AGENDA

Kent County Council

PLANNING AND REGULATION COMMITTEE MEMBER PANEL

Wednesday, 11th November, 2026, at 2pm
Darent Room, Sessions House, County Hall, Maidstone

Ask for: **Hayley Savage**
Telephone **03000 414286**

Membership

Mr M Brice, Mr D Burns, Mr W Chapman, Ms S Emberson and Mr T Mallon

UNRESTRICTED ITEMS

(During these items the meeting is likely to be open to the public)

1. Apologies and Substitutes
2. Declarations of Interest for items on the agenda
3. Application to register land known as Church Street Playing Fields at Whitstable as a new Town or Village Green (Pages 1 - 40)

EXEMPT ITEMS

(At the time of preparing the agenda there were no exempt items. During any such items which may arise the meeting is likely NOT to be open to the public)

Benjamin Watts
Deputy Chief Executive
03000 416814

Tuesday, 3 November 2026

This page is intentionally left blank

Application to register land known as Church Street Playing Fields at Whitstable as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Planning and Regulation Committee Member Panel on Wednesday 11th November 2026.

Recommendation: I recommend that, for the reasons set out in the Inspector's report dated 15th April 2026, the Applicants be informed that the application to register the land known as Church Street Playing Fields as a Town or Village Green has not been accepted.

Local Member: Mr. A. Ricketts (Canterbury North) Unrestricted item

Introduction

1. The County Council has received an application to register an area of land known as Church Street Playing Fields at Whitstable as a new Town or Village Green from the Friends of Church Street Fields ("the Applicants"). The application, made on 27th November 2023, was allocated the application number VGA693.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.

3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:

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

4. In addition to the above, the application must meet one of the following tests:

   • **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or

   • **Use of the land 'as of right' ended no more than one year prior to the date of application**, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

The Application Site

6. The land subject to this application ("the Application Site") comprises a parcel of grassed open space of approximately 13 acres (5.22 hectares) in size, known as Church Street Playing Fields, situated on the western side of Church Street (opposite its junction with Ham Shades Lane) at Whitstable. The Application Site is shown on the plan at **Appendix A**.

7. The site is fenced (with palisade and chain link fencing) along its eastern boundary with Church Street, although access has been available via gates, and access is also possible via a number of gaps in the western boundary alongside the Crab and Winkle Way.

The County Council's role

8. Members should note that, in addition to being the 'Commons Registration Authority' ("CRA") responsible for determining this application – a function undertaken by the PROW and Access Service – the County Council is also both the landowner and the Local Education Authority ("LEA"). In respect of the latter, there are proposals for a Special Educational Needs School to potentially be built on the Application Site.

9. Throughout the process, the PROW and Access Service (as the CRA) has remained entirely independent from the Estates and Education Teams, including having completely separate legal representation. Although the County Council has opposed the application in its capacity as the landowner (and LEA), the PROW and Access Service (as the CRA) has maintained a strictly neutral stance at all times, as required by the quasi-judicial nature of this function.

10. It is also important for Members to note that the future use to which the land might be put is irrelevant for the purposes of determining whether the legal tests have been met for Village Green registration, and must be disregarded for the purposes of reaching a decision on the current application. Indeed, Members are required by law to consider this application purely from the perspective of discharging its functions (as the CRA) under the Commons Act 2006, and cannot have regard to any other interests that the County Council may have arising.

The case

11. The application has been made on the basis that the Application Site has been in regular use by the local residents for a range of recreational and sporting activities for a period well in excess of twenty years, with many residents using it on a daily basis throughout this time. It is submitted that use has taken place openly, without permission and not in exercise of any force, and no signs have ever been erected on the land either restricting, prohibiting or permitting access to it. The land has also been used by a number of local schools (but formal educational sports use has coexisted with informal recreational use over several decades) and for various community events (e.g. boot fairs and training for local sports clubs).

12. Included with application were a supporting statement, photographs of the access points and recreational use of the site, newspaper cuttings referring to use of the

site for sports activities for school and local groups, and Canterbury City Council documents relating to a previous (rejected) planning application in 2001.

13. Also submitted in support of the application were 54 user evidence questionnaires from local residents detailing their recreational use of the land.

14. The application has been made under section 15(2) of the Commons Act – i.e. on the basis that use of the Application Site has continued 'as of right' until the date of the application – such that the relevant twenty-year period for the purposes of the application is 27th November 2003 to 27th November 2023 ("the material period").

Consultations

15. Consultations have been carried out as required.

16. Messages of support have been received from three local residents as well as Canterbury City Councillors Turnbull and Wheeler.

Landowners

17. The Application Site is wholly registered to Kent County Council under title number K924243, which also includes the nearby site of The Whitstable School (previously known as Whitstable Community College).

18. The County Council's Estates Team ("the Landowner") opposed the application on the basis that:
    - The site was acquired by the County Council in the early 20th century and was laid out and thereafter maintained as playing fields;
    - The land has been used for community events (e.g. boot fairs) with the express permission of the Landowner, and whilst those events took place the land was unavailable for informal recreational use by local residents;
    - It is not accepted that the use of the land for informal recreational by local people was sufficient to justify registration of the land as a Village Green;
    - The land is held for educational purposes such that the principle of statutory incompatibility applies – which represents a 'knockout blow' – and the application therefore falls to be rejected.

19. The Landowner submits that the application should be rejected on the principle of statutory incompatibility (explained below) without further consideration of the facts. Failing that, the issue of statutory incompatibility should be determined as a preliminary point.

The principle of 'statutory incompatibility'

20. As is noted in paragraph 3 above, section 15 of the 2006 Act sets out a number of criterion in respect of the nature and quality of use required in order for Village Green rights to arise (i.e. use must be 'as of right' for 'lawful sports and pastimes' by the residents of the locality etc.). However, following recent changes in case law, the County Council is now also required to consider whether the issue of 'statutory incompatibility' applies; it is this issue upon which the current application turns.

21. The concept of 'statutory incompatibility' arose as a result of a case (known as the Newhaven[1] case) involving registration of a tidal beach at Newhaven in East Sussex, where the landowner challenged a decision to register the beach as a Village Green on the grounds that such registration would be incompatible with the landowner's statutory role as a Port Authority (which included powers to govern the area and develop the land for use as a port).

22. The Supreme Court held[2] that:

> *"The question of incompatibility is one of statutory construction… 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."*

23. In respect of the land that had been acquired by the Port Authority, the Court determined that *"there is a clear incompatibility between [the landowner'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".*

24. The conjoined appeals in the Lancashire[3] and NHS Property[4] cases took this concept further, and the Supreme Court allowed the appeals of both landowners. The former case involved land adjoining a Primary School for which Lancashire County Council (in its capacity as the Local Education Authority) was the landowner, whilst the latter involved land adjoining Leatherhead Hospital which was under the control of NHS Property Services Ltd. The Supreme Court found[5] that:

> *"In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in Newhaven, [the landowners] can show that there is statutory incompatibility in each of their respective cases. As regards the land held by [Lancashire County Council] pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of [part of the Application Site] as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use… takes place. Secondly, however, and more generally, such rights are incompatible with the use of [any part of the Application Site] for education purposes, including for example*

[1] R (Newhaven Port and Properties Ltd.) v East Sussex County Council and another [2015] UKSC 7
[2] Paragraph 93 of the Newhaven judgement
[3] R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs and another [2019] UKSC 58
[4] R (NHS Property Services Ltd.) v Surrey County Council and another [2019] UKSC 58
[5] At paragraph 65

construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see Newhaven, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law."

25. The effect of this evolution of the case law is that if 'statutory incompatibility' applies, then the land is not capable of registration as a Village Green, regardless of whether the other legal tests set out in section 15 of the Commons Act 2006 are met.

Legal advice

26. In response to the representations received from the Applicant and the Landowner in respect of this matter, advice was sought from Counsel as to how the County Council (in its capacity as the CRA) should proceed. Mr. David Forsdick KC, a Barrister specialising in planning, environmental and local government law, was appointed in this regard.

27. The initial advice received (copy attached at **Appendix B**) was that the historic conveyances make clear that the land was acquired for educational purposes and there appeared to be no evidence that the land had ever been appropriated for use for any other statutory purposes, such that the only possible inference to be drawn was that the land had at all times been held for educational purposes. Thus, there appeared to be no relevant basis to distinguish the Lancashire case, and accordingly, there was a bar to registration – that of statutory incompatibility – and the application should be refused.

28. Following a lengthy exchange of submissions between the parties regarding that advice, including considerable research by the Landowner in the archives adducing new material in the form of Committee Minutes, Mr. Forsdick invited the parties to participate in an oral hearing to assist him in finalising his view on the matter and informing his recommendation as to how the CRA should proceed. The hearing was primarily concerned with whether any statutory incompatibility arises in this case and proceeded on the basis that Mr. Forsdick considered it appropriate to address that matter as a preliminary issue prior to undertaking any detailed assessment as to whether the statutory requirements for registration (set out in Section 15 of the Commons Act 2006) might be met.

29. A hearing was held at County Hall on 23rd February 2026, at which the Applicants were represented by Ms. Claire Nevin (a Barrister) and KCC's Estates Team were represented by Mr. Douglas Edwards KC. Mr. Forsdick assumed the role of the Inspector. The hearing lasted for one day, during which all parties were offered ample opportunity to make their submissions and respond to any questions raised by the Inspector. At the conclusion of the hearing, Mr. Forsdick was keen to ensure that all parties felt that they had had a fair hearing, and all parties agreed that had been the case.

30. Following the hearing, Mr. Forsdick issued a report setting out his advice to the CRA. A copy of that report is attached at **Appendix C** and summarised below.

The Inspector's report

31. Mr. Forsdick considered[6] that, in light of the Lancashire case, it was fundamental to understand:
    (a) the statutory purpose for which the land was acquired and held at the outset;
    (b) whether there has been any appropriation of the land since (to another purpose); and
    (c) how the land was held during the material period (2003 to 2023).

    Once that statutory purpose was identified, the issue of statutory incompatibility could then be considered as a matter of principle by comparing that purpose with the rights claimed under the Commons Act 2006.

32. In order to assist in reaching a view on those questions, Mr. Forsdick considered in detail the history of the land, which can be summarised as follows:

    In the mid-1920s, the LEA decided to establish the Whitstable Secondary School for Girls and the Application Site was identified as the site for the proposed new school. Following negotiations with the relevant landowners, the LEA acquired part of the land on 7th October 1927, it being conveyed to KCC '*as the local education authority and being desirous of acquiring the said property for education purposes*'. The remaining part of the land was acquired by the LEA on 20th December 1927, for the same 'education purposes'.

    The relevant statutory provision in force at that time enabling the LEA to acquire land for education purposes was section 109 of the Education Act 1921 ("the 1921 Act"), which provided that '*a local education authority may for the purposes of their powers and duties under this Act purchase or take on lease any land or any right over land*'.

    Pending delivery of the new secondary school, the minutes of the KCC Education Committee (from 17th April 1928 and 21st August 1928) indicate that the LEA resolved to use the Application Site as a playing field for local elementary (primary) school children.

    However, by January 1930, it was no longer proposed to build a secondary school on the land, and the Committee instead considered proposals for the provision of a 'Central School for Whitstable' (which fell within the remit of the 'elementary' rather than 'secondary' school system) and the appropriation of the land to that purpose. On 27th January 1930, it was recommended by the Education Committee that the land be used for Central School purposes, and the required approval of the then Department for Education is recorded by the LEA in a letter dated 13th November 1936. However, in the event, no Central School was ever built on the land (although it is not clear why from the evidence available) and it appears that the land continued to be used for the temporary uses previously approved.

    There followed the passing of the Education Act 1944 ("the 1944 Act"), which introduced fundamental changes to the system of education in England and

[6] Paragraph 29

required (under section 11) every LEA to prepare a 'development plan' showing the action which the authority proposed should be taken for securing sufficient primary and secondary schools in their area. KCC's plan, prepared in around 1947, showed the Application Site labelled 'SS7', with the relevant key noting that the 'SS' meant that: (i) the land was held for education purposes; and (ii) in existing use for secondary school purposes.

33. Thus, as to the first question set out at paragraph 31 above, Mr. Forsdick was satisfied that the land was acquired and held for education purposes. He noted[7] that the evidence relating to the acquisition of the land was 'direct and clear' and 'does not require any inferences to be drawn': it was undertaken under the auspices of the Education Committee, carried out by KCC as LEA, and expressly for education purposes.

34. In respect of the second question set out at paragraph 31 above – i.e. whether there was any subsequent appropriation of the land to a different purpose – Mr. Forsdick could find no evidence, despite the extensive research undertaken by the parties, that had been the case[8]. The discussions in the late 1920s regarding the temporary use of the land for primary school playing field was still an educational purpose within the scope of section 109 of the 1921 Act and cannot be read as any indication of an appropriation to non-education purposes, to general purposes, or to public open space purposes. There was no documentary evidential basis to infer that the land was subsequently appropriated to non-education purposes following the apparent abandonment of the 1930 Central School proposal[9], and the plan prepared under the 1944 Act was entirely consistent with the land still being held for education purposes[10]. In 1966, a small part of the land originally acquired to build the proposed secondary school was appropriated to highway purposes – that appropriation being approved by KCC's Education Committee, whose involvement would only be explicable if the land remained held for education purposes at that time[11]. Although subsequent records, comprising non-statutory registers held by the Landowner and the Department for Education, do not explicitly record the land as held for educational purposes, Mr. Forsdick did not consider that to be sufficient to lead to a conclusion that the land had been formally appropriated out of education purposes[12].

35. During the material period (and in respect of the third question above), it appears that the land as a whole continued to be used intermittently by nearby Whitstable Community College and local primary schools. In 2018, the College became an academy known as Whitstable School and the Application Site was not included in the scheme made by the Secretary of State in respect of the transfer of property to the academy trust. The Applicants argued that this exclusion demonstrated that the land was not held for the purposes of college use. However, Mr. Forsdick concluded[13] on this point that the land appeared to be held for education more generally and was not 'wholly or mainly' used by the

[7] Paragraph 48
[8] Paragraphs 64 to 72
[9] Paragraph 90
[10] Paragraph 101
[11] Paragraph 102
[12] Paragraph 105
[13] Paragraph 111

College[14], such that was not possible to infer from the exclusion of the land from the scheme that it had somehow ceased to be held for education purposes. Although it appears that school use may have reduced over the years and other uses (including informal public use and occasional events with the consent of KCC) became more prevalent, it was not possible (on the basis of usage alone) to infer an appropriation away from education to more general purposes[15].

36. Ultimately, Mr. Forsdick concluded that the land had been acquired for education purposes pursuant to section 109 of the 1921 Act and that there was no evidence of any subsequent appropriation away from those purposes, such that it continues to be so held.

37. Having reached that conclusion, it was then necessary to consider the position regarding statutory incompatibility. Mr. Forsdick noted[16] that registration would bring with it the right for local inhabitants to use the land for recreation, thus preventing both the construction of any buildings (or a new school, as is proposed here) and the exclusion of the public from parts of it when in use for educational purposes. He further noted[17] that, in the Lancashire case, the inability to exclude members of the public and their dogs was held to give rise to statutory incompatibility on safeguarding and on health and safety grounds; thus, regardless of the practical ability for uses to co-exist and notwithstanding the land had been used for recreational purposes by many people over may years, the issue '*has to be approached as a matter of principle and of legal rights – and my clear conclusion (dictated by Lancashire) is that there is a clear statutory incompatibility between the purpose for which the land is held and the claimed rights which would arise on TVG registration*'[18].

38. Ultimately, Mr. Forsdick recommended[19] that the application be refused '*on the grounds of registration being incompatible with the statutory education purposes for which the land is held*'.

The parties comments on the Inspector's report

39. Following receipt of Mr. Forsdick's report, it was circulated to the parties for their comments.

40. The County Council (in its capacity as the Landowner and LEA) did not offer any comments on the report, but requested that the CRA move promptly to reject the application.

41. The Applicants responded to the effect that they rejected the conclusions made in the report on the grounds that:
    i. Although it is not disputed that the land was purchased under section 109 of the 1921 Act, it is not logical to infer that the land remains appropriated

[14] A requirement for making the scheme (under Schedule 1 of the Academies Act 2010) was that the land was used 'wholly or mainly' for the purposes of the previous school.
[15] Paragraph 117
[16] Paragraph 120
[17] Paragraph 121
[18] Paragraph 122
[19] Paragraph 127

to this purpose in the face of subsequent recreational use showing that the land has been used as a playing field for by the wider community; and

ii. The Lancashire case can be distinguished on the basis that it involved fenced playing fields in constant curricular use that were integral to an existing school with a live proposal to expand onto the land, whereas the land in the current case is unsecured, sees constant public recreational use and does not form part of any school estate, such that it is not in active educational use.

42. In respect of the latter point, there is no requirement for the land to be in active educational use in order for statutory incompatibility to arise; the issue of statutory incompatibility falls to be determined by reference to the manner in which the land is held, rather than the particular use to which the land is being put.

43. In that regard, and in respect of the former point, it is not in dispute that the Application Site was originally acquired for educational purposes (as confirmed by the conveyances). However, a formal process, or at the very least some sort of formal recognition, would be required to transfer the land from educational purposes to a different purpose and, despite extensive enquiries and research (including the relevant KCC Minutes), no such evidence has been adduced. The only reasonable conclusion, therefore, is that the land continues to be formally held for education purposes, notwithstanding in practice it is now also used for the purposes of informal recreation by the community.

Conclusion

44. The application turns (at this stage) on whether or not the Application Site is held for education purposes; if so, then registration of the land as a Village Green is clearly incompatible with the purposes for which the land is held by the County Council as Landowner.

45. Having carefully considered the Inspector's report and for the reasons set out above, it is considered (by the PROW and Access Service as CRA) that the land was originally acquired for education purposes, continues to be so held, and, that being the case, the principle of statutory incompatibility applies.

46. Accordingly, it is considered that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the Application (shown at **Appendix A**) should not be registered as a new Village Green.

Financial implications

47. The determination of Village Green applications is a quasi-judicial function of the County Council and, accordingly, any financial implications can have no bearing whatsoever on the Member Panel's decision. However, Members should be aware that the only right of appeal open to an aggrieved party following a final decision by the County Council is an application to the High Court for Judicial Review, which potentially carries significant legal costs for all concerned.

Recommendation

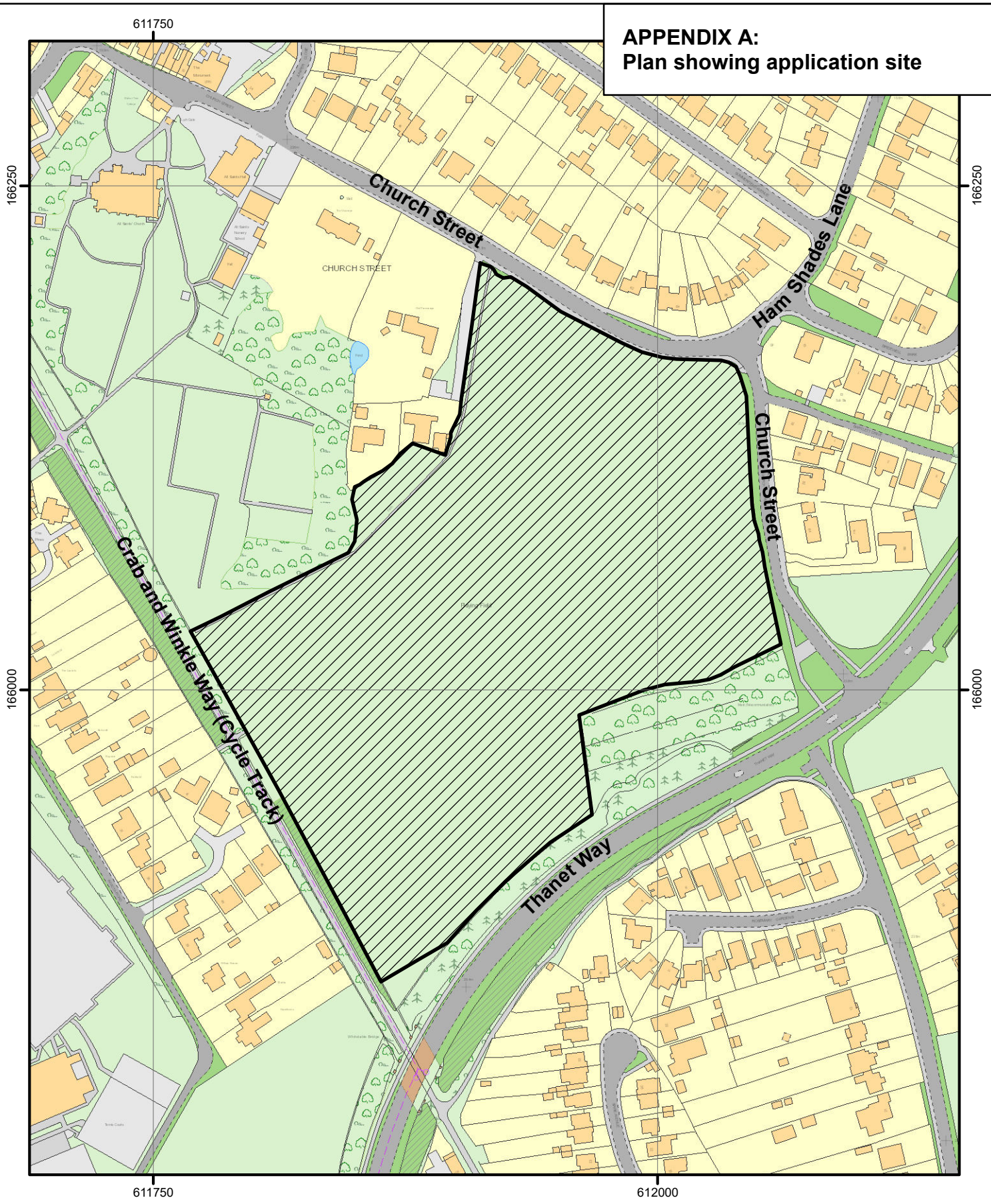
48. I recommend that, for the reasons set out in the Inspector's report dated 15th April 2026, the Applicants be informed that the application to register the land at Church Street Playing Fields at Whitstable as a Town or Village Green has not been accepted.

Accountable Officer:
Mr. Colin Finch – Tel: 03000 413990 or Email: colin.finch@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing the Application Site
APPENDIX B – Legal advice dated 10th September 2024
APPENDIX C – Inspector's report dated 15th April 2026

APPENDIX A:
Plan showing application site



N
W E
S

Scale 1:2500 @ A4

Land subject to Village Green application at Church Street, Whitstable (VGA693)

Kent County Council
kent.gov.uk

This page is intentionally left blank

KENT COUNTY COUNCIL

CHURCH STREET PLAYING FIELDS

APPROACH OF REGISTRATION AUTHORITY TO REGISTRATION APPLICATION

OPINION

1. I am asked by Kent County Council ("KCC") as registration authority ("RA") to give my opinion on a single question - namely whether the registration of land referred to as Church Street Playing Fields, Church Street, Whitstable, Kent ("the Land") as a town or village green ("TVG") under s.15 of the Commons Act 2006 ("the CA 2006") is permissible in the light of the decision of the Supreme Court in *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2021] AC 194 ("the Lancashire case") or is incompatible with the statutory purposes for which the Land is held.

2. This is a discrete question the answer to which could be determinative of the application for registration.

The Short Facts

3. The Land was acquired under three conveyances in the period 1927 – 1930. They refer to KCC "acting as the local education authority" and being "desirous of acquiring the [Land] for education purposes".

4. The Land was subsequently used as playing fields as part of the nearby (but not adjoining) school - Whitstable Community College ("the College") - until 2018 when the College became an Academy called Whitstable School.

5. I am told that Whitstable School was not granted any interest in the Land and KCC as landowner remains the freehold owner in possession of it.

6. The Land was used as school playing fields and for other non-school activities (apparently some such other user being with the consent of KCC as landowner and some not).

7. It is not now used for school playing fields. Other uses are said to continue and I will proceed on that basis.

8. The Land is not allocated for any particular development and there is no claim of any trigger event preventing registration having occurred.

9. On 27th November 2023, an application for registration as a TVG under s.15 of the CA 2006 was made on the basis of 60 years user as of the Land for lawful sports and pastimes informally by residents of the locality alongside use by a number of local schools and sports clubs ("the Application").

10. The Applicant stated that there was no statutory incompatibility (as explained in *Lancashire*) because:
    a. the School held a lease of the Land and was not under similar duties re: provision of education to KCC as education authority. "There is no specific statutory duty to which an academy school is subject, that is incompatible with registration…";
    b. KCC which held the reversion had no immediate entitlement to use the Land for educational purposes and thus had no statutory duties in respect of the Land; and
    c. the provision of playing fields for informal recreational and educational leisure activities was itself an educational purpose.

11. KCC as landowner objected ("the KCC Objection"), so far as relevant, on the basis that:
    a. there was no lease and it was in possession of the Land which was held by it for education purposes;
    b. *Lancashire* applied and that was a "knock out" blow to the registration.

12. The Applicant responded with a Representation in Response to Kent County Council's Objection prepared by Andrew Sharland KC ("the Applicant's Response") which, having made some procedural submissions, addressed statutory incompatibility and *Lancashire* at [11-14][1]. It was contended that:
    a. KCC had to show that the Land was held for a particular statutory purpose – there was no such evidence and the conveyances only demonstrated that the Land was held by KCC and "say nothing about the statutory purposes of which the Land is held"; and
    b. "critically, even if the Land is held for education purposes, it does not follow that this will give rise to statutory incompatibility preventing registration…. The present case is very different to *Lancashire*… [There] the land was immediately adjacent to a primary school. By contrast the Land is not attached to a particular school but is located someway from the nearest school. It is thus in a similar position to the land in issue in *R(Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin). In that case the relevant statutory duty applicable to the Land… was inter alia section 507A and 507B of the Education Act 1996…. The independent inspector appointed by the Council concluded that these statutory provisions did not give rise to statutory incompatibility if the land was registered as a TVG. The High Court rejected a challenge to this conclusion… The Court's conclusion on this issue in *Cotham School* is unaffected by the Supreme Court's judgement in *Lancashire* which concerned different statutory provisions".

13. The Applicant's Response did not dispute that the Land was not leased to the School or that KCC had not parted with possession of it. I will proceed on the basis that KCC is the freehold owner in possession.

[1] I do not need to address paragraphs 11 and 12. It is not in dispute that land held by a local authority can be the subject of registration as a TVG. All the examples quoted though were, as noted in *Lancashire @ [49],* where the land in question was not held for a specific statutory purpose or where there was no suggestion of statutory incompatibility.

Lancashire

14. An understanding of the reasoning of the Supreme Court in *Lancashire* and how it differs (fundamentally) from the reasoning of the lower courts is central to addressing the issue here.

15. Lancashire County Council ("LCC") as landowner objected to the application for registration of land belonging to it adjacent to a primary school on the basis that registration would be inconsistent with the statutory purposes for which the land was held – it would impede the ability to fulfil LCC's educational duties to provide suitable accommodation and to safeguard pupils (see High Court judgment at [69]).

16. The relevant statutory provisions relied on (at least by the time the case reached the High Court) included:

    a. s.8 Education Act 1944[2] and ss.13/14 Education Act 1996[3] concerning provision of school accommodation;
    b. s.542 of the EA 1996 and the School Premises (England) Regulations 2012 – concerning prescribed standards for schools including outside space for physical education and outside play; and
    c. s.175 of the Education Act 2002 which requires the education authority to make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children.

17. LCC contended that the incompatibility of registration with the statutory educational purposes for which the land was held arose because registration would mean that it could not: (1) use the land to build a new school, new buildings being inconsistent with such registration; and/or (2)provide safe and adequate playspace if the public had access rights to the playing fields - inconsistent with the safeguarding function.

18. The Inspector concluded that the land should be registered because the registration as a TVG would not be inconsistent with the statutory purposes for which the land was held. In short summary: (1) the Land was not held under any specific statutory provision; (2) in so far as it was used as a playing field there was no necessary incompatibility; (3) there were no plans to build a new school on the remainder. Any need for a new school would not necessarily be met there. That conclusion was upheld by the judge and the Court of Appeal but the appeal to the Supreme Court was successful.

19. The fundamental relevant ratio of the Supreme Court was that for an incompatibility to arise it was *not* necessary that the land was actually being used or was intended to be used for an inconsistent statutory purpose. Instead, the issue of incompatibility was to determined as a matter of principle – by comparing the statutory purpose for which the land was held with the rights claimed pursuant to the CA 2006 rather than by carrying out a factual assessment of how the land was used or was proposed to be used. Given that

[2] "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment**;**

[3] Which require 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

the statutory purposes included the construction of new school buildings and the provision of secure playing fields with which registration was incompatible, registration could not occur.

20. The land was in three key parts. Areas A and B were playing fields. Areas C and D were identified as a "Replacement School Site" but were not used by the school. Area E was an overgrown area and difficult to access.

21. As to Areas A and B, the Inspector found that there were no plans to expand the school onto the relevant land and no evidence to suggest that the school wished to use the relevant land other than for outdoor activities and sports and such use is not "necessarily incompatible" with TVG use.

22. As to areas C – E, the school was being expanded without use of those areas and there was no suggestion of a need to provide a school (or school extension) on areas C – E in the immediate future. Even if there was a need for more educational land in the future, the evidence did not demonstrate that this land needed to be kept available - "it is not necessarily the case that LCC would wish to make that provision the Application Land".

23. There was thus no "clear inconsistency".

24. The High Court and Court of Appeal upheld the inspector's approach – the Court of Appeal stating that:

> ***"The statutory purpose for which Parliament had authorised the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with [the Newhaven case] there was no "specific" statutory purposes or provisions attached to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a [TVG} would be incompatible."***

25. The core question for the Supreme Court was whether that approach to statutory purposes was correct. It held that it was not. The Supreme Court adopted a far broader approach.

26. The test was not whether the land had been allocated by statute itself for particular statutory purposes but whether it has been acquired for such purposes and is for the time being so held. An "incompatibility between general statutory powers under which land is held…. and the use of such land as a [TVG] excludes the operation of the 2006 Act" [57]. "It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act" [61]. There was no indication of such Parliamentary intent.

27. Thus, the playing fields engaged the statutory duties of LCC to safeguard children - free from risk from strangers and from risks to health from e.g dog mess. More generally,

registration was incompatible with the "use for any of the areas for education purposes including the potential construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes [or that there were plans to use them for such purposes] only that they are held for such statutory purposes… The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law" [65].

28. It follows that the focus is on the statutory purposes for which the land is held and not the use to which the land is currently put or is planned to be put.

29. The approach of the Supreme Court to the linked *Surrey* case is consistent with that and does not require elaboration.

Cotham School

30. Reference has been made to the decision of the High Court in *R(Cotham School) v Bristol City Council* [2018]EWHC 1022 (Admin) which was decided after the Court of Appeal judgement in *Lancashire* but before the Supreme Court decision.

31. An application was made to register land owned by Bristol City Council ("BCC") which was held for education purposes and largely laid out as playing fields first for Fairfield School and then Cotham School. The registration was granted and the school challenged on a number of grounds. It was successful on two grounds but did not succeed on the statutory incompatibility argument. It did not need to pursue the statutory incompatibility ground further to force a fresh decision.

32. On the statutory incompatibility issue, the School had argued that registration was incompatible with statutory purposes. The inspector found to the contrary [88]. The High Court expressly adopted the approach of the Court of Appeal in *Lancashire* directing itself that registration would only be defeated if "the land in question is held for a defined statutory purpose and the registration of the land would allow local inhabitants to acquire rights which were incompatible with the continuing use of the land for those statutory purposes. In each case the relevant statutory provisions must be interpreted with care so as to permit of an analysis as to whether the statutory purposes for which the land in question is held would be defeated by registration"[91].

33. The inspector had referred to s.507A Education Act 1996 under which the local education authority was required to secure that education facilities included adequate facilities for recreation and physical training; and the equivalent requirement on academies (s.94 Education and Skills Act 2008). The Land was held by the Academy.

34. The High Court held - applying the Court of Appeal approach in *Lancashire* - that none of the statutory provisions "specifically relate to this land" [96]. The Inspector had concluded on the facts that "duties and functions of the landowner (as education authority in respect of educational provision) can be carried out – albeit with difficulty (including financial difficulty) in some instances" [96] alongside registration as a TVG. The High Court considered that the Inspector's detailed conclusions based on a careful appraisal of the provisions and the evidence presented were unimpeachable and this ground of challenge failed.

35. It is of course important to focus on the relevant statutory purposes for which the land was held but I do not find the decision in *Cotham* persuasive because it was reached before the decision of the Supreme Court in *Lancashire* and appears to have been in large part influenced by the (now rejected) reasoning of the Court of Appeal in *Lancashire*. I do not agree that the fact that different statutory provisions were in play in *Cotham* means that the logic of *LCC* does not apply to it or that the decision in it is thereby unaffected by the Supreme Court decision.

Analysis

36. Contrary to the Applicant's Response, the historic conveyances make clear that the land was acquired for educational purposes – "the Council acting as the local education authority and being desirous of acquiring the same for educational purposes…".

37. For essentially the reasons given by Ouseley J in *Lanchashire* at first instance at [57], and the Supreme Court @ [32] it is appropriate to infer that there were resolutions underpinning the acquisition at the time (although I am not aware that any such resolutions or the reports leading to them have been identified).

38. There is no evidence to support any inference other than that each part of the Land was acquired for statutory educational purposes.

39. There was no definition of, or limit on such purposes. There is no indication in any material that the statutory purposes for which the Land was held was limited to playing fields. The educational purposes were thus broad.

40. The land was, in fact, laid out, maintained and used as playing fields, latterly for the College. I do not know the intensity or nature of the use.

41. The College became an academy in 2018 but I am told that the Land was not conveyed to the new school and that Kent County Council is the freeholder in possession of the Land. There is no lease. I will assume this is all factually correct[4]. If that is correct, the Applicant's points summarised in the first two bullets of para 10 above are wrong

42. There is no evidence (or suggestion) that the Land has ever been appropriated for use for other statutory purposes. Applying the principles and approach in *Lancashire* (as subsequently discussed in *R (Adamson) v. Kirklee*s [2020] EWCA Civ 154 [2020] 2 P&CR 9) the only possible inference is that the Land has at all times been held for education purposes.

43. Those purposes include to fulfil the statutory provisions relied on in *Lancashire* and summarised at para 16 above. I can find nothing in the papers to suggest any limitation

[4] if it is not correct then the statutory provision under which the Academy holds the Land would need to be investigated.

on the range of educational purposes for which the Land was held or the statutory provisions in support of which it can, thus, be used.

44. It would follow that this is no basis here to distinguish Lancashire in respect of the relevant statutory provisions. There would thus be the same incompatibility.

45. It is said that the fact that the Land is physically separate is a relevant distinguishing feature. I do not agree. That fact does not go to the question as for what purpose the Land is held – there is nothing to prevent Land which is not adjacent to an existing school (or not used with an existing school) being held for education purposes.

Further Material

46. There is very limited material provided to establish the history of the acquisition of the Land and its subsequent use – reports to committee on acquisition; details of subsequent use; details of the resolutions and transaction in respect of the School in 2018 and why the Land was retained by KCC at that time including reports to committee explaining the rationale.

47. I have above relied on the original conveyances, the absence of any evidence of any later appropriation and the retention of the Land on the creation of the School and drawn inferences from all that in accordance with the approach that Ouseley J would have adopted in *Lancashire (*as subsequently approved by the Supreme Court).

48. If further information is provided as to the background and how the Land was acquired, held, used and subsequently retained in 2018, then the clear conclusions I reach above may need to be revisited.

Conclusion

49. On the assumptions and inferences I have referred to above, and on the basis that the Land is held for educational purposes by KCC as landowner and that the statutory provisions thus engaged are as in paragraph 16 above, I conclude that there is no relevant basis to distinguish *Lancashire,* that there is a bar to registration and that the result is that the Application would have to be refused.

50. It would not be necessary to investigate the merits of the claims re: historic use for 20 years and whether it was "as of right" and no need for a public inquiry to be held. The Applicant would of course have to be given the opportunity to comment on the *Lancashire* conclusion including orally to the committee if KCC as registration authority is minded to accept my opinion set out above.

David Forsdick KC

Landmark Chambers

10th September 2024

This page is intentionally left blank

LAND AT CHURCH STREET, WHITSTABLE

APPLICATION FOR REGISTRATION AS A TOWN OR VILLAGE GREEN

INSPECTOR'S REPORT

Introduction

1. I have been appointed by Kent County Council as commons registration authority ("the CRA") to make recommendations to it as to whether land at Church Street, Whitstable which, putting it neutrally, comprises playing fields ("the Land") is capable of being registered as a town and village green ("TVG") under the Commons Act 2006 ("the CA 2006").

2. An application for registration of the Land was made by Victoria Falconer on 27th November 2023 ("the Application") on the basis of much more than 20 years user of the Land such user meeting all the other statutory requirements. The Friends of Church Street Playing Fields ("the Friends") - an unincorporated association - was substituted as the Applicant on 2nd February 2024. No objection has been raised to that substitution. Victoria Falconer continued her involvement with the Application as part of the Friends and orally confirmed her agreement to the substitution.

3. The landowner, Kent County Council as local education authority ("the LEA") objected to the Application and to any registration of the Land pursuant to it including on the basis that:
    a. the Land was held for education purposes and that there was a statutory incompatibility between those purposes and registration; and
    b. if they were wrong on that, any use of the Land cannot have been "as of right" given the alternative statutory framework under which the Friends then claimed it was held.

4. Either of those two matters, if established, would prevent the Land being registered and I considered it appropriate to consider those matters first as a preliminary issue before considering whether on the facts the other statutory requirements for registration were met. To meet b. the Friends have adjusted their case on the statutory purposes for which the Land was held and no longer claim that it was held under s.507A of the Education Act 2006. I address the new argument pursued before me only.

5. In what follows wherever I refer to the LEA I am referring to KCC acting as such and pursuant to its statutory powers and duties - and irrespective as to whether at that point in time it was called the local education authority. I refer to the Government department responsible for education as the DFE even though it has had different names during the relevant period including the Board of Education.

6. In the evidence the parties have gone further than the two questions in paragraph 3 above and have addressed whether the Land was fenced and whether there were relevant signs inconsistent with any use being "as of right". Given that it is now clear that those matters involve disputes of fact, all agreed orally that those matters could not be determined at this stage as part of the preliminary issues. Late evidence principally on those issues had been submitted by the LEA but given that I am not considering those issues here I do not consider it necessary to decide whether to allow that late evidence in. If I had done so I would also have allowed in the Friends' response to the LEA's late material.

7. This Report addresses just the matters in paragraph 3 above. It is for the CRA to consider this Report and to reach its own conclusions on those questions in the light of it. The Friends and the LEA will have a final opportunity to make representations to the CRA on those issues before the final decision is made on the preliminary issue.

8. References to the Core Bundle are given as "[CB/page number"] and to the Authorities Bundle as ["AB"]. Further documents were submitted during the hearing and those are referred to by their "inquiry" document number – "[ID/no]". The Core Bundle only includes material arising from the time I decided to hold a hearing. Earlier material is referred to by description and date. Where this Report refers to material in those bundles I do not quote it unless necessary to do so (and instead shortly paraphrase it) and incorporate the text by reference.

Procedure

9. Following the application for registration, the LEA objected on statutory incompatibility grounds. I provided an Advice on that issue in the light of the Supreme Court decision in *R (Lancashire County Council) v. Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58; [2021] AC 194 ("*Lancashire")* [AB71] which led to further exchanges of representations, further research in the archives and new factual information.

10. The totality of that material seemed to me to raise further complex and overlapping issues which would be best addressed through a hearing. I therefore convened a hearing which took place on 23rd February 2026. In advance of that hearing there was exchange of representations including on a detailed list of questions and issues which I considered might need to be addressed. I also identified a preliminary list of statutory provisions and authorities that might be relevant.

11. At the hearing, the Friends were represented by Claire Niven of counsel and the LEA by Douglas Edwards KC supported by teams who had done extensive research and provided substantive arguments. I considered that a round table format was the appropriate format for the hearing – both parties agreed. I am extremely grateful for all involved for the preparatory work and the professional, helpful and courteous way in which the hearing was conducted by all involved.

12. Earlier in the process the Friends had made submissions through leading counsel as to the required procedures (including under the Commons Registration (England) Regulations 2014) not having been complied with and unfairness resulting. I consider that the process I have gone through resolves any historic issues and have ensured that both parties have had a full opportunity to produce all material and make any submissions they considered appropriate. The Friends confirmed at the hearing that their historic concerns about process and fairness had been overcome by the process I followed for the determination of the preliminary issues.

13. During the protracted process, as new evidence has become available, the arguments of the Friends have evolved. The LEA has no objection to me considering those new arguments. At the hearing, the Friends confirmed that its original position on the statutory incompatibility issue to the effect that the Land was held for informal playing field purposes (under s.507A of the Education Act 1996) and thus there was no statutory incompatibility was not being pursued. I note that if the Land was so held, the Friends may have had significant difficulty establishing that use of it could have been "as of right" but I need say no more on that.

14. After the Inquiry, the Friends made further submissions to the effect that the land was, pending any education use (see below) held under what is now s.120 of the Local Government Act 1972 (general power to acquire and thus hold land). I gave the LEA an opportunity to address that matter. Those representations are taken into account in what follows. There is no dispute that a local authority can acquire and hold land under s.120. The question here though is whether it in fact did so.

Evidence

15. There has been extensive research over a prolonged period by the Friends and the LEA including into the County Archives in Canterbury and the National Archives – the most recent research carried out in response to detailed questions I raised in Procedural Note 1. I am satisfied that the process adopted means that each party has had ample opportunity to carry out investigations and any research it thinks fit.

16. Despite that, there remain some gaps in the historic document trail and inferences will therefore have to be drawn.

Lancashire

17. An understanding of the reasoning of the Supreme Court in *Lancashire* and how it differs (fundamentally) from the reasoning of the lower courts is central to addressing the issue here.

18. Lancashire County Council ("LCC") as landowner objected to the application for registration of land belonging to it adjacent to a primary school on the basis that registration would be inconsistent with the statutory purposes for which the land was held – it would impede the ability to fulfil LCC's educational duties to provide suitable accommodation and to safeguard pupils (see High Court judgment at [69]).

19. The relevant statutory provisions relied on (at least by the time the case reached the High Court) included:

    a. s.8 Education Act 1944[1] and ss.13/14 Education Act 1996[2] concerning provision of school accommodation;
    b. s.542 of the EA 1996 and the School Premises (England) Regulations 2012 – concerning prescribed standards for schools including outside space for physical education and outside play; and
    c. s.175 of the Education Act 2002 which requires the education authority to make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children.

20. LCC contended that the incompatibility of registration with the statutory educational purposes for which the land was held arose because registration would mean that it could not use the land to build a new school - new buildings being inconsistent with such registration - and it could not

[1] "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] Which require 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

provide safe and adequate play space if the public had access rights inconsistent with the safeguarding function.

21. The Inspector concluded that the land should be registered because the registration as a TVG would not be inconsistent with the statutory purposes for which the land was held. That conclusion was upheld by the judge and the Court of Appeal but the appeal to the Supreme Court was successful.

22. The fundamental relevant *ratio* (central reasoning) of the Supreme Court was that for an incompatibility to arise it was not necessary that the land was actually being used or was intended to be used in the future for an inconsistent statutory purpose. Instead, the issue of incompatibility was to determined as a matter of principle – by comparing the statutory purpose for which the land was held with the rights claimed pursuant to the CA 2006 rather than by carrying out a factual assessment of how the land was used or was proposed to be used. Given that the statutory purposes included the construction of new school buildings or the provision of secure playing fields with which registration was incompatible, registration could not occur.

23. The land was in three key parts. Areas A and B were playing fields for an adjoining school. Areas C and D were identified as a "Replacement School Site" but were not used, and apparently had never been used, by the school. Area E was an overgrown area and difficult to access. As to Areas A and B, the Inspector found that there were no plans to expand the school onto the relevant land and no evidence to suggest that the school wished to use the relevant land other than for outdoor activities and sports and such use is not "necessarily incompatible" with TVG use. As to areas C – E, the school was being expanded without use of those areas and there was no suggestion of a need to provide a school (or school extension) there in the immediate future. Even if there was a need for more educational land in the future, the evidence did not demonstrate that this land needed to be kept available "it is not necessarily the case that LCC would wish to make that provision on the Application Land". There was thus no "clear inconsistency".

24. The High Court and Court of Appeal upheld the inspector's approach – the Court of Appeal stating that:

> ***"The statutory purpose for which Parliament had authorised the acquisition and use of the land and the operation of section 15 of the 2006 Act were not*** **inherently inconsistent with each other*****. By contrast with [the Newhaven case] there was no "specific" statutory purposes or provisions attached to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a [TVG} would be incompatible."***

25. The core question for the Supreme Court was whether that approach to statutory purposes was correct. It held that it was not. It adopted a far broader approach.

26. The test was not whether the land had been specifically allocated by statute itself for particular statutory purposes but whether it has been acquired for such purposes and is for the time being so held. An "incompatibility between general statutory powers under which land is held…. and the use of such land as a [TVG] excludes the operation of the 2006 Act" [57]. "It would be a strong

thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act" [61]. There was no indication of such Parliamentary intent.

27. Thus, the playing fields engaged the statutory duties of LCC to safeguard children - free from risk from strangers and from risks to health. More generally, registration was incompatible with the "use for any of the areas for education purposes including the potential construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes… The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law" [65].

28. It follows that the focus is on the statutory purposes for which the land is held and not the use to which the land is currently put or is planned to be put.

The Central Issues and Summary of Conclusions

29. In the light of *Lancashire,* it is fundamental to understand: (1) the statutory purpose for which the Land was acquired and held at the outset; (2) whether there has been any appropriation of it to other purpose since; and thus (3) how it was held in the requisite period necessary to establish registration – which is here the 20 years up to 27th November 2023.

30. The requirements for an appropriation are not in dispute. The appropriateness of drawing inferences as to the purposes for which land is held and whether there has been an appropriation, where there are gaps in the historic evidence is not in dispute.

31. Once the relevant statutory purpose is identified, the issue of statutory incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the Land was held with the rights claimed pursuant to the CA 2006. In short, land cannot be registered under s.15 of the CA 2006 if it was acquired and held by the LEA for statutory purposes that are inconsistent with its registration as a TVG: *Newhaven* @ [93] approved in *Lancashire* @ [55-61] [AB119-121].

32. On the question as to the statutory purposes for which the Land is held, a central submission now on behalf of the Friends is that whatever the purpose for which the Land was *intended to be used or was acquired,* that purpose was never given effect to and unless and until that purpose is given effect to, the Land could not be held for that purpose and was instead held under a general power. In short, for Land to be held for purpose X it had to be used for purpose X or purpose X had to be manifested in some other way.

33. I will explain in detail below why I do not accept that central submission. It is normal and to be expected that public authorities will acquire land for purpose X in advance of the precise details of how the land is to be used for purpose X are formulated and before final decisions are made and consequent actions on the ground occur. Pending such details, decisions and actions, I consider that land acquired for purpose X is held for purpose X unless there is appropriation to another use. I consider that to be consistent with all the case law, established practice and with the general approach to statutory purposes. In particular, as evidenced by *Lancashire,* land will – absent appropriation to other purposes - be held for education purposes even if was acquired for such purposes many years previously and there has never been any use for such purposes –

see areas C – E in *Lancashire*. I conclude that it is wrong in principle to infer that absent actual use for purpose X or absent action to deliver those statutory purposes on the acquired land, land cannot be held for the purposes for which it was acquired and must, instead, be held for general (e.g. s.120 LGA 1972) purposes.

34. As to statutory incompatibility, I find there to be no relevant distinguishing feature from *Lancashire.* Whilst the Land has undoubtedly been used by many people over many years for activities not associated with (formal or informal) education uses and the education and non-education uses have, in fact, coexisted without any evidence of significant problems, registration as a TVG would be incompatible with the statutory purposes for which the Land is held. Fundamentally, no school buildings could be built on any part of it. Further, the public would have a general right to traverse across and use the whole of it alongside any education use of it. The safeguarding and health and safety implications seem to me to be indistinguishable from *Lancashire* once one considers statutory incompatibility as a matter of principle rather than on the current use or the potential for uses to co-exist practically. The practical ability for uses to co-exist is not the legal test.

History of the ownership of the Land and its Legal Consequences

35. It is appropriate to address the history of the ownership of the Land chronologically and to tie that into the relevant applicable statutory scheme at each stage of the history drawing such inferences as are necessary and appropriate in so doing. In so doing I introduce and address the key arguments of the parties at each stage.

The Original Acquisition

36. Prior to 1925, the Land comprised undeveloped open land in multiple ownerships.

37. In or about 1925, the LEA decided to establish the Whitstable Secondary School for Girls ("WSSG"). Under the then legislative scheme, "Secondary Schools" were a form of "higher" education (as opposed to "elementary education") and I thus infer that the specific power to establish the WSSG would have been s.70 of the Education Act 1921 ("the EA 1921") [AB6]. There were similar provisions for elementary schools: s17 [ID/5] albeit that imposed duties not just powers on the LEA to provide elementary schools.

38. The Land was identified by the LEA as the site for proposed new WSSG which the LEA decided to acquire. (I address separately the position of the DFE on the acquisition below).

39. The LEA reached agreement for the acquisition of much of the Land from Mrs Holden in 1925 ("the Holden Land") and, ultimately in around 1927, with the executors of the successor in title to Miss Beckhuson ("the Beckhuson Land"). The requisite funds to acquire the Land were allocated by the LEA in 1926. By October 1927, the LEA had resolved to purchase a further 2.4 acres of land which fronted the coastal road from Miss Beckhuson's executors ("the Coastal Road Land").

40. On 7th October 1927, the Holden Land was conveyed to KCC "as the local education authority and being desirous of acquiring the said property for education purposes" under the powers in the

Education Act 1921. The statutory power under which the Land was acquired was expressed in general terms and was not specifically or expressly tied to "higher" education purposes.

41. Given that the Land was explicitly acquired for education purposes under the EA 1921, the power relied on to acquire the Land could only have been s.109 of that Act - that being the key relevant power under the EA 1921 [AB8]:

> ***"A local education authority may for the purposes of their powers and duties under this Act purchase or take on lease any land or any right over land.".***

42. I note that that power is general in that it is not limited to acquisition for higher or elementary education or for built form or other uses including playing fields - it empowers the acquisition of Land for any and all of those purposes.

43. I thus conclude that the Land was acquired for general education purposes with a then current intent that it be used for the WGSS.

44. No party contended (despite my express invitation to consider the point) that the Land was acquired under s86 of the EA 1921 - the power to supplement and reinforce the public education system through making arrangements to supply or maintain e.g. playing fields [AB7]

45. Notwithstanding the generality of s.109, if greater specificity is required, it is clear that the Land was acquired for education purposes comprising the provision of WGGS for higher education under s.70.

46. Subject to the Friends' central argument addressed below, I do not accept that it is possible to infer that the Land was acquired under the statutory predecessor of s.120 of the 1972 Act. First, no inference is required to be made – the acquisition was expressly on its face for education purposes. Second, there is nothing in the background papers to justify any such inference and all the indications are to the contrary. I therefore reject the apparent claim that the Land could have been and was acquired under such a general provision and for open ended and general purposes.

47. On 20th December 1927, the Beckhuson Land was conveyed to KCC as LEA for essentially the same "education purposes" – and pursuant to the same s109 power.

48. All of this was: (1) under the auspices of the Education Committee; (2) carried out by KCC as LEA; and (3) axiomatically and expressly, for education purposes. I note that the evidence here is direct and clear and thus far stronger than that available to the Inspector in *Lancashire* and does not require any inferences to be drawn.

49. Whilst, the point ends up going nowhere for reasons explained below, the distinction between "higher" education purposes under s.70 and "elementary" education purposes may explain some of the later history which I consider after addressing a key argument of the Friends.

Does acquisition for Education mean it was held for education?

50. I come back to a key submission on behalf of the Friends. At its heart, the argument is as follows. S109 is a very broad power but following *Lancashire* @ [66] it is necessary to move from the general (or broad) position to the specific. One must focus on the steps *after acquisition* to determine for what purposes the Land was actually held (and, I interpolate, irrespective as to the power under which it was said to be acquired). It is only if the Land is actually used or is shown to be about to be used for, or needed for, education purposes then it can be said to be held for such purposes. The EA 1921 required schemes to be formulated as to how the powers and duties in e.g. s17 and s.70 were to be exercised for elementary (s.12) and higher (s.13) education purposes respectively. On approval of the schemes, s.15 imposed a duty to give effect to the scheme. The Land only came to be held for education purposes if and when it was included in such a scheme or when positive steps were taken to give effect to deliver the education use. Here it is said that there was no such scheme covering this Land in 1929-31; and no evidence of any such scheme including the WGSS ever having been approved or of any steps to deliver the education use pursuant to any such scheme. Thus, the intent behind the acquisition did not crystallise into the Land being held for any specific education purpose. It was not held for that purpose until there was a programme or scheme to deliver that purpose. It was thus held for more general purposes.

51. Though attractively put, I cannot accept that argument.

52. As the Friends contend, Part II of the EA 1921 contains provisions for Schemes as to the exercise of powers and duties. There is a "power" (s.11) for LEAs to submit schemes showing how their powers and duties with a view to contributing to the "progressive development and comprehensive organisation of education" are to be performed and exercised. There is only a duty to have such a scheme if required by the DFE. There would be a duty to comply with any such scheme once approved (s.15(1)). To my mind, the fact that there is a power but not a duty to prepare schemes indicates that the absence of a scheme cannot be determinative as to whether the Land was held for a particular purpose.

53. More fundamentally, I do not accept the starting point for the submission - namely that it is necessary to "move from the broad to the specific" before Land can be said to be held for education purposes rather than just held "for the intent of later delivering the purpose" and that: (1) the specific purpose for which Land is held only crystallises when it is in an approved scheme; or (2) that an acquisition with an intent to use for education does not mean that the Land is then held for education purposes - something more is required to deliver on the intent.

54. As to being held with just the "intent of delivering the purpose", I do not understand the claimed distinction between being held with the intent of delivering X and being held for X. Until delivery of X is formalised by final resolution and/or provision of funding and/or build contracts, there will only ever be an intent to deliver X but land will, pending those steps, still be held for X rather than for something else.

55. As to the scheme (point (1) above), I can find no necessary read across from the s.109 power to acquire for education purposes to the need for that purpose to be contained in a scheme. The s109 power is independent of the existence of any scheme. The scheme can indicate the need

to acquire land under s.109 but the inclusion of land in a scheme is not a statutory prerequisite to the existence of the s.109 power. Thus, the question as to what power land is held under cannot be predicated on the existence of a scheme and must be capable of identification independent of the existence of a scheme. In short, I conclude that land could be held for education purposes even if it was not included in a scheme under Part II of the EA 1921.

56. As to point (2) above, the position here is equivalent to that in *Lancashire* @ [22] and [30] and *Cotham School v Bristol City Council* [2025] EWHC 1382 (Ch) ("Cotham School") @ [14] and [255]. In both cases the Land was held for education purposes even though it had not been used for such purposes (and for much of the land in *Lancashire* no steps to so use it had ever occurred).

57. It is inevitable that Land may be acquired for statutory purposes but no step to deliver that purpose immediately follows. It is normal and to be expected that public authorities acquire land in the expectation of a need for it for purpose X in the future but not immediately, that plans of public authorities as to how they will use their land for general purpose X may change over time and do not have to be crystallised before the land is held for that purpose; and that there may be a substantial gap between the acquisition and steps to deliver pursuant to the purpose. There is no case of which I am aware (despite my request to be furnished with any relevant authority) which shows that the lack of delivery or the inchoate nature of the acquiring authority's plans means that the land is to be deemed to have been held under a general (e.g. s.120) purpose even when it was expressly acquired for a specific (here s.109 education) purpose.

58. Further, I do not see how the Friends' submission could work. It would appear to mean that Land would be expressly acquired for purpose X; pending steps to deliver X it would then be deemed to be held other than for that purpose and instead for general purposes; and then as and when steps were taken to deliver purpose X it would then be held for purpose X. That would appear to insert an unnecessary and unintended statutory step into the chain, may require appropriations at each stage and would be directly contrary to the express purpose for which the authority acquired (and thus intended to hold) the Land. I therefore accept the LEA's submissions on this issue.

59. In *R v Somerset Couty Council ex parte Fewings* [1995] 1 WLR 1037, the Court of Appeal held that the land in question was held by Somerset County Council, following an appropriation, for the purposes of s.120(1)(b) of the Local Government Act 1972 (see Sir Thomas Bingham MR at p.1041, Simon Brown LJ. at p.1048; see also the judgment of Laws J. (as he then was) at first instance in *Fewings* [1995] 1 All.E.R. 513 at p.523A). That was the natural inference on the historic facts there being no other identifiable statutory purpose. As such, in *Fewings* s.120(1)(b) was engaged in respect of the use and management of the land in question. I agree with the LEA that, here, the Land is plainly not held by the LEA under s.120 LGA 1972. It was not acquired pursuant to any predecessor of s.120(1) nor has it been appropriated to be held under that section. The evidence demonstrates that the land was acquired for education purposes. As such, the purposes set out in s.120(1)(b) LGA 1972 and the *Fewings* case are not relevant.

60. Further, I do not accept that the facts support the Friends' analysis. The Friends' contend that the acquisition of the Land for education was not approved by the DFE under a scheme or otherwise. I do not agree.

61. In 1926, the LEA approached the DFE in relation to the acquisition of the Land [CB362]. The DFE responded that the proposal should be deferred until the LEA had considered its education development programme for 1927 and following years [CB363]. Later in 1926 [CB367], the DFE approved "in principle" the acquisition but considered that the "site proposed is unnecessarily large". It was said by the Friends that this meant that the delivery of a school here was inchoate ("up in the air"). However, it is clear that that issue was then resolved [CB369; CB371 and CB373] leading to the Land being acquired. The DFE agreed to the acquisition. Whether that was expressly under a s.12 scheme or otherwise does not impact that central factual point. I thus think the point about the DFE's initial reluctance to agree to the acquisition goes nowhere. Indeed, if anything, it confirms that the DFE approved the acquisition for the purposes of s.70 (and perhaps under a s.12 scheme).

62. The Friends' submission continues to claim that on the facts that the WGSS scheme "never got going" after acquisition as part of its argument that the intent to hold for education purposes never materialised. By 1933, the urban district council was complaining about the lack of progress and the LEA minutes record that it was "unable at the present time to submit any proposals on the question of the provision of secondary accommodation in Whitstable." There was no progress on that by 1934 (CB359). I accept that the natural inference is that the WGSS proposals "never got going" (and as explained below had been overtaken by events in relation to proposals for a Central School). However, for reasons already addressed I do not think that that means the Land was not held for education purposes. Further, the absence of any appropriation to any other non-education use is telling. The specific WGSS scheme never got going but, as addressed below, subsequent education uses occurred and proposals for different education uses were at times pursued. There is no evidence of any appropriation at any time to s120 or "general" purposes of any other (non-education) function of KCC.

63. I therefore reject a central part of the Friends' legal and factual analysis. The Land was acquired for education purposes under s.109 with the agreement of the DFE and was held immediately thereafter for education purposes. Absent an appropriation, the fact that there was then no substantive progress with the WGSS and the proposals for it were later abandoned is of no legal or factual consequence.

The Temporary Use as Elementary Education Playing Fields pending the provision of WSSG

64. Pending the (at that point, still) anticipated delivery of the WSSG, the LEA decided to use the Land so acquired as a playing field for organised games for Elementary School children in the area.

65. The key resolutions are as follows:
    a. on 17th April 1928, the Secondary and University Education Sub-Committee of the Education Committee which was responsible for "higher" education and which would therefore have been responsible for the Land and for delivery of WSSG resolved that the

land should be used by Elementary School children until required for the purposes of the WSSG. A contribution was to be paid from elementary school funds to "higher" education funds to reflect the fact that the Land had been paid for by the higher education budget (with the quantum yet to be determined);

b. on 21st August 1928, the Elementary Education sub-committee "propose[d] to make use [of the Land] for elementary school children" with some accounting adjustment required – in effect governing the temporary use and costs of the temporary use of the Land by it; and

c. on the same date, the Finance and General Purposes sub-committee of the Education Committee ("the FGPSC") resolved that the contribution should be £20 pa for the "temporary use of [the Land] as a playing field for organised games for Elementary School children in the area" – what it termed an "Elementary Playing Field".

66. All of this was: (1) under the auspices of the parent Education Committee; (2) carried out by the LEA as such; and (3) axiomatically for education purposes (albeit more specifically for Elementary as opposed to Higher education purposes). Given those central points, I cannot read those resolutions as any indication of an appropriation to non-education purposes or to general purposes.

67. Given that the use of Land for playing field for elementary school children is within the s.109 purposes of which the Land was originally acquired, and that this was in any event expressly a temporary use pending the delivery of the WGSS, there was, in my view, no need for any appropriation.

68. In any event, despite all the extensive and, for all practical purposes, exhaustive research carried out by the parties covering this period, I can see no evidence that the Land was formally appropriated to Elementary *playing field* purposes (or even general elementary education purposes) from higher education purposes at this stage.

69. The natural (indeed inevitable) inference is that the Land remained held, at this stage, for education purposes with the intent of delivering the WSSG here pursuant to s.70 but pending that use, was temporarily to be used for elementary playing field provision.

70. It may be, and I put it no higher, that the Land could have been appropriated at this time[3] to temporary elementary playing field (perhaps under s.113 and s.17 or under s.86[4] of the EA 1921)

[3] S.113(1)(ii) of the Education Act 1921 provided that a LEA "may appropriate, with the consent of the Board of Education [subsequently the DFE], for the purpose of elementary education, any land acquired by them for the purpose of higher education, either under this Act or the Education Act 1902, or for similar purposes under any Act repealed by the last mentioned Act"

[4] That provision essentially empowered the LEA to provide playing fields for education purposes for elementary school children. It is an education related power and within the ambit of general education purposes:

a. it is conferred on the LEA not KCC generally;
b. it is subject to the approval of the Board of Education not the department of government more generally responsible for public health, open space and local government;
c. it is, so far as relevant, expressly for elementary school children (not the public more generally);

but it is hardly surprising that that step was not considered given the explicit anticipation that the elementary use would be temporary pending delivery of the WSSG. The presumption of regularity applies and I will therefore assume that the temporary use was a lawful use under the education purposes for which the Land was held.

71. Nor does the temporary use for elementary purpose provide any support for the inference that the Land was held for general purposes.

72. There is also no basis to infer that the Land was then held for ***public*** open space purposes. There were other statutory provisions in other legislation which addressed provision of open space for such purposes not specifically related to education: see e.g s.164 Public Health Act 1875 and s.9 Open Spaces Act 1906. These powers were principally used by local district councils and not county councils or LEAs. In urban areas, the normal position is thus that public open space is owned and managed by district councils. Whilst KCC owns a number of country parks, it is the local district councils who generally own and manage public open spaces in urban areas. I consider it clear that, in deciding to use the Land for elementary playing fields, the LEA and the Education Committee were not purporting to (and probably did not have the power to – absent appropriation) exercise these wider powers or to provide public open space but were confining themselves to their relevant remit – namely education for elementary school children.

The Position in 1930 and the Central School

73. The Coastal Road Land was conveyed to KCC on 9th January 1930 for the same purposes as the rest of the Land thus completing the Land acquisition. I have not been able to establish whether or when the Coastal Road Land then came to be used as part of the Elementary Playing Field.

74. However, by 21st January 1930, it was no longer proposed to provide the WSSG on the totality of the Land. Instead, on that date, the FGPS Committee of KCC considered proposals for provision of the "Central School for Whitstable" on the Land [CB200] and "appropriation" (presumably) under s.113(1)(ii) of the EA 1921 of the Land for that purpose from the former WGGS (higher education) purpose.

75. At that time, Central Schools were part of the Elementary School system - providing advanced instruction for children and young people in technical skills but within the Elementary (as opposed to "higher") School system: see e.g. s.2(1)(a) and s.32(1) Education Act 1918.

76. The agreement of the Secondary and University Sub-Committee was required if the Land was to be moved out of its remit and into the remit of the Elementary Education Committee. On 27th January 1930, in the light of the urgent necessity for the provision of Central School accommodation, that sub-committee of the Education Committee (broadly responsible for

d. it is to supplement existing provision in the public system of education for elementary school children;
e. the facilities listed in (b) are all school related; and
f. in my view, the overall wording and framework of s.86 ties the provision of playing fields to education purposes.

"higher education") recommended that the Land be used for Central School purposes. Proposals for an alternative site for the WSSG would be made later. The Sub-Committee was thus effectively agreeing to the Land being moved from its responsibility to the responsibility of (and for use by) the Elementary education sub-committee for provision of a Central School and explicitly not limited to playing field purposes.

77. S113(1)(ii) provided a power to appropriate with the consent of the DFE for the purposes of elementary education any land acquired by them for the purposes of higher education. The LEA here contends that that move between higher and elementary purposes is not "appropriation" as properly understood but simply a moving of education land between education sub-committees.

78. I do not agree. S113 covers all categories of former uses (see s.113(1)(iii); and "appropriate" in s.113(1)(ii) cannot mean something different from that in s.113(1)(iii) which would undoubtedly be "appropriation" properly so called. The FGPSC resolved to appropriate the Land to "Central School Purposes". Having regard to the statutory scheme, it appears to me that the appropriation was thought to be necessary because the Land had been acquired for, and remained held for, ***higher*** education purposes (for a secondary school) and s.113 of the Education Act 1921 required land so acquired to be appropriated to ***elementary*** school purposes if it was to be so used (including as a Central School). In effect, the legislation appears to have treated elementary education purposes and higher education purposes as separate heads of education purposes thus requiring appropriation before Land could be moved from one to the other. This sub-division was also reflected in the sub-committee structure of the LEA.

79. I therefore consider that this demonstrates that:
    a. the LEA at the time considered that the specific statutory purpose for which the Land was acquired under s.109 was s.70 "higher education";
    b. the Land was agreed to be appropriated to "elementary education" purposes – s.17;
    c. both those purposes included for the purposes of building a new school - either the WGSS or a Central School; and that
    d. either way the Land was and remained held for education purposes including for the purposes of building a school and not just playing fields.

80. The need underpinning the original acquisition for the WGSS was to be met elsewhere.

81. There was no suggestion of any appropriation under s.114 away from education.

82. The proposed appropriation would require approval of the DFE under s.113(1)(ii) and financial adjustments to reimburse the "higher" education budget for the purchase costs incurred. It appears that the appropriation was approved by the DFE – as recorded by the LEA in a letter dated 13th November 1936 [CB247]. The Friends contend that there is no direct record of the DFE granting its consent to the appropriation. That is correct but, in my view, the inevitable inference from the facts and the surrounding correspondence is that the approval of the DFE was obtained.

83. A combination of the resolution to appropriate and the approval of the DFE seems to me to constitute the appropriation of the Land from higher (WGSS) purposes to elementary (Central School) education purposes in both cases including for the purposes of building a new school. The necessary degree of formality and compliance with the statutory procedures is clearly evident.

84. There was then an appeal (apparently under s.18 of the EA 1921) by a neighbouring school against the creation of a Central School on the Land [CB280] but the appeal failed in or about 1940 [CB274].

85. I will therefore infer that thereafter the Land was held for education purposes most specifically elementary education.

Non-Delivery of the Central School and the temporary playing field use continuing

86. No Central School was ever built on the Land. Indeed, the temporary uses approved in 1930 appear to have continued: [CB36: top extract].

87. Despite the parties having had ample opportunity to fill the gaps in the history after 1940, I do not know the reason why the Central School was not delivered. There is no evidence as to what happened after the 1930 resolutions and the developments in 1936 to 1940 referred to above. It is simply not known what happened with the intent to deliver a Central School and why that intent was not realised.

88. I do not know whether the January 1930 resolutions were formally reversed or abandoned at any time thereafter.

89. However, there is no evidence available to me of the LEA then making any further decision as to how the Land was to be held. Especially given the extent of the opportunity afforded to the parties to produce any material evidencing any such decisions and any later appropriation, I consider the absence of any such evidence to be significant.

90. There is no documentary evidential basis to found an inference that the Land was subsequently appropriated to non-education purposes. I consider the relevance of the evidence of actual use below.

91. The Friends contend that, because a Freedom of Information Act request to the DFE revealed that the Land was not "registered in Whitstable for school buildings" the inference can and should be is drawn that the land was "deregistered in 1930" and that therefore the temporary "agreement" re: playing fields has remained in place since. I consider this issue separately below – under Registers.

The KCC Education Plan under the Education Act 1944

92. The Education Act 1944 introduced fundamental changes to the system of education in England.

93. Under s.11 , every LEA was required to "estimate the immediate and prospective needs of their area having regard to the provisions of this Act and of any regulations made thereunder and to the functions relating to primary and secondary education thereby conferred on them" and to produce a plan showing the action which the authority propose should be taken for securing that there would be sufficient primary and secondary schools available for their area.

94. The Friends contend that this was a "complete overhaul" of the system and is central to the question as to what purposes the Land was held for thereafter.

95. It is said that given the Land was not included in KCC's Education Plan for new buildings under s.11 that demonstrates that the Land cannot have been continued to be held for such education purposes following the fundamental "reset" in the 1944 Act. That is said to support the argument that the Land was only held with an education *intent*, that was not sufficient (the argument I have addressed above) and that it was therefore held for general purposes only.

96. I do not agree. Whilst the EA 1944 introduced major changes to the education system it did not mean that land previously held for education purposes somehow thereafter ceased to be so held. S11 was concerned with planning for the future - not the purposes for which existing education land was held. Further there was no relevant change to the basic framework concerning local authority land holdings - namely land being acquired and held for one purpose and then having to be appropriated to another purpose if it was to be held and/or used for that other purpose. Appropriation remained a formal process (although over the years various legislation removed the need for the approval of the DFE to any such appropriation).

97. Thus, irrespective of s.11, the question remains whether, if as I have concluded the Land was held for education purposes in 1927-40, it was thereafter formally appropriated to another non-education use. I do not think that the enactment or the provisions of the EA 1944 changes the need to demonstrate such an appropriation on the evidence. There was no necessary implication from the statutory scheme that existing education land had to be somehow re-committed to education purposes for it to be so held.

98. In any event, the contemporaneous facts do not support the Friends' argument.

99. During the Second World War, the Land was temporarily held under emergency powers legislation by the Kent War Agricultural Executive Committee as was commonplace for vacant land suitable for food production. In 1946, the urban district council requested that the Land (described as the Kent Education Committee's Playing Fields") be released from its war use so that it may "once more be used as children's playing fields" [CB37]. There is no evidence of the LEA or the War Committee ever accepting that request or any subsequent appropriation away from education purposes.

100. Instead, the LEA produced its s.11 Plan in or around 1947. The Land is labelled as SS7 on the relevant plan: [CB39]. The Key [CB38 top extract] indicates that the "SS" means that: (1) the land is held for education purposes; and (2) in existing use for secondary school purposes. A note at CB66 indicates that it was also used for playing field provision for a local primary school.

101. That is consistent with the Land still being held for education purposes and not being released to any other purposes. It tends to suggest that the LEA did not think the appropriation to elementary education had been finalised in 1940 and that the Land remained held for secondary school purposes (including building new buildings). It is not necessary for me to determine whether the LEA was correct on that. Those purposes were the same as before the 1946 Education Plan and were thus not limited to "education playing fields" under what was s.86 of the EA 1921 and is now s.507A of the EA 1996.

The 1966 Appropriation

102. In 1966 a small part of the land originally acquired for the WGGS was appropriated to highway purposes [ID7]. The *Education* Committee approved the appropriation - its involvement is only explicable if the Land was then held for education purposes. This is thus consistent with the conclusions I have reached above.

The DFE and KCC Registers

103. The Friends rely on the lack of reference to the Land as "education" or education building land in registers held by the DFE and/or KCC.

104. As to the KCC register, it is a non-statutory register of KCC's land ownership compiled for management purposes. It does not have any statutory status. The hard copy of it provided by the Friends describes the Land as "playing fields" and, in contrast to almost all other playing fields held by KCC, not as "school playing fields". On the electronic version, the use is stated as "public open space" with the "Site alternative name" being given as "Community College Whitstable Playing Fields, Church Street Playing Fields". These two entries are inconsistent and confused and elsewhere in the register there are different and inconsistent approaches to how land is defined. The description of the uses in the register has no statutory force and does not purport to tell us under what statutory power any particular area of land was held. Whilst it is of some evidential value as to what the author considered the Land to be used for at the point of its compilation, I do not attach much weight to the register in answering the statutory question as to the power under which the Land was held.

105. As to the DFE register, it appears that the Land is not identified by the DFE as land for education buildings. The register is non-statutory and its relevance is unclear. The source of information contained in it is not clear. I do not think it can lead to the inference that the Land must have been appropriated out of education purposes (or had never been so held) given all the contemporaneous indications to the contrary addressed above. Nor can it lead to the inference that the Land was only held for school playing field purposes (s.86 EA 1921 or s507A EA 1996) or that it was held for general recreational purposes.

The Transfer to the Academy

106. Prior to its academisation, the Land had been intermittently used by the non-adjacent Whitstable Community College (as part of its playing field provision) as well as by primary schools

in the locality. In 2018, the College became an academy - Whitstable School - under the Academies Act 2010 ("the AA 2010").

107. The Land was not included in the scheme made by the Secretary of State ("the SoS") under s.8(2) and sch 1 of the AA 2010.

108. The Friends rely on that as demonstrating that the Land was not held for the purposes of the College because had it been it would have had to have been transferred.

109. Under s.8(2) and s.13 of the Academies Act 2010 the Secretary of State may make a scheme for the transfer of property to an academy trust where the property is used or held for the purposes of the school. A requirement for the making of a scheme is that the Land was used wholly or mainly for the purposes of the previous school [Sch 1 para 1(2)(a)] but had been or is about to be no longer so used.

110. Subject to that, the content of the Scheme is in the discretion of the SoS.

111. The reasons why the Land was not included in the Scheme are nowhere expressly set out. However, it appears that:
    a. the Land was never understood as being, or expressed as being, held *solely* for the purposes of the College but for education more generally;
    b. the Land was not "wholly or mainly" used by the College but was more generally used; and
    c. whether because the statutory requirements were not met, or because the academy did not request or want the transfer of the Land (or even because no-one put their mind to the Land as part of the College), the SoS decided not to include the Land in the Scheme.

112. I do not think that it is possible to infer from that that the Land had somehow ceased to be held for education purposes.

The Use of the Land

113. I do not have any details as to the history of the nearby former Whitstable Community College ("WCC") now Whitstable School ("WS") – and whether it started life as a Central School or similar (as a replacement for the Central School earlier suggested on the Land) and if so when. In more recent years it has clearly been a secondary school.

114. In 1966, the Land was still held by the LEA (and not by KCC more broadly) but was referred to as "playing fields"; not school playing fields.

115. Whilst, following *Lancashire,* the actual use does not tell us the powers for which the Land is held, I am told as a matter of fact the Land was laid out and used as playing fields. I do not have evidence as to the history of such use from the 1930s but the evidence as to more recent use shows that it was used:
    a. as playing fields for decades up to 2018 including by WCC (see Friend's Submissions of 18th October 2024 p2 – "playing fields for decades and was used by the school when

[WCC] was a maintained school"; and Landowner's undated original response to the Friend's Application);

b. by local primary schools for organised sports (see Application for Registration Annex B page 2);
c. for informal uses by the public generally;
d. for occasional events licensed by the LEA such as car boot sales; and
e. for more formal use by sports clubs not directly linked to any particular school.

116. It appears that the use by WCC may have reduced over the years and other uses became more prevalent.

117. I do not think that the actual use can be used to infer an appropriation away from education or that the Land was held for general (or s.120) purposes. Indeed it will always be the case in applications for registration of school playing fields as TVG that there will have been extensive user other than for education purposes. That user does not tell us for what purposes the Land was held and that is the necessary focus of the current assessment.

Conclusion on the Purpose for which the Land is held.

118. I conclude that:

a. the Land was acquired for education purposes under s.109 of the EA 1921 and, if it necessary to be more specific, under s.70 (higher education purposes);
b. those purposes included provision of new school buildings on the Land and use as school playing fields;
c. if and to the extent relevant, the acquisition was not under s.86 of the EA 1921 and was not limited to use for school playing fields;
d. the Land was not acquired under some general power of acquisition akin to s.120 of the LGA 1972 or for open space purposes;
e. the Friend's key contention that acquisition for, and an unrealised intent to use for, a particular purpose does not mean that it is *held* for such purpose is, in my view and with respect to the skilled way in which the submission was put, wrong in law and on the facts;
f. once acquired for education purposes, the Land is thereafter held for education purposes unless appropriated to another non-education use;
g. on the temporary use of the Land for elementary school playing fields, there was understandably no appropriation given the temporary nature of the use pending the intended delivery of WGGS;
h. shortly after acquisition, it became clear that the Land would not be used for WGGS and it was decided to appropriate it for elementary school purposes to deliver a Central School;
i. that appropriation would have been to elementary education purposes including construction of new school buildings;
j. it is not clear whether that appropriation was ever completed - my view, on balance, is that all the elements for appropriation to have occurred are present and that the Land was thereafter held for elementary education purposes;

k. the distinction in s.113 between land held for elementary and higher education purposes became of no significance on the passing of the EA 1944;
l. the Central School proposals were not pursued – there were thereafter no express proposals for new school buildings on the Land but the land remained held for education purposes including for buildings. There was no appropriation away from such broad education purposes and to more limited "playing field" only purposes;
m. the statutory provisions for the making of Education Plans in the EA 1944 do not impact the powers under which the Land was held but, even if I am wrong on that, the relevant plan of the LEA here showed the School as held for secondary school education purposes - albeit probably not then anticipated to be required for buildings;
n. the omission of the Land from the DFE and KCC registers does not justify an inference of an appropriation away from education purposes after 1940 – and any such inference would be contrary to all the other surrounding evidence and would entail assuming that there was an appropriation when the records have been thoroughly examined and no evidence of any such appropriation having been identified;
o. the omission of the Land from the 2018 Scheme on creation of Whitstable School is understandable on the facts and does not demonstrate that the Land had been appropriated to other uses;
p. whilst the actual use was far wider than simply pursuant to education purposes, actual use is not the focus of the inquiry and *Lancashire* requires the focus to be on the powers for which the Land is held not the use of it; and
q. therefore the Land is held for education purposes including for provision of new buildings and not limited to playing fields.

Statutory Incompatibility

119. Given those findings, it follows that there is a statutory incompatibility, as the LEA contends. The situation is indistinguishable in any relevant respect from that in *Lancashire* and *Cotham.*

120. Registration here would bring with it the right to use all or any of the Land for recreation by (at least) residents of the locality. Buildings could not be constructed and the public could not be excluded from parts of it. The intensity of TVG rights would be limited by findings of fact on the substantive registration and it might therefore be possible for teachers to exclude the public from pitches in use and to ask members of the public to keep well away from school groups.

121. However, as in *Lancshire @ [14],* registration would prevent the construction of a new school here under s.13 – 14 EA 1996 or otherwise. Thus, on the facts the LEA would not be able to build the SEN school it currently wishes to construct here. The inability to build a school on Land held for education purposes including for new school buildings is a clear statutory incompatibility.

122. In *Lancashire,* the inability to exclude members of the public and their dogs was held to give rise to statutory incompatibility on safeguarding and on health and safety grounds. I accept of course, that with good will, any public use could on the facts be controlled to not generate those issues on the ground but that is not a matter for me. The issue has to be approached as a matter of principle and of legal rights – and my clear conclusion (dictated by *Lancashire*) is that there is

a clear statutory incompatibility between the purpose for which the Land is held and the claimed rights which would arise on TVG registration.

"As of right"

123. At points, the Friends contended that the land was held under s.507A of the EA 1996. I had understood some comments to also suggest that the Land might have been held under public open space powers. Orally, the Friends expressly disavowed such claims and I therefore do not need to address them.

124. If they had been pursued they would have raised the issue as to whether the public user was "as of right" rather than pursuant to the legislative purpose for which the Land was held.

125. Given that those issues are not pursued I do not need to address the "as of right" issue further in order to determine the preliminary issue. It will be necessary to address it further on the facts of the gates and alleged signs if the application proceeds beyond the preliminary issues.

126. However, the "as of right" issue is of some relevance. Here, to avoid any issue on "as of right" the Friends' argument necessarily had to be that the Land was not held for general education purposes or for open space or playing field purposes but was held for general purposes (under s.120 or similar). If it is held for education purposes, statutory incompatibility becomes an issue. If it was held for open space purposes then "as of right" would pose a significant obstacle. I have rejected the argument that the Land was held for general purposes because it is inconsistent with all the historic information in the period 1926 – 1947 and there is no evidence or logical reason to make an inference that it was so held.

Conclusion

127. I therefore recommend to the CRA that the application for registration must be refused on the grounds of registration being incompatible with the statutory education purposes for which the Land is held.

David Forsdick KC

15th April 2026