusion. In terms of positive evidence, areas A, B and E were conveyed to LCC in 1948. The endorsement on the conveyance refers to s87(3) of the Education Act 1944. This section, repealed in 1996, exempts from the Mortmain and Charitable Uses Acts any "assurance of land…if the land is to be used for educational purpose." An assurance of land to any local education authority to be used for educational purposes is void if the assurance or a copy is not sent to the Minister within 6 months of when it takes effect, and he has to keep a copy of every such assurance. The endorsement shows that that section appears to have been complied with. The Inspector did not discuss

the significance of the reference on the conveyance to that provision. Areas C and D were conveyed to LCC in August 1961. The conveyance makes no reference to the purpose of the acquisition. On it there is what the Inspector described as a "faint manuscript endorsement" referring to a named secondary school.

45. The print out which she refers to in [DL 116] records that land described as "Moorside Primary School" is education land, as she interpreted the document, which as I read it means that she accepted that it showed that it was held for that purpose. The third sentence of [DL116] makes that that refers to areas A, B and E. Again, the Inspector does not appear to conclude otherwise.

46. The electronic print out of the Property Asset Management Information, no date given by the Inspector, referred to "Moorside Primary School" as under the aegis of the Education Committee. An LCC Plan showed Areas A, B and E as "Moorside Primary School" and owned by "CYP education"; it is not suggested that that refers to a body other than LCC. Areas C and D were shown on it as "Replacement School Site." LCC produced its terrier which showed the relevant committee for C and D to be the Education Committee, but there was an unexplained line through the whole page. She discounted for all areas the 1925 instrument, and the 1991 letter; [DL 115]. They related to land adjacent to the land in question, and what she said about that, [115] is clearly rational.

47. Mr Edwards also pointed to the fact that that Areas A and B were in actual use for educational purposes, so they must have been bought or appropriated for educational purposes.

48. The Inspector did have oral evidence from two witnesses called on behalf of LCC. Ms Campy, a solicitor employed by LCC who was present at the Inquiry, produced notes of their evidence. Ms MacDonald, of LCC's Asset Management Team, had said that "a piece of land", but it is not clear whether she was referring to the whole or part only of Areas A, B and E, was "reserved for primary school provision". Mr Bower, LCC's Estates surveyor, said that the whole of the land had been acquired for and was held by LCC for educational purposes throughout the whole of the 20-year period, and had never been declared surplus to educational requirements, as Ms MacDonald agreed.

49. Mr Westaway referred to the witness statement of Ms Bebbington, the applicant at the Inquiry and the Interested Party here, about how the Inquiry had progressed on this issue. The decision in *Newhaven* had been given some 4 months before the resumption of the Inquiry in July 2015, but this issue was raised only 3 days before its resumption. Each day, the Inspector had asked LCC to provide the evidence that the land was held for educational purposes. There was no reason for the Inspector to suppose better evidence existed. Ms Bebbington also gave evidence in her witness statement, in addition to the Inspector's summary in DL [117], about the oral evidence upon which Mr Edwards relied: she said that neither Ms Macdonald nor Mr Bowers had been able to say anything material about the statutory power under which the land was held. The former had not taken up her present role until 2008.

50. Before I turn to the legal submissions about the evidence which was before the Inspector, I need to rule on LCC's application to adduce evidence which was not

before her. The further evidence upon which LCC now wishes to rely, which LCC said was only found after receiving her adverse decision, were relevant committee minutes. Ms Campy, the LCC solicitor explained the circumstances in her second witness statement. She said that the LCC thought that it had produced sufficient documentary evidence, backed up by the oral evidence, and evidence of the actual use made by the school of Areas A and B to prove that LCC had acquired the land for educational purposes, and had held it for educational purposes throughout the whole of the 20-year period. So there had been no further search of LCC's records.

51. The records now produced showed (1) that before the 1948 conveyance, the LCC Finance Committee, at the request of its Education Committee, had recommended and that the LCC had then authorised borrowing money for the purchase of the site and for covering incidental expenses for the proposed Lancaster Scotforth Moorside primary school; and (2) that, at the request of its Education Committee, LCC resolved to seal the conveyance from a Mr Dilworth of 13.89 acres of land "as a site for a proposed primary school". That is the area of the 1948 conveyance shown on the 1945 conveyance.

52. Mr Edwards submitted that this evidence was admissible pursuant to the principles in *E and R v SSHD* [2004] QB 1044, [64-69, 91], and *Ladd v Marshall* [1954] 1 WLR 1489. Its admission was opposed.

53. In my judgment, it is not admissible. It fails the first *Ladd v Marshall* test because it was obtainable with reasonable diligence; the LCC judged that it had sufficient evidence on a point which it knew was in issue and for which it needed evidence, and so searched no further. One of the reasons for the tests is to bring finality to litigation. It could have had an important bearing on one aspect of the case, namely the purpose for which the land was held, but as the Inspector considered statutory incompatibility on the basis that the land was indeed held for educational purposes, it could have no important bearing on the ultimate outcome of her decision, unless the Inspector erred in law in her approach to statutory incompatibility. It is of course apparently credible.

54. The error of fact as error of law tests in *E and R* reflect the differing public interests at work in public law cases, which also enable a departure from *Ladd v Marshall* principles in exceptional circumstances. Before any question of that arises, the Inspector's decision must be shown to have been made in ignorance or misunderstanding of an "established and relevant fact", which has led to unfairness in the result. The mistake must have been about an existing fact, now uncontentious and objectively verifiable; the appellant must not have been responsible for the mistake, and it must be material. The Inspector's mistake, if such it be, is one of existing fact. I am sure that the Inspector, faced with the evidence, would have concluded that the land had been acquired for educational purposes. But for reasons which I develop later, she might not have been persuaded that the land, or all of it, was still held for that purpose throughout the 20 years, in view of the use or rather absence of educational use made of it. The last two points must be answered as before: LCC is responsible for the mistake if mistake it be; the mistake is only material if the Inspector is wrong on statutory incompatibility.

55. I now deal with the legal arguments about the evidence which was before the Inspector. Mr Edwards submitted that the correct approach to the evidence and to

uncertainty about what it showed was to be found in *R(Malpass) v Durham County Council* [2012] EWHC 1934 (Admin) HHJ Kaye QC, where [41] he records common ground between two experienced advocates that, even if the evidence showing that the basis upon which land was held by a local authority was not clear, it was proper to assume that the acquisition and holding was lawful provided the use to which the land was put was lawful under statute. A lawful statutory use can show what the origin of the acquisition or holding was. That does not help Mr Edwards here where the evidence of regular educational use was limited by the nature of the use actually made, its intermittency, and the area used for it. *Naylor v Essex County Council* [2014] EWHC 2560 (Admin), John Howell QC sitting as a Deputy High Court Judge, holds that a Court should assume that a local authority acted properly and lawfully in pursuance of a statutory power in the absence of contrary evidence. This was the presumption of regularity. It is referred to in that case, but was not the subject of debate as to its role or limitations. That still falls short of enabling the purpose of acquisition and continued holding to be inferred from limited use, if it cannot be inferred from the documents. Finally, Mr Edwards referred to *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [20115] EWHC 2576 (Admin), Dove J [20-25]. He submitted that appropriation did not need to be spelt out expressly in a document but evidence of the exercise of the power sufficed. I doubt that that is a correct analysis of the decision or in reality one helpful to him. S122(1) of the Local Government Act 1972 deals with the appropriation of land from one purpose to another. What is required is a decision to appropriate since the authority has to be satisfied that the land is no longer required for the former purpose, but that does not normally require any particular procedure. Appropriation cannot be inferred simply from how the authority uses or manages the land, even though there may be no need for a formal record or resolution of the appropriation. Land can also be acquired for a particular purpose but need not be put to that use immediately, and can be used for other purposes, at least temporarily; s120(2).

56. Mr Buley submitted that the Inspector was entitled to find that there was no sufficient evidence that the land had been acquired or appropriated for educational use. The presumption that a local authority has acted lawfully, in the absence of contrary evidence, could not prove that the land had been appropriated to any particular purpose unless there was a requirement that it be so appropriated. Mr Westaway pointed out that the presumption of regularity could only operate where the issue was whether an act, which had been done by a public authority, had been done "regularly and properly". It could not be a substitute for evidence that the act had been done for a particular purpose. LCC had not raised this presumption before the Inspector. It was insufficient for LCC to prove a belief that the land was held for educational purposes. *Goodman* showed that appropriation could not be inferred from subjective belief or conduct.

57. I rather doubt that, confined to the express reasoning in the DL, I would have reached the same conclusion as the Inspector as to what could be inferred from the conveyances and endorsements on them in relation to the purpose of the acquisition of the various areas. I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition was put forward; there was no suggestion that the parcels were acquired for public open space. I would have inferred that there were resolutions in existence

authorising the acquisitions for that contemporaneously evidenced intended purpose, which simply had not been found at this considerable distance in time. It would be highly improbable for the lands to have been purchased without resolutions approving it. The presumption of regularity would warrant the assumption that there had been resolutions to that effect, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL [116], which shows the property, after acquisition, to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding.

58. On that basis, the next question would have been whether there was evidence of later appropriation to any purpose other than education. If the land had been acquired for educational purposes, it is not clear why any resolution appropriating the land for educational purposes would have been required. That is not a question the Inspector asked, because she concluded that it had not been proved that the lands had been acquired for educational purposes.

59. But if prepared to conclude that there were missing resolutions for the acquisition, she might well have inferred that there must have been a lost decision that Areas C, D and E were surplus during the 20-year period - and if so, perhaps Areas A and B as well. I say that because of the evidence, which I refer to later, as to how the land had been left unused for educational purposes for so long, and other land used for the identified purposes behind the acquisitions.

60. However, I do not consider that I can regard the Inspector's conclusion on acquisition or appropriation as irrational. First, although the explicit reasoning of the Inspector permits a different conclusion, it does not impel it as clearly as is required for her conclusion to be held irrational. The presumption of regularity is being worked quite hard to fill in gaps in any alternative analysis. I am far from clear that any reliance was placed on the presumption at the Inquiry.

61. Second, and more importantly, although not explicit, her reasoning and conclusion in the DL must have been affected by how this issue developed at the Inquiry. LCC would have been well aware of it, and did not take issue with what Ms Bebbington said had happened. As I read the DL, the fundamental problem for the Inspector in the LCC evidence was the absence of what she regarded as the primary sources for power under which the acquisition or appropriation of the land occurred: the resolutions to acquire or to appropriate it for educational purposes. She was entitled to regard those as the primary sources to prove the basis for the exercise of the powers of the authority. She was also entitled to infer, on what Ms Bebbington described of the way in which the issue was raised and on the Inspector's own interventions, that she had received from LCC the evidence which it had rather than the results of an incomplete search. She certainly does not refer to any LCC suggestion that there were files yet to be examined or the search truncated because LCC thought it had enough. So she approached her decision, as I read it, knowing what transpired before her, not on the basis that resolutions related to acquisition might well have existed but could not be found at this distance in time, but on the basis that none had been produced despite proper endeavours to find them, endeavours which had nonetheless produced the conveyances, and other related documents. So she was not prepared to assume that

resolutions in relation to acquisition had existed. That was entirely a matter for her, and cannot come close to legal error.

62. Once she reached the conclusion that the land had not proved to have been acquired for educational purposes, she was not looking for resolutions which led to the conclusion that the land had been appropriated to another use from educational use, but for evidence that the converse had occurred, that the land had been appropriated to educational use before or during the 20-year period. Not merely were no appropriation resolutions found, despite search, but the history of the uses of the land for educational purposes could not assist the inference that they must have existed.

63. The Inspector refers, in DL[119-120], to the way in which the schools for which it seems that the land was acquired were or are in fact being provided for or enlarged without the use of the land. Her description of the land in DL [10 and 11] shows only Areas A and B to be performing any educational function. E plainly does not. So land acquired for educational purposes in 1948 has not been put to the specific envisaged form of educational use, and part, E, was put to none at all in the nearly 70 years thereafter. Land acquired in 1961 has not been put and is still not put to any educational use, in the 55 years that followed.

64. Accordingly, I do not accept that the Inspector has erred in law in her conclusion about the purpose for which the land was acquired or held during the relevant period.

(2) Statutory incompatibility

65. The Inspector then turned to the question of whether, if the land were held for education purposes, there was any necessary incompatibility between that and its use for recreational purpose. She concluded that there was not. This issue does not now strictly arise for decision in view of the lawfulness of her conclusions on the purpose for which the land was acquired or held. But I heard full argument, and, like her, I shall deal with it.

66. The Inspector held in DL [119-124]:

> "119. Furthermore, even if the land is held for "educational purposes", I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The School is currently being extended on other land and will, according to Lynn MacDonald, provide 210 places which will meet current needs. There is no evidence to suggest that the School wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.

120. Areas C and D are marked on LCC's plan as "Replacement School Site". However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her 5 year planning phase.

121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.

122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish or need to make that provision on the Application Land.

123. In *Newhaven*, it was held that *"it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour Authority from dredging the harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence"*. Although evidence of other consequences which may occur was presented the judges stated that "*we do not need to consider such matters in order to determine that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green"*.

124. It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the

> working harbour were clear to their Lordships. Even if it is accepted that LCC hold the land for "educational purposes", there is no *"clear incompatibility"* between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility."

67. The statutory provisions upon which LCC relied before me were: (1) s8 of the 1944 Education Act which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment; (2) ss13 and 14 of the Education Act 1996 which requires local authorities to contribute to the development of the community by securing efficient primary and secondary education, and contains provisions equivalent to those of s8 of the 1944 Act; (3) s542 of the 1996 Act which requires school premises to conform to prescribed standards; these include the School Premises (England) Regulations SI 2012 No.1943 which require suitable outside space for physical education and outside play; and (4) s175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children."

68. I accept what Ms Bebbington said about the way LCC put its case at the Inquiry: safeguarding had not been raised at the Inquiry by LCC other than in a few "throw-away" lines during LCC's cross-examination of a witness. Mr Westaway said, without contradiction, that it was not mentioned in LCC's supplementary statement of case issued shortly before the Inquiry resumed in July 2015, nor in its closing submissions to the Inquiry. The focus, as is clear from the DL, was on sufficiency of school provision.

69. Mr Edwards submitted that LCC's ability to fulfil its educational duties, in short to provide suitable educational accommodation and to safeguard the pupils, would be prevented or impeded by the registration of any part of the land as a town green, and the rights which the public would have over it. Applying *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7, [2015] AC 1547, the public's use would be inconsistent with those duties, and so registration would fall outside the scope of the Commons Act 2006. LCC could not use any part of the land for a new school or for an extension to a new one, or to facilitate the construction of any new facilities, without committing a criminal offence. LCC could not use it for educational purposes, whether open air classes or for open air recreational purposes, formal or informal, since the presence of the public as of right would prevent the school fulfilling its safety and welfare duties to its pupils. This was not a matter which give and take could resolve. Here, any educational use would be frustrated by registration. The relevant question was whether, if or when the land came to be used for educational purposes, it could not be so used because of the rights over the registered green, rather than the actual educational use currently being made of the land.

70. Mr Buley submitted that, even if LCC had appropriated the land for educational purposes, that fact did not of itself give rise to any particular rights or obligations on the part of LCC: it had no duty to maintain the land, or to use it in a particular way. The range of general statutory duties which LCC had as education authority did not alter with the appropriation of the land; they were not specific to the use of any land which it owned or held for educational purposes, or to this particular land. LCC could declare the land as surplus should it so choose. The Inspector was entitled to conclude that, looking at LCC's specific intentions in relation to the land, there was no factual incompatibility, since LCC might not wish or need to use this land for educational provision.

71. Mr Westaway adopted those submissions, pointing out that LCC relied principally on s14 of the Education Act 1996 to provide sufficient schools. That duty could be fulfilled on other land, and did not require the use of this land for its fulfilment. The harbour authority in *Newhaven* had to fulfil its obligations using the land there at issue. The possibility of future educational use would not suffice, since that would in reality mean that rights registrable under the 2006 Act could not be acquired over publicly owned land, which was not the law at all. The land could be used for outdoor space by the school, the provision of which was also a function of the education authority under s14; that use by the school and recreational use by the public would not inevitably be incompatible, and the give and take of the past could be expected to resume. The Inspector's conclusions were evidence-based and rational. LCC had taken no steps to safeguard the pupils using it such as by fencing it off, until after the application for registration had been lodged. It would be irrational to hold that the use of a public recreation ground by school children for outdoor recreation was inevitably in breach of the Education Act and various safeguarding policies. Even the new evidence on safeguarding from LCC, which could readily have been given at the Inquiry, showed no more than that informal play on the land during breaks "may become untenable".

72. The *Newhaven* case is central to this issue: the beach which the applicants sought to register as a village green was owned by the operator of a port pursuant to various statutory provisions. S15 of the 2006 Act did not, on its true construction, apply to land acquired by a statutory undertaker and held for statutory purposes inconsistent with its registration as a village green. Accordingly, the 2006 Act did not apply to enable the public to acquire user rights over it. It was not essentially a question of whether the statutory body, because of the statutory function, lacked capacity to grant an easement or to dedicate land in a way which would be incompatible with its statutory functions:

> "92. In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, "Statutory Interpretation*" 6th ed (2013):

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

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

94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates (section 33 of the 1847 Clauses Act). NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore (section 57 of the 1878 Newhaven Act, and paras 10 and 11 of the 1991 Newhaven Order).

95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 - or to encroach on or interfere with the green - section 29 of the

> Commons Act 1876. See the Oxfordshire case [2006] 2 AC 674, per Lord Hoffmann at para 56."

73. There was a clear incompatibility between the function of operating and maintaining a working harbour under those statutes and the effect of registration which would create criminal offences in respect of damage to the registered land and interruptions to its use and enjoyment. Damage to the land would follow from the exercise of the statutory undertaker's powers to carry out works which included dredging the seabed and foreshore over which public user rights had been claimed, or altering the breakwater off which access was obtained and which affected the accretion to or removal of sand from the beach. There was a direct conflict between the statutory functions of the harbour authority and the rights which others would have over the land within its undertaking were the beach registered such that the authority could not perform its legal obligations. That is the context for the observations in [96], quoted by the Inspector, and set out above in DL [123] that specific evidence was not required of the undertaker's future plans in order to demonstrate the inconsistency. The general provisions of the Commons Act 2006 yielded to the earlier specific statutory provisions governing the harbour authority.

74. In [101-2], the Supreme Court held:

> "101. In our view, therefore, these cases do not assist the respondents. The ownership of the land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.
>
> 102. In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the Byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility."

75. The crucial point to be drawn from *Newhaven*, is this: where a statutory body holds land under statutory powers for a defined statutory purposes, the public cannot register a green under the Commons Act on the basis of public user which is incompatible with the continuing use of the land for those statutory purposes; [93]. I refer to a "statutory body" rather than to a "statutory undertaker" although the latter is how the Supreme Court phrased the issue. I do not think that it intended to confine the role of statutory incompatibility in quite that narrow way in the light of what it said at [101], nor did it intend its restricting construction of the Commons Act to apply

generally to land owned by statutory bodies. No such broad Parliamentary intention can be gleaned from the Commons Act.

76. Instea**d,** here is a clear limitation on the scope for statutory incompatibility in [101] which I do not read as being confined simply to those cases where a local authority could assert no particular statutory function for which the land was held, as appears to have been the position in the cases to which [101] referred: *New Windsor Corporation v Mellor* [1976] Ch 380, *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, *R (Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] UKSC 11, [2010] AC 70. That paragraph is making a wider point about general statutory powers, pursuant to one or other of which most public bodies acquired or hold their land. The mere fact that the land is owned by a statutory body for an identified statutory function does not mean that use as of right for public recreation is necessarily incompatible with that function. Had that been the principle, it would have been expressed more broadly. After all, were the mere fact of ownership of land by a public body for its functions pursuant to general statutes to engage the principle of statutory incompatibility, there would be a complete circle in which land could not be used as of right for public recreation because that would be incompatible with the fullness of the exercise of the general statutory purposes for which the land was held, unless that purpose was itself recreational, in which case the use would not be as of right but permissive.

77. It is clearly easier to apply the principle that the intention of Parliament was that the general Commons Act should yield to special Acts where the Act governs a specific statutory undertaker with specific functions to be performed over its landholdings. It is rather less easy to apply the principle where one general Act is said to yield to other general Acts, dealing with a local authority function. The notion that the general was intended to yield to the specific is very different from the general yielding to the general. But that glimpse of the rather obvious still leaves some issues as to how the line is to be drawn.

78. In *Newhaven*, the land in question was obviously central to any changes which might be needed to the operation of the port. Two questions however which did not arise directly in *Newhaven* were (1) whether public recreational use is incompatible with the exercise of the statutory body's functions where some use can nonetheless be made of the land for its purpose but the range of uses, including the more important ones for its functioning is inhibited; and (2) if no use could be made of that land for the statutory purpose, how significant did the impact have to be on the performance of the statutory function for statutory incompatibility to arise, if other land could be used albeit less satisfactorily.

79. If the question about the effect of registration is: can the LCC carry out some educational functions on the land if the public has the right to use Areas A-D or any of them for lawful games and pastimes, the answer is yes; some educational use can be made of the Areas A-D; open air classes and some supervised or organised recreation are not prevented by public rights of access with reasonable give and take, though they may be inhibited or made less convenient than would be the case without registration as a town green; DL [119] last sentence. The fact that the range of recreational uses is not limited to that which has taken place hitherto does not mean that give and take ceases. See *R (Lewis) v Redcar and Cleveland BC* [2010] UKSC 11

[47], [71], [84,], [115] and notably Lord Brown at [100-102]: registration did not carry with it a right in the future "to use the land inconsistently with such use as the owner himself has been making and wishes to continue making of it". If the question is: can LCC put the land to whatever educational purpose it might want in the future, the answer is no. Some educational uses obviously are prevented, notably the construction of buildings or other uses such as a contractor's compound or for temporary classrooms while maintenance or expansion takes place. A different and perhaps less convenient or costlier solution would have to be found. If the question is: can LCC carry out its educational functions if the public has the right to use Areas A-D for recreational purposes, the answer is yes. And it would still be yes, even if it could make no educational use of the land at all. But in *Newhaven*, the answer to the latter two questions would have been no, and the answer to the first, would have been: yes but only temporarily.

80. It is the third question which matters, in my judgment and, answered in the positive here, there is no statutory incompatibility. There is a spectrum of statutory bodies and statutory duties in relation to land which could be impeded by public rights of access for recreation, and the duty to avoid damaging its surface on pain of criminal penalty. What is envisaged for a specific Act to be in conflict with the general Commons Act, and to override it by necessary implication, is that the statutory ownership of the land should bring specific statutory duties or functions in relation to that specific land which are prevented or hindered by its use for public recreation after registration. It is not enough that the duty could be performed on the land in question but could also be performed on other land, even if less conveniently. That does not essentially require evidence of the statutory body's intentions because it should be clear from the statutory function taken with the nature and location of the land in question. In *Newhaven*, the provision which governed it as a harbour authority showed that the land or beach in question could be required for harbour works including dredging and the construction of breakwaters for a working harbour with public obligations to fulfil. Public recreational access as of right would be incompatible with that function. The land in question was obviously significant to the future performance by the harbour authority of its duties.

81. Here the loss of Areas A-D or A or B may be an inconvenience to varying degrees. But it cannot be said that the general educational functions of LCC required this specific land to be used for educational purposes. The land was not central or even significant to the performance of the general educational duties. It is not enough that, after registration, LCC could only use the land for a limited range of educational purposes, nor that it might have to look elsewhere for land. Its general statutory educational functions can still be undertaken even if no educational functions could be undertaken on this specific land compatibly with public recreational use. A closer relationship is required between the performance of the function and the use of the particular land before conflict with public recreational use can give rise to statutory incompatibility. That is going to be a hard test to satisfy for public bodies with general functions which do not specifically or in reality have to be performed on the land in question. In *Newhaven,* the importance of the beach to possible future needs of the harbour was obvious. This highlights the difference between a specific statutory function which requires the use of specific identifiable land, and a general statutory

function which can be performed, more or less conveniently without the land in question.

82. This is not essentially an issue for evidence of the landowner's intentions but though these are not determinative, they are not either necessarily irrelevant; *Newhaven* [96] cited in DL [123]. The Inspector's conclusions on that aspect, however, are quite clear. Indeed, the basis upon which the Inspector found that there was no statutory incompatibility related very much to what she found about the past and present use made of the land for educational purposes and LCC's intentions and needs, rather than to an analysis of how the various educational statutory provisions relied on by LCC might show that s15 of the Commons Act had to be read as subject to them. The reasons are given by the Inspector, in DL [119-122]. The specific purposes for which the Areas were acquired have been met elsewhere. LCC does not need the land for new school buildings now and has no immediate plans to use them for that purpose. It is possible in the future that they would be used since there is no other land reserved by LCC for that purpose, but the Inspector found that LCC may not need or wish to use that land in the future. She also concluded that Ms MacDonald had not demonstrated the need to keep the land for educational purposes. So to the extent that the landowner's intentions are relevant, they do not advance LCC significantly.

83. I reject this ground of challenge, if it arises.

Ground 5: the approach to the evidence of user "as of right"

84. This ground alleged that although the Inspector had considered evidence that users had been excluded but she had not appreciated the significance of evidence that users had been challenged and controlled, by teachers holding classes, or the implication that that evidence showed that unchallenged or uncontrolled use was user by permission.

85. There is of course a dividing line between a use which is neither by force, stealth or permission over the 20-year period, and which has been met with silent passive inaction or acquiescence on the part of the landowner and a use carried on over twenty years in circumstances where, from the landowner's conduct, the grant of permission can be inferred. It is not every act by the landowner as landowner in relation to the land which will be such an overt act: short term low level agricultural activities, such as taking a single hay crop hay, which on the facts of a case is consistent with public recreational use as of right, would not show that use at other times was by permission. But that inference cannot be drawn in the absence of some clear positive or overt act of permission, though it need not be spoken, or written.

86. I was referred to a number of cases, not all of which need to be mentioned. *Newhaven* and *Barkas v North Yorkshire County Council* [2014] UKSC 31 establish that a permission from an express prohibition in byelaws or other acts, and that permission does not have to be expressly communicated to be effective, and that user by a publicly based licence did not have to be explicitly communicated to the users for it to be effective as a permission. The normally accepted rule, but not necessarily now definitive for private land, was that the licence had to be communicated subject to the possibility of inferring consent from the surrounding circumstances without communication of consent. But communication was not always necessary.

87. *Lewis*, above, is a good example of the give and take by users, the public acting as if by right, and the landowners or its licensees using it for their own purposes by right. If a use continues despite the owner's protests and attempts to interrupt it, it is by force, and gives rise to no rights. However, once it is accepted that a relationship of give and take does not prevent registration, the difficulty lies in discerning whether the protests are merely against bad behaviour, the selfish manner in which rights are exercised, the want of normal give and take, or whether they are protests about the use itself. That is in reality the issue which the evidence about control by teachers raised. How that evidence is assessed, where the line is drawn, is for the Inspector.

88. The Inspector held that such signs as she found had been put up were not sufficient to render the use of the land use by force. That conclusion was not challenged. The only area in respect of which LCC was found to have challenged the public use was B. The Inspector concluded:

> "96. I have no reason to doubt the evidence provided by the School that during the relevant period some members of the public were asked by staff at the School either to leave Area B, to keep to the perimeter, or to put their dogs on leads. However, there was no policy of challenging users and the majority of the evidence, rather than amounting to a challenge to the use of the land, appears to demonstrate users of the field showing courtesy to each other, with members of the public avoiding walking through children's games and activities.
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> 97. Even when courtesy was not shown and, for example a dog was disrupting a lesson or activity, people were not always asked to leave. For example, Kay Whiteway recalls in her statement "We had to stop the games, telling children to stand still until the dogs went away or we convinced the owners to put the dogs on a lead". The evidence of occasions when there has been a major conflict is sparse and I note that in their statements 3 members of staff recalled the same incident which concerned teenagers on quad bikes, "around 2005-2009". In such situations the approach of staff at the School has often been to leave the area rather than to challenge – indeed Michelle Dent stated that this was the instruction of the headmaster."

89. Mr Edwards submitted that the evidence before the Inspector, and referred to by her just before those conclusions, went rather further than she had appreciated. It was not just a question of whether the LCC's actions would not have conveyed to a reasonable user that their use of Area B was contentious, but whether the use was controlled and so permissive even when not challenged. One teacher gave evidence that on several occasions she had asked people who were walking dogs, or just gathering or picnicking to leave the land, and that they usually had done so. If not, she had taken the children back to the school or would call upon the assistance of another teacher. She had had to abandon lessons or had felt at risk and had passed her concerns to the head. She was not aware of any action in consequence, and there was no formal policy of recording incidents. Another teacher taking lessons on the Area had asked

people to walk their dogs elsewhere or put them on leads. The advice of the head teacher was not to approach people but to take the children back to school if they felt unsafe. A third teacher said that he had asked people to leave Area B most weeks, and they would often go to Areas C and D. He had helped teachers who had asked other groups to leave. The head teacher from 2002-2011 had asked people to leave Area B and they had gone to C or D or on to the cycle path. A teaching assistant had asked dog walkers to leave B or to put their dogs on leads. Generally, they left or walked around the perimeter; if not, she would pause in her lessons. A further teacher, a governor and a parent of children at the school who had also been Chair of the PTA, all said that the public had used Area B but they had never seen anyone asked to leave. The governor had used Area B for recreation herself without being asked to leave. No one who gave evidence of user had been challenged.

90. The Inspector dealt with implied permission. She recorded LCC's contention:

> "100. LCC states that the evidence of challenges should be set in the context of the use made by the School of Areas A and B and submits that a fair representation is that the School made a significant amount of use of both areas. A number of members of staff referred to extensive use of Area B for outdoor teaching, including science lessons and literacy, as well as physical education, and stated that they used the area in all weathers throughout the year. Although it was accepted that, prior to drainage works which took place after the relevant period, Field B could be wet in places, reference was made to children having wellington boots and waterproofs. Michelle Dent stated that it was not waterlogged and she didn't have to abandon any lessons."

91. The head teacher however added that the use of Areas A and B often had surface water and an uninviting condition until drainage works and fencing were competed. The Inspector then said:

> "103. There is little evidence before me of use of Area A by the School during the relevant period. However, it is clear that some use was made of Area B during the relevant period. Sports pitches were marked out and I heard evidence of various sporting activities, including sports day, lunchtime football clubs and the taking of a variety of outdoor lessons. However, the use of Area B clearly increased after the end of the relevant period and it is difficult to reconcile the evidence of some members of staff with the evidence of the headmaster and the condition of the field. On the evidence before me, I consider that, although Area B was clearly used by the School for various activities during the relevant period, use of it was not as extensive as suggested by some members of staff.
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> 104. LCC submits that the apparently different accounts with regard to challenges are reconcilable as many of the witnesses stated that if they saw activities taking place on Area B, such as

> ball games or school lessons, they would keep to the perimeter of the field as a courtesy. Accordingly these witnesses would not have been challenged, but others, who had perhaps not been so courteous, had been challenged. LCC therefore states that those who were asked to leave clearly knew that their presence was unwelcome and not acquiesced in by the School. However, when the School was not using the land, no conflict would arise and people where therefore not asked to leave. LCC submit that this is exactly the situation which was described in *Beresford*; namely that the inhabitants were excluded when the landowner wished to use the land for his own purposes.
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> 105. I do not agree with this submission. There is no evidence that the School had a policy of excluding users on a systematic basis and there is no evidence that the occasional challenge by a member of staff, to, for example, teenagers on quad bikes, demonstrated to members of the public that access depended upon the School's or anyone else's permission. To the contrary, I agree with the Applicant that the general impression is one of peaceful co-existence. Furthermore, on the occasions when there was a conflict between use by the School and by members of the public, there is evidence that rather than asking people to leave, staff asked people to put their dogs on leads or keep to the perimeter, or even abandoned lessons."

92. Her final conclusion on this was:

> "110. In this case the landowner has failed to "do something". The evidence of occasional challenge and the need to pay for various activities at a School fair are insufficient to show to the reasonable onlooker that a right to exclude was being exercised. The presence of a dog waste bin on Area B and the occasional laminated notice made by children at the school indicating that people should clean up after their dogs do not take matters any further. I conclude that this is not a case where the landowner had given the inhabitants implied permission to use the land and accordingly, use of the Application Land was not precario."

93. Mr Buley submitted that the conclusion in DL [105] was rational, and that the challenge was really no more than a rationality challenge. Requests by teachers to members of the public to alter what they were doing or where did not show that the members of the public were there by permission or against the landowner's will; they showed no more than give and take. The issue was not control as such; it was whether LCC had done enough by challenges or requests or other actions in relation to members of the public using the land, and Area B in particular, to convey to the reasonable user that their use was contentious or by permission. That was a matter for the Inspector's rational conclusion. That had been answered rationally in DL [96]. There was no action which could convey the sort of permission implied by the byelaws in *Newhaven*. Mr Westwood adopted those submissions.

94. To my mind it is clear that the question of implied permission and the significance of the challenges was fully considered. It was for the Inspector to judge whether they reflected give and take and responses to poor behaviour by certain members of the public. Her decision was rational. It did not turn on some contentious issue of law as to whether some licence had been explicitly communicated. More importantly, Mr Edwards' submissions do not grapple with the difficulties in his case: the inaction of the school or LCC faced with the known activities of the public over 20 years. This produced no signing of note requiring behaviour of a certain sort, no policy requiring incidents to be reported, no vigorous reaction by the head teacher or the LCC itself. It can all properly be seen as acquiescence. This ground fails.

Conclusion

95. I grant permission, on all grounds, though I would not have done so for Ground 2 had it stood alone, but I dismiss the application.

Aarhus Convention and costs

96. Mr Edwards submitted that this was an Aarhus Convention claim because the principles relevant to the registration of land as a green were "environmental matters," relevant to the "state of the land". The Defendant submitted that the claim fell outside the scope of the Convention as it concerned private ownership rights; but that there was no need to decide the point since the Defendant's legal fees did not exceed the £10000 limit above which the issue might become live. I do not propose to rule on this unless it becomes necessary.

Delay

97. I mention this briefly: Mr Westaway contended that the claim had been lodged with but two weeks to go before the expiry of the three-month period and so was not lodged "promptly". This was not a point which Mr Westaway pressed. I would not have acceded to it had he done so.