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

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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