

**DERBYSHIRE COUNTY COUNCIL  
REGULATORY-LICENSING AND APPEALS COMMITTEE**

**25 JULY 2016**

**REPORT OF THE DIRECTOR OF LEGAL SERVICES  
APPLICATIONS TO REGISTER LAND AT HADY AND SPITAL, CHESTERFIELD,  
AS A TOWN OR VILLAGE GREEN (VG138 AND VG141)**

**1. Purpose of the Report**

To ask the Committee to determine two applications made under the Commons Act 2006 to register land at Hady and Spital, Chesterfield ("the Land") as a town or village green.

**2. Information and Analysis**

The Committee previously authorised the appointment of an independent Inspector to conduct a public inquiry into this matter and thereafter make recommendations to the Council as to the determination of the applications.

Charles Mynors of Counsel was appointed as Inspector ("the Inspector") and a public inquiry was held on 29 February and 1 March 2016.

The Inspector's report to the Council (Appendix 1) sets out the evidence presented to him, legal submissions made and his conclusions and recommendations as to the determination of the applications. The references to paragraph numbers in this report are references to paragraphs of the Inspector's report, unless otherwise stated.

The first application (VG138), made by Kevin Bailey was accepted as validly made on 21 June 2013. The second application (VG141), also made by Kevin Bailey ("the Applicant") was accepted as validly made on 31 January 2014. Objections were made to those applications by Mr Abishek Chand, Chesterfield Borough Council, Derbyshire County Council (in its capacity as owner of part of the land) and Mrs Siobhan Spencer on behalf of the Derbyshire Gypsy Liaison Group.

VG138 was made pursuant to Section 15(3) of the Commons Act 2006 (“the Act”) on the basis that the use of the Land had been as of right on 20 December 2011, but had ceased on that date due to fencing being erected on that date. An area of land, referred to as “the Scrubs” or “Farmer’s Field” and owned by Mr James Cash, was excluded on the basis that it had been subject of a planning application which constituted a trigger event under Section 15C of the Act. Also excluded for the same reason was the site of a gas well and thin strip of land running across the Land from Hady Lane. The Inspector deals with the issue at paragraph 35 and 48-52 of his report.

At paragraph 8 the Inspector provides a breakdown of the remainder of the land comprised in VG138:

<i>The Playing Field</i>	<i>An area of open land, to the south of Hady Primary School and to the west of Hady Lane, including a plantation known as Jubilee Wood.</i>	<i>Owned by the County Council, subject to a 99-year lease to the Borough Council.</i>
<i>The Farmer’s Fields (West)</i>	<i>An area of rough open land, to either side of a public path running east-west from Hady to Spital, including a small, roughly square area of mature mixed-species woodland, adjacent to the south-east corner of the Farmer’s Field (West).</i>	<i>Owned until 2003 by Dr Diwan Chand; since then by Mr Abishek Chand.</i>
<i>Hady Woods</i>	<i>An area of recently planted woodland, between the Scrubs and the Dismantled Railway.</i>	<i>Owned by the County Council.</i>
<i>The Dismantled Railway</i>	<i>The cutting made for a former railway line, now used as a public path, parallel to Spital Lane to the south</i>	<i>Owned by the Borough Council.</i>
<i>Hady Plantation</i>	<i>A small area of woodland to the south of the Dismantled Railway,</i>	<i>Owned by the Borough Council.</i>

*between Spital Lane and Hady Lane.*

VG141 was made pursuant to Section 15(2) of the Act on the basis that use of the Land as of right had continued for 20 years up to the date of the application. The Applicant relied upon the same supporting documentation as had been supplied in relation to VG138.

At paragraph 29 of his report, the Inspector outlines the statutory definition of a town or village green as provided for in Section 15 of the Act:

*“(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*

*(2) The subsection applies where –*

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

*(b) they continue to do so at the time of the application.*

*(3) This subsection applies where –*

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

*(b) they ceased to do so before the time of the application but after the commencement of this section; and*

*(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).”*

Section 15(2) makes it clear that for land to be eligible for registration as a town or village green it must have been used throughout a 20 years period ending on the date of the application:

- by a significant number of inhabitants of a locality or neighbourhood within a locality;
- for lawful sports and pastimes;

- as of right.

Section 15(3) was amended by the Growth and Infrastructure Act 2013, however as the cessation of use for VG141 occurred before 1 October 2013 the Land will still be eligible for registration under section 15(3) of the Act as originally enacted i.e. provided the application for registration is made within 2 years of the cessation.

As previously stated above, the land known as “the Scrubs” was excluded by virtue of Section 15C of the Act as a ‘trigger event’ had occurred on the land. Further the Inspector concludes the land known as “the Playing Fields” (including Jubilee Wood) should also be omitted from VG138, the reasoning for this is given at paragraph 53-55.

As to the remainder of VG138 the Inspector concluded at paragraph 56-57 that:

*“As to the remainder of the VG 138 Land, no other event has occurred that would have brought to an end use as of right, thus bringing into play section 15(3); nor had there been any trigger event, invalidating the application under section 15C. It follows that, in relation to that land, the application for registration could and should have been made under section 15(2). It was agreed at the inquiry that there would be no injustice caused if I treated it on the basis that it had been made under section 15(2).”*

*I have therefore considered the use of the VG 138 Land (excluding the Scrubs, the Pipeline Land and the Playing Field) for the period starting 20 years before the application was made – that is, from June 21 1993 until 21 June 2013.”*

From paragraph 58 – 60 the Inspector deals with the relevant period for VG141 concluding:

*“The application for registration of the VG141 Land as town or village green was made on 31 January 2014. Section 15C would thus not have operated so as to invalidate application VG141. I have therefore considered the use of the VG141 Land for the period starting 20 years before application was made – that is, from 31 January 1994 until 31 January 2014.”*

From paragraph 61 the Inspector sets out the “Non-contentious evidence” in relation to both applications and then from paragraph 78-100 the evidence and submission presented in support of the application. The evidence and submissions presented by those objecting to the applications is set out from paragraph 101-119.

The Inspector provides his over all conclusion and recommendations from paragraph 147:

*“My conclusions in relation to the VG138 land are as follows:*

*(a) that the part of the Land shown as “The Scrubs/Farmers Field” on the map included at Appendix B to the application has been correctly excluded from the land subject to the application by virtue of having been subject to a planning permission at the time application VG138 was made [51];*

*(b) that the use for sports and pastimes of the part of the Land shown as “Playing Field” on the map included as Appendix B to the application (including the plantation (including Jubilee Wood)) has been by right, not “as of right “ [55];*

*(c) that parts of the Land, namely the area shown as Farmer’s Field (West) and the other woodland at the western end of Hady Woods, may have been used as of right for twenty years until at least April 2011 by the inhabitants of Spital for lawful sports and pastimes, but that insufficient evidence has been adduced by the Applicant to prove that on the balance of probability [127], [138]; and*

*(d) that the remainder of the VG 138 Land has not been used for lawful sports and pastimes, either by local inhabitants or otherwise, to such an extent as to justify its registration as a town or village green [124] – [126];*

*I therefore consider that none of the VG138 Land is eligible to be registered as a town or village green, and I do not recommend that the register under the 2006 Act be amended to include any of it.*

*In relation to the VG141 Land, I conclude, firstly, that the evidence proffered in support of Application VG141 falls far short of being sufficient, in either its nature or its quantity, to establish a case to justify registration of any land as a green. Secondly, and in any event, insofar as it is possible to deduce anything from the evidence that has been put forward, I tentatively conclude as follows:*

(a) *that the use of the garages on the Land, for as long as they lasted, was probably in the most part by those entitled to use then under leases, and thus by right, not as of right [143];*

(b) *that the use of the land around and associated with the garages, for fly-tipping and other such activities, was not use for lawful sports and pastimes [143];*

(c) *that the use of the pedestrian route across the Land to gain access from Hady Lane to the Playing Field, and the north-south pedestrian route across the Land, was and is not such use [38], [144]; and*

(d) *that there has been no other use of the Land of such a character as to justify being categorised as lawful sports and pastimes [145];*

*I therefore recommend that the register under the 2006 Act should not be amended to include the VG 141 Land.”*

A copy of the Inspector's Report has been sent to the Applicant, Objectors and local member.

### **3. Legal Considerations**

The County Council is the Commons Registration Authority for Derbyshire under the Act. Responsibility for determining applications to register land as common land or a town or village green is delegated by the Council to this Committee.

### **4. Financial Considerations**

The cost of determining this matter will be met from the existing budget held by the Director of Legal Services.

### **5. Other Considerations**

In preparing this report the relevance of the following factors has been considered; prevention of crime and disorder; equality and opportunity; and environmental, property, health, human rights and personnel considerations.

**6. Background Papers**

Applications VG138 and VG141 held by the Director of Legal Services.

**7. CHIEF OFFICER'S RECOMMENDATION**

That the Committee considers the Inspector's Report and recommendations in relation to the determination of applications VG138 and VG141, land at Hady and Spital, Chesterfield and resolves to refuse both applications for the reasons set out in the Inspector's Report of 31 May 2016.

**John McElvaney**  
**Director of Legal Services**

In the matter of the Local Government Act 1972 and the Commons Act 2006  
And in the matter of land at Hady and Spital, Chesterfield

**Report to Derbyshire County Council  
on the determination of Applications VG138 and VG141  
to register as a town or village green land at  
Hady and Spital, Chesterfield**

---

**Summary**

Derbyshire County Council, in its capacity as registration authority under the Commons Act 2006 ("the Registration Authority"), has received from Mr Kevin Bailey two applications, registered as VG 138 and VG 141, for the registration as a town or village green of two areas of land at Chesterfield, Derbyshire:

- (a) a large tract of land stretching from Hady Lane in the east across to Alexandra Road East, Hartington Road, and Valley Road in the west ("the VG 138 Land"); and
- (b) a small area of land off Hady Lane, in use for a while for lock-up garages, roughly opposite the entrance to Houldsworth Drive ("the VG 141 Land").

Objections have been made to those applications by Mr Abishek Chand, Chesterfield Borough Council, the County Council (in its capacity as owner of part of the Land), and Mrs Siobhan Spencer (on behalf of the Derbyshire Gypsy Liaison Group).

I have been appointed by the Registration Authority under section 111 of the Local Government Act 1972 to hold a public local inquiry into the two applications and the objections to them, and to advise the Authority as to how to determine them. I accordingly held an inquiry on 29 February and 1 March 2016.

My conclusions in relation to the VG 138 land are as follows:

- (a) that the part of the Land shown as "The Scrubs / Farmers Fields" on the map included as Appendix B to the application has been correctly excluded from the land subject to the application by virtue of having been subject to a planning permission at the time Application VG 138 was made;
- (b) that the use for sports and pastimes of the part of the Land shown as "Playing Field" on the map included as Appendix B to the application (including the plantation known as Jubilee Wood on the western part of that land) has been by right, not "as of right";



- (c) that parts of the Land, namely the area referred to in this report as Farmer's Fields (West) and the older woodland at the western end of Hady Woods, may have been used as of right for twenty years until at least April 2011 by the inhabitants of Spital for lawful sports and pastimes, but that insufficient evidence has been adduced by the Applicant to prove that on the balance of probability; and
- (d) that the remainder of the VG 138 Land has not been used for lawful sports and pastimes, either by local inhabitants or otherwise, to such an extent as to justify its registration as a town or village green.

I therefore consider that none of the VG 138 Land is eligible to be registered as a town or village green, and I do not recommend that the register under the 2006 Act be amended to include any of it.

In relation to the VG 141 Land, I conclude, firstly, that the evidence proffered in support of Application VG 141 falls far short of being sufficient, in either its nature or its quantity, to establish a case to justify registration of land as a green. Secondly, and in any event, insofar as it is possible to deduce anything from the evidence that has been put forward, I tentatively conclude as follows:

- (a) that the use of the garages on the Land, for as long as they lasted, was probably in the most part by those entitled to use them under leases, and thus use by right, not as of right;
- (b) that the use of the land around and associated with the garages, for fly-tipping and other such activities, was not use for lawful sports and pastimes;
- (c) that the use of the pedestrian route across the Land to gain access from Hady Lane to the Playing Field, and the north-south pedestrian route across the Land, was and is not such use; and
- (d) that there has been no other use of the Land of such a character as to justify being categorised as lawful sports and pastimes;

I therefore recommend that the register under the 2006 Act should not be amended to include the VG 141 Land.

In this report I first consider first various procedural matters, and outline briefly the relevant legal background, applying it so as to eliminate some of the VG 138 Land from eligibility to be registered.

I then refer to the non-contentious evidence – the physical condition of the Application Land and the immediate vicinity, and relevant documents produced independently of the present proceedings. Next, I outline the case in support of the registration of some or all of the VG 138 Land and the VG 141 Land, and the case of those opposing the registration of some or all of that land. In the final section I set out my conclusions and recommendations.

Numbers in square brackets refer to paragraphs of this report.

## **Procedural matters**

### *The Applications*

1. Derbyshire County Council, in its capacity as registration authority under the Commons Act 2006 (“the Registration Authority”), has received two applications, registered as VG 138 and VG 141, for the registration as a town or village green of two areas of land at Chesterfield, Derbyshire:
  - (a) a large tract of land (between 15 and 20 hectares in extent) stretching from Hady Lane in the east across to Alexandra Road East, Hartington Road, and Valley Road in the west (“the VG 138 Land”); and
  - (b) a small area of land off Hady Lane, in use for a while for lock-up garages, roughly opposite the entrance to Houldsworth Drive (“the VG 141 Land”).I refer to the VG 138 Land and the VG 141 Land together simply as “the Application Land”.
2. The documentation relating to this case so far has referred to the two sites collectively as “Land at Hady Lane, Chesterfield”. On reflection, I consider that that is an inappropriate appellation, as the VG 138 Land is an amalgam of a number of different plots of land, some of which have little or nothing to do with Hady Lane. I have therefore entitled this report “Land at Hady and Spital”.
3. The applications were made by Mr Kevin Bailey of Old Farm Cottages, 150 Hady Lane, Chesterfield (“the Applicant”).

### *Application VG 138*

4. Application VG 138 was made on 21 June 2013. The VG 138 Land was said to be eligible for registration under section 15(3), on the basis that the use of the Land had been as of right on 20 December 2011, but had ceased to be such on that date by virtue of fencing erected on that date.
5. In addition to the statutory form, the Applicant submitted a statement justifying the registration of the land, as well as 44 evidence questionnaires, and a limited selection of other supporting material. He explained in the statement that the process of evidence gathering had been accelerated, to pre-empt the change in the law to be introduced by the Growth and Infrastructure Act 2013; but no further evidence questionnaires were submitted following the submission of the application. I consider the questionnaires in more detail later in this report.
6. The Registration Authority considered that Application VG 138 had been duly made, and proceeded to advertise it, and to notify those whom the Authority considered might be expected to object.
7. A triangular area of land, sometimes referred to as “the Scrubs” or “Farmer’s Fields” (the latter term not to be confused with “Farmer’s Fields (West)”), owned by Mr James Cash, was excluded by the Registration Authority on the basis that it had been the subject of a planning application, such as to constitute a trigger event under section 15C of the 2006 Act (see [35] and [48] to [52] below). Also excluded on the same basis was the site of a gas well and a thin strip of land running towards it from Hady Lane.

8. The remainder of the VG 138 Land comprises a number of quite distinct areas, as follows (referring to each by the name it has been given on the plan accompanying Application VG 138 as Appendix B):

The Playing Field	An area of open land, to the south of Hady Primary School and to the west of Hady Lane, including a plantation known as Jubilee Wood.	Owned by the County Council, subject to a 99-year lease to the District Council
The Farmer's Fields (West)	An area of rough open land, to either side of a public path running east-west from Hady to Spital; including a small, roughly square area of mature mixed-species woodland, adjacent to the south-east corner of the Farmer's Fields (West).	Owned until 2003 by Dr Diwan Chand; since then by Mr Abishek Chand
Hady Woods	An area of recently planted woodland, between the Scrubs and the Dismantled Railway	Owned by the County Council
The Dismantled Railway	The cutting made for a former railway line, now used as a public path, parallel to Spital Lane to the south	Owned by the Borough Council
Hady Plantation	A small area of woodland to the south of the Dismantled Railway, between Spital Lane and Hady Lane	Owned by the Borough Council

9. Use of the land was said to have been the inhabitants of the areas of Hady and Spital which border the Green. The accompanying map showed hatched in green a widely defined area, consisting of three sub-areas:

- a group of residential streets to the west of the VG 138 Land – Alexandra Road East, Hartington Road, Valley Road and Stanley Street;
- Spital Lane (from its junction with Stanley Street to its junction with Calow Lane) and a few small residential cul-de-sacs opening off it; and
- the whole of Hady Lane, from Hady Hill down to its junction with Calow Lane, together with High View Close and a number of streets (again, generally cul-de-sacs) to the east.

The first of these, or possibly the first and second taken together, could generally be referred as "Spital"; the third as "Hady".

10. Objections have been made to the registration of the VG 138 Land by Mr Abishek Chand, and by the Borough Council and the County Council (in their capacity as owners of parts of the Land).

#### *Application VG 141*

11. Application VG 141 was made on 31 January 2014. The VG 141 Land was said to be eligible under section 15(2), on the basis that the use of the Land as of right had

continued for 20 years up until the date of the application. The application relied on the same supporting material as had been used to justify Application VG 138.

12. Objections have been made to the registration of the VG 141 Land by the Borough Council, which owns it, and Mrs Siobhan Spencer (on behalf of the Derbyshire Gypsy Liaison Group).
13. Presumably the use of the VG 141 was considered to have been by those within the same green-hatched area as defined in relation to Application VG 138 (see [9] above).

#### *The inquiry*

14. I have been appointed by the County Council under section 111 of the Local Government Act 1972 to advise the Council as to how to determine the two applications.
15. I considered that there was a significant degree of factual dispute, and therefore recommended that a public local inquiry should be held; and a provisional date – a week in November 2015 – was set aside. That was subsequently deferred to a week in February/March 2016, in order to provide more time in which the Applicant could get his case together. Procedural directions were issued accordingly. There were subsequently requests to defer the inquiry again, but these were declined. I thus held an inquiry on 29 February and 1 March 2016, at the Arkwright Centre, in Hardwick Drive, Chesterfield.
16. In the event, the Applicant did not appear at the inquiry, and was not represented; but he did provide a brief written statement, and his wife was present as an observer. Mr Roger Jackson and Mr Fred Walker (both residents in Alexandra Road East) gave oral evidence in support of the Application VG 138, and were cross-examined by counsel for the objectors; both had completed evidence questionnaires.
17. Mr Jonathan Easton, of counsel (instructed by Banner Jones, solicitors, of Chesterfield) appeared on behalf of Mr Abishek Chand. Both Mr Abishek Chand and Dr Diwan Chand, his son, gave oral evidence. Written statements were tendered in evidence from Mr Vrandavan Talati and Mr Craig Fletcher.
18. Ms Nina Pindham, of counsel, appeared on behalf of and was instructed by the Borough Council, and called Mr Paul Staniforth, a senior planning officer employed by the Council, to give oral evidence. She also relied on written statements from Mr Andy Pashley (the green spaces manager at the Borough Council), and Mr James Crouch (a housing strategy and enabling manager), Mr Paul Longley (a neighbourhood ranger) and Ms Julie Hilditch (senior revenues officer). Mr Pashley had been intending to provide oral evidence at the inquiry, but had been taken ill.
19. The County Council, in its capacity as owner of part of the Application Land, did not appear at the inquiry, and was not represented.
20. Ms Siobhan Spencer appeared at the inquiry on behalf of the Derbyshire Gypsy Liaison Group.

21. I also carried out an inspection of the Application Land in December 2015, accompanied only by an officer of the Registration Authority, and a further inspection during the inquiry, accompanied by representatives of the parties.
22. I am grateful to all those taking part in the inquiry for their cooperation, and particularly to Mr Jackson and Mr Walker, and to the staff of the Registration Authority for ensuring the smooth running of the whole exercise.

### *The evidence*

23. As is normal in such cases, the available evidence on which I have to base my recommendation consists of the documentary material (plans, photographs, reports, and so on) produced before the start of the present dispute; the oral evidence presented by those who appeared at the Inquiry, and the written statements accompanying such evidence; the statements produced by others who did not give such evidence; and what I saw myself in my various site inspections.
24. I have given special weight to documentary evidence produced prior to the start of the present dispute, as the documents themselves could not be tainted by any suspicion of possible bias. As to the selection of those documents, there is no procedure for discovery, as there is in civil litigation, so there is always the possibility that unhelpful material could have been simply omitted; but there was no suggestion that that had occurred. In this case, such evidence generally came from the Borough Council, and I therefore refer to it in more detail in the context of my analysis of its case below.
25. As for oral and written evidence produced specifically in connection with these proceedings, it needs to be remembered that the desirability or otherwise of any proposals for development (or the possibility of any such proposals in the future) on or affecting any of the land in question is wholly irrelevant. Equally irrelevant are opinions as to whether any land should, as a matter of principle, be retained for recreation. However, it is likely that much if not all of the evidence in this category will have been produced by those who have views – possibly strong views – on such matters; and that will be relevant to my assessment of their credibility as witnesses.
26. As noted above, two witnesses appeared at the inquiry in support of the Application; and a further 42 or so produced only written evidence (in the form of a questionnaire). I gave the greatest weight to the two who appeared at the inquiry and were available to be cross-examined by the advocate appearing for the objectors; and I gave less weight to the evidence of those who merely filled in a questionnaire. I emphasise that I am not suggesting that those in the latter category were in any way seeking to mislead the inquiry, but in the absence of a significant number of witness who actually were cross-examined, I had insufficient material against which to compare the written evidence of those who were not. I return to this point later in this report.
27. In this case, it was noticeable that the Applicant did not attend the inquiry in person; and only two of those who had supplied questionnaires attended it. However, that does not affect the broad principle that, once an application has been made under the 2006 Act, it should if at all possible be determined, in the public interest. After all, land either is or is not eligible for registration as a town or village green; there is no scope for discretion – as there is with, for example, planning applications.

28. Obviously in formulating my recommendation to the Registration Authority I will give what weight I consider appropriate to the evidence I read, heard and saw; but I am mindful that the 2006 Act makes no provision whatsoever for an inquiry, far less requiring one to be held.

## The law

### *The statutory definition of a town or village green*

29. The statutory definition of a town or village green is in section 15 of the 2006 Act, which, so far as relevant, when first enacted provided as follows:

“(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where—

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
- (b) they continue to do so at the time of the application.

(3) This subsection applies where—

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
- (b) they ceased to do so before the time of the application but after the commencement of this section; and
- (c) the application is made within *the period of two years beginning with the cessation referred to in paragraph (b)*”

30. Section 15 came into force on 6 April 2007, in place of the definition previously to be found in section 22(1)(c) of the Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000). That earlier definition was virtually identical.

31. Section 15(2) of the 2006 Act thus makes it clear that, for land to be eligible to be registered as a town or village green by virtue of that subsection, it must have been used throughout the period of 20 years ending on the date of the application for registration:

- by a significant number of the inhabitants of a locality or of a neighbourhood within a locality, and
- for lawful sports and pastimes,
- as of right.

32. With effect from 1 October 2013, the Growth and Infrastructure Act 2013 amended section 15 of the 2006 Act, to substitute for the words in italics the words “the relevant period”. That phrase was defined in a new subsection (3A), also inserted by section 14 of the 2013 Act with effect from 1 October 2013, as follows:

“(3A) In subsection (3), “the relevant period” means—

- (a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b); ...”

33. The amendments to subsection 15(3) of the 2006 Act, and the insertion of subsection 15(3A), took effect on 1 October 2014 – see Growth and Infrastructure Act 2013 (Commencement No. 2 and Transitional and Saving Provisions) Order 2013 (SI 1488), article 6. However, by article 8(2) of that Order,

“The coming into force of section 14 of the Act so far as it applies to land in England, has no effect in relation to any cessation referred to in section 15(3)(b) of the Commons Act 2006 which occurs before 1st October 2013.”

34. The result of these amendments is that, where land has been used in that way for twenty years, but then ceases to be so used, for example because the landowner fences the land to prevent its use by local people,

- where the cessation occurs before 1 October 2013, the land will still be eligible for registration – under subsection 15(3) of the 2006 Act as originally enacted – provided the application for registration is made within two years of the cessation;
- where the cessation occurs after 1 October 2013, the land will still be eligible for registration – under subsection 15(3) as amended – provided the application is made within one year.

35. Further amendments were made to the 2006 Act (amending section 15 and inserting sections 15A to 15C) by the 2013 Act. So far as relevant, section 15C and Schedule 1A – which came into effect in England on 25 April 2013, and which do not apply in relation to applications made before that date – provide as follows:

15C. (1) The right under section 15(1) to apply to register land in England as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land (“a trigger event”).

(2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table occurs in relation to the land (“a terminating event”).

#### SCHEDULE 1A. EXCLUSION OF RIGHT UNDER SECTION 15: ENGLAND

##### *Trigger events*

1. An application for planning permission in relation to the land which would be determined under section 70 of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of that Act.

##### *Terminating events*

- (a) The application is withdrawn.
- (b) A decision to decline to determine the application is made under section 70A of the 1990 Act.
- (c) In circumstances where planning permission is refused, all means of challenging the refusal in legal proceedings in the United Kingdom are exhausted and the decision is upheld.
- (d) In circumstances where planning permission is granted, the period within which the development to which the permission relates must be begun expires without the development having been begun.

36. This means that, once an application has been submitted for planning permission for the development of land, it is not possible to submit an application for the registration of that land as a town or village green until:

- the application has been finally determined, and permission has been refused, and all chance of appealing against that refusal has gone; or
- permission has been granted, but the development has not been begun within the period allowed.

If permission has been granted and the development has been begun, an application for registration may not be made at all.

### *Use for lawful sports and pastimes*

37. The use of an area of land for “lawful sports and pastimes” includes use of it for various forms of informal recreation, such as walking, with or without dogs, picnicking, flying kites, picking blackberries, and children playing. This was explained by the House of Lords in *Sunningwell* as follows:

“Class c [in section 22(1) of the 1965] Act is concerned with the creation of town and village greens after 1965, and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J in *R v Suffolk CC, ex parte Steed*, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green.<sup>1</sup> It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right. In the present case, however, [the inspector] found ‘abundant evidence of use of the glebe for informal recreation’ which he held to be a pastime for the purposes of the Act.”<sup>2</sup>

38. In particular, use for lawful sports and pastimes may not include walking along a specific route either around the edge of a field or across the middle, as a means to get from one point on the perimeter to another – that might in certain circumstances be appropriate to establish a claim to a public right of way, but it could not form the basis of a claim to a town or village green. This was considered by Sullivan J in *R (Laing Homes) v Buckinghamshire CC*,<sup>3</sup> and by Lightman J in *Oxfordshire v Oxford CC*, who summarised the position as follows:

“[102] The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green.

The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land: see Lord Hoffmann in *Sunningwell*,<sup>4</sup> cited by Sullivan J in *Laing Homes*.<sup>5</sup>

Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending

<sup>1</sup> (1995) 70 P. & C.R. 487, at p 503.

<sup>2</sup> *Sunningwell*, per Lord Hoffmann at pp 357D.

<sup>3</sup> [2003] 3 PLR 60.

<sup>4</sup> [2000] 1 AC 335, 352h-353a and 354f-g.

<sup>5</sup> [2003] 3 PLR 60, 80, paras 78-81.



upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).

[103] Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. ...

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

[105] The third scenario is where there has been a longer period of user of tracks referable to the existence of a public right of way and a shorter period of user referable to the existence of a green. ...”<sup>6</sup>

39. When *Oxfordshire* came to the House of Lords, the observations of Lightman J at first instance, quoted above – and indeed those of Sullivan J in *Laing Homes* – were described as “sensible” by Lord Hoffmann; the other members of the House did not express an opinion on the relevance of rights of way, but did not dissent from or overrule those observations. I consider the implications of this further towards the end of this report.

#### *Use as of right*

40. The House of Lords in *Sunningwell* established that the use of land “as of right” means use that is not by force, by stealth or by permission.<sup>7</sup> Whether a use of land is “as of right” must be judged from the perspective of “how the matter would have appeared to the owner of the land”<sup>8</sup> – a question which must be assessed objectively.<sup>9</sup> Thus in *Sunningwell* itself, twenty years’ use of glebe land for recreation by residents, the majority of whom came from a single locality, was treated as an effective assertion of village green rights.
41. The House of Lords in *R (Barkas) v North Yorkshire County Council* held that where members of the public use land in reliance on a statutory right, such as (in that case) under section 12(1) of the Housing Act 1985, they do so “by right”, not “as of right”, so that the land is not eligible to be registered as a green.<sup>10</sup> That section provides that

---

<sup>6</sup> *Oxfordshire CC v Oxford CC* [2004] Ch 253, at [96]-[105]. Sub-paragraphs added for clarity.

<sup>7</sup> *R (Sunningwell PC) v Oxfordshire CC* [2000] 1 AC 335, HL at p 356A.

<sup>8</sup> *Sunningwell*, per Lord Hoffmann at pp 352H-353A.

<sup>9</sup> *R (Barkas) v North Yorkshire CC* [2015] AC 195, per Lord Neuberger at [ 21], and Lord Carnwath at [62].

<sup>10</sup> *R (Barkas) v North Yorkshire CC* [2014] UKSC 31, per Lord Neuberger at [21].

“A local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part,

- ... (b) recreation grounds; and
- (c) other buildings or land which, in the opinion of the Secretary of State, will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.”

### *Other points*

42. Where part of an area of land is overgrown or inaccessible, that does not of itself preclude the registration of the whole (including that part) as a town or village green. As pointed out by in *Oxfordshire CC v Oxford CC*, the whole of a public garden may be used for recreational activities even though 75 per cent of the surface consists of flower beds, borders and shrubberies on which the public may not walk.<sup>11</sup>
43. As to the standard of proof that applies in village green cases, the classic test is that set out by Sir George Jessel M.R. in *Hammerton v. Honey*:

“... I agree that, the nature of custom being, as it is, local law, you can only get rid of it the same way as other local laws are got rid of, namely, by Act of Parliament. I am not aware of any other means. Of course, it is opposed to the true notion to support there is such other means, but that is an additional reason why the judges have been very careful, not only in restricting the custom to certain classes of cases, but also in seeing custom is properly and strictly proved. If there is such a custom in the inhabitants of a vill you never can get rid of it, as far as I know, by any means short of an Act of Parliament.”<sup>12</sup>

This has been cited with approval in a number of subsequent cases, in particular by the Court of Appeal in *R (Steed) v Suffolk CC*, in which Pill LJ held as follows:

“I approach the issue on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green and that the evidential safeguards present in the authorities already cited dealing with the establishment of a customary right (class B) should be imported into a class C case.”<sup>13</sup>

44. This does not affect the standard of proof: applicants for registration merely have to prove their case on the balance of probabilities, and to the criminal standard of beyond reasonable doubt; but it does emphasise that there has to be real proof, and not mere assertion or implication.
45. Finally, where a registration authority forms the view that the case for registration as a town or village green has been made out only in respect of part of the land that forms the subject of an application, it may register just that part, provided it considers that can be done with no injustice to the parties – and there is no rule that the smaller area of land bear any particular relationship to the land originally claimed.<sup>14</sup>

---

<sup>11</sup> *Oxfordshire CC v Oxford CC* [2006] 2 AC 674, HL, per Lord Hoffmann at [67].

<sup>12</sup> *Hammerton v Honey* (1876) 24 W.R. 603.

<sup>13</sup> *R (Steed) v Suffolk CC* (1998) 75 P&CR 102, CA, at p. 111.

<sup>14</sup> *Oxfordshire CC v Oxford CC* [2004] Ch 43, CA, at [101 ]-[111], upheld at [2006] 2 AC 674, HL, at [67].

## **Application to the present case**

### *Application VG 138*

46. In this case, Application VG 138 was made on 21 June 2013. To justify registration under subsection 15(2), therefore, it must be shown that the relevant land was used in a qualifying manner for 20 years starting on 21 June 1993.
47. Application VG 138 was in fact made in reliance upon section 15(3), on the basis that part of the VG 138 Land – the Scrubs – had been fenced off on 20 December 2011.

### *The Scrubs*

48. On 12 August 2010, an application was submitted by Mr Cash for planning permission for the use of the triangular area of land known as the Scrubs as paddocks, with storage sheds being erected at the eastern end. That application was refused on 18 October 2010. The period for appealing against that refusal would have been six months, expiring on 18 April 2011.
49. On 17 June 2011, that application was resubmitted; it is not clear when the application was publicised. Permission was granted on 10 August 2011, with condition 8 (relating to fencing) being discharged on 19 August 2011. Condition 1 required that the development permitted be begun within three years – that is, by 17 June 2014.
50. It follows that, by virtue of section 15C of the 2006 Act (see [35] above), an application for the registration of the Scrubs could not have been made after 25 April 2013, when the section came into force, since an application for planning permission had been made, and the permitted development had been begun – a “trigger event” had thus occurred, so as to activate section 15C(1), and no corresponding “terminating event” could now occur.
51. In the light of that analysis, Application VG 138 was not valid insofar as it related to the Scrubs, and the Registration Authority was correct to have adjusted it accordingly.
52. I was given little evidence as to the construction of the pipeline along (and just to the north of) the northern boundary of the Scrubs. But I note that none of the parties challenged the decision by the Registration Authority to omit the land in question (“the Pipeline Land”) from the land subject to Application VG 138, in reliance upon section 15C, and I have considered that application accordingly.

### *The Playing Field*

53. Miss Pindham, on behalf of the Borough Council, draw attention to the 1987 lease of the Playing Field (including Jubilee Wood) from the County Council, under which the Borough Council owned a 99-year term, covenanting to use that land only for the purposes authorised by section 19 of the Local Government (Miscellaneous Provisions) Act 1976, which provides as follows:

“(1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide—

- ... (b) outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding; ..."

54. She submitted that that was a provision such as section 12(1) of the Local Government (Miscellaneous Provisions) Act 1976, so that those using the Playing Fields did so by permission of the Borough Council, as leaseholder, and thus not by right rather than as of right – in accordance with the decision of the Supreme Court in *Barkas* (see [41] above).
55. The Applicant was not present at the inquiry, and therefore had no opportunity to rebut that submission. However, it does seem to be correct; and I have on that basis omitted the Playing Field (including Jubilee Wood) from the VG 138 Land.

#### *The remainder of the VG 138 Land*

56. As to the remainder of the VG 138 Land, no other event has occurred that would have brought to an end use as of right, thus bringing into play section 15(3); nor had there been any trigger event, invalidating the application under section 15C. It follows that, in relation to that land, the application for registration could and should have been made under section 15(2). It was agreed at the inquiry that there would be no injustice caused if I treated it on the basis that it had been made under section 15(2).
57. I have therefore considered the use of the VG 138 Land (excluding the Scrubs, the Pipeline Land and the Playing Field) for the period starting 20 years before application was made – that is, from 21 June 1993 until 21 June 2013.

#### *The VG 141 Land*

58. As for the VG 141 Land, a planning application for its use as a traveller site was made on 25 January 2012, and refused on 15 May 2012. A further application was submitted in February 2013, which was the subject of an appeal against non-determination in September 2013. That appeal was withdrawn on 29 October 2013, and a further application was submitted on 15 April 2014. Permission was granted on 7 October 2014.
59. The public notification of the second application (which presumably took place in or around February 2013) would have constituted a trigger event under section 15C, if it had been in force. As it was, when the section did come into force (on 25 April 2013) the planning application had been made, so no application for the registration of the land could be made. It was no doubt on that basis that the VG 141 Land was not included in the VG 138 Application (made on 21 June 2013). However, the withdrawal of the appeal against refusal of permission would have constituted a terminating event (category (c)), so an application could have been made after 29 October 2013.
60. The application for the registration of the VG 141 Land as a town or village green was made on 31 January 2014. Section 15C would thus not have operated so as to invalidate Application VG 141. I have therefore considered the use of the VG 141 Land for the period starting 20 years before application was made – that is, from 31 January 1994 until 31 January 2014.

## Non-contentious evidence

### *Actual and putative rights of way*

61. There is a well-used tarmac footpath (Path 118 on the definitive map) running from Hady to Spital. Its eastern section coincides with the driveway to Hady Primary School from Hady Lane. From the right-angled bend in the driveway, which I refer to in this report as “Point X”, the path runs in a west-south-west direction between the grounds of the School (to the north) and Jubilee Wood (to the south), and then between the two halves of the Farmer’s Fields (West). Its western end is a point a few metres south of the end of Hartington Road. It has a hard surface and is lit.
62. There is another reasonably well-used footpath (Path 139), parallel to Spital Lane. This starts at Hady Lane, near its junction with Barnes Road, heads westwards along the line of the former railway and then turns north to run along the western boundary of the VG 138 Land, with access to and from the eastern end of Alexandra Road East (which is a cul-de-sac). There is a further footpath (Path 11), from the eastern end of Hartington Road to the eastern end of Valley Road (both of which are also cul-de-sacs), linking with a further path that goes across the recreation ground to join Hady Hill.
63. It appears that the path between the end of Alexandra Road East and the end of Hartington Road is not part of any of the paths noted above; and that it is not the subject of any application for registration. However, it is clearly used as if it were a public path, whatever its precise status in law.
64. There is a further north-south pedestrian route, starting Point X on Path 118 (see above), and running from there across the Playing Field to the site of the former garages on the VG 141 Land, and south through the Hady Woods to join Path 139 roughly due north of Taylor Crescent. This has not been registered as a footpath, but is the subject of an application for registration as such (as Path 129), presumably based on intensive use over the relevant period.
65. In view of the observations as to the use of paths in *Oxfordshire* (above), I have disregarded the use of all the paths noted above in considering the use of the Application Land; but they are of course still relevant in that they provide access to the open areas that constitute the remainder of the Application Land.

### *The Application Land: the physical evidence*

66. As noted above, I had the opportunity to view the Application Land and its immediate vicinity before and during the inquiry – although I am of course very aware that the condition of the Land may have been very different 20 years ago. As also noted above, it comprises a number of quite distinct areas; I consider each in turn, starting with the various sub-areas that together constitute the VG 138 Land.
67. The Playing Field, as it is now, consists of a large area of featureless open land, to the south of the driveway to Hady Primary School (from of which it is separated by a fence) and to the west of Hady Lane (from of which it is also separated by a fence and a hedge). There is a small planted area at the north-east corner of the field. Aerial photographs suggest that there is a network of pipes or drains under the field.

68. To the west of the Playing Field is a roughly square area of newly planted woodland, apparently planted to celebrate the Diamonds Jubilee in 2012 (hence its name “the Jubilee Wood”). The Wood occupies approximately 40 per cent of the area of the original Playing Field. There is an informal path through it, running approximately east-west from a point half way down its eastern boundary, where it adjoins the open playing field, to its north-west corner, where it meets Path 118. I refer to this latter junction as “Point Y”. There is also a north-south path within the Wood, along its western boundary, from Point Y to the south-western corner of the Playing Field (“Point Z”). Other than in the immediate vicinity of those paths, this area does not seem to be used for any purpose in addition to its primary use for forestry.
69. There remains a small strip of open land, to the south of the Wood, separating it and the triangular area to the south known as the Scrubs, and leading from the main area of the Playing Field towards Point Z.
70. The Farmer’s Fields (West) is a substantial area of rough open land, to either side of Path 18. It looks as though it has not been used for any other purpose for some while. But it is crossed by a number of informal paths, that must be used by someone. The most noticeable of these paths go from Point Y to the ends of the three cul-de-sac streets in Spital – Alexandra Road East, Hartington Road, Valley Road – and to the north-west corner of the northern field, and on across the recreation ground towards Hady Hill. There are also further informal paths radiating from Point Z, which is the mid-point of the eastern boundary of the southern field.
71. There is shown on the OS map a path running northwards from Point Y along the boundary with the school grounds, and out via the north-eastern corner of the north field towards Hady Hill, in the vicinity of no 77. This however is no longer in use; and appears to have been out of use for quite a while.
72. The southern part of these fields is slightly more overgrown. But there is a path from Point Z around the southern perimeter, leading to the end of Alexandra Road East. And it is easily possible to pass without any hindrance from this area into the older woodland at the western end of Hady Woods (see below).
73. To the south of the triangular area known as the Scrubs, between it and the Railway Cutting, is another area of relatively recently planted woodland. This is generally referred to as Hady Woods, and there are within it a few reasonably well-used tracks. This plantation is older than Jubilee Wood, but still relatively recent; here too, most of the land is used for nothing other than forestry. The possible exception is a small, roughly square area of significantly older mixed-species woodland at the western end of the plantation – shown on a 1984 plan of the Hady Lane Waste Disposal Site as “existing woodland”. This latter area appears to have rather more recreational potential, and is criss-crossed by a number of informal paths.
74. The Dismantled Railway is, as its name implies, a cutting constructed for the Lancashire, Derbyshire and East Coast Railway line, now used as a public path, parallel to Spital Lane to the south. The southern boundary of the VG 138 Land is the southern boundary of the former railway land, which is the northern boundary of the gardens of the houses on the northern side of Spital Lane, Smith Crescent and Taylor Crescent.

75. There is a reasonably well-used path along the line of the former railway. At its eastern end is an open space adjacent to Hady Lane; at its western end, the path climbs up the side of the cutting to reach the end of Alexandra Road East – this is of course Path 139, described above. There are some routes intersecting with this path, but few show signs of being well-used – with the exception of the route proposed to become Path 129, heading north through the VG 141 Land, and a route heading south into Spital Park and on to Spital Lane.
76. Finally, there is an area to the south of the Dismantled Railway, referred to on the OS map as Hady Plantation. This is a small area of woodland, between Spital Lane and Hady Lane. There is a path running through it that starts at the clearing where the Dismantled Railway crosses Hady Lane, and ends up going sharply downhill to emerge at Spital Lane. There does not seem to be much sign of activity to either side of this path.
77. The VG 141 Land is now a disused area of land, where the garages formerly stood. There is still an area of hardstanding, and a reasonably well-worn path running down between the former garage plots; but there does not seem to be much sign of the land now being actively used for anything else.

## **Evidence and submissions in support of the applications**

### *Submissions from the Applicant*

78. The principal justification for the registration of the VG 138 Land came in the statement from the Applicant accompanying the initial application. That described the physical condition of the Land, both now and, to some extent, in the past.
79. He explained that:

“The farmers fields to the far west of the village green area were farmed in the 1960s by Pembertons, and evidence has been gained confirming that in the 1970s there were at least permissive footpaths around the perimeters of those fields and over time, as fewer crops were produced, inhabitants began to walk more diagonally across those fields, as can again be clearly seen from Google Earth satellite photographs.”

He also explained that the Playing Fields have been used for the playing of organised sports.
80. He said that the whole of the Application Land had been used as a social meeting place, particularly for those walking, with or without dogs.
81. As for the VG 141 Land, the statement from the Applicant accompanying Application VG 138 explained that that land had been excluded from the first application, but that it had consistently been a popular access to the village green area (presumably he was there referring to the Playing Fields, or possibly to the Scrubs). His further statement accompanying Application VG 141 provided details of the intermittent use of the garage court, mainly as a gathering place for local people, in addition to its use by those passing and re-passing along the route that had been the subject of an application for registration as Path 129.

82. The Applicant also submitted a document dated 26 February 2016 commenting on the material that had been submitted by the various objectors.

*Evidence from Mr Jackson and Mr Fred Walker*

83. Mr Roger Jackson, of 71 Alexandra Road East, gave oral evidence at the inquiry. In his questionnaire, he had stated that he had used the Land from 1988 to the present time (25 years to 2013). He had used the land daily, for dog walking and photography, and watching football, and had seen others playing football, and kite flying. He had also seen team games, blackberry picking, bird watching, and bicycle riding. He had never been asked to leave the land by the owner.
84. He explained orally that the two fields owned by Mr Chand (the Farmer's Fields (West)) were not used for anything. He agreed that Spital was different from Hady. He accepted that the football and the cricket had been on the Playing Field. He had walked on the Land three times a day, until his dog had died in 2000; in recent years he had walked his daughter's dog a few times a year. He had walked in the woods, but not into the new plantation. He was aware of part of the land being fenced off in 2012.
85. Mr Fred Walker, of 60 Alexandra Road East, gave oral evidence at the inquiry. He had completed a questionnaire, in which he had stated that he had used the land from 1978 to the present (35 years to 2013), for daily dog walking, and general nature watching. He was aware of football and cricket taking place on the Land (he had taken part as a football referee). He was also aware of blackberry picking, and other activities such as picnicking, kite flying and bicycling. He too was aware of part of the land being fenced off.
86. In oral evidence, he explained that he had used all of the VG 138 Land except the plantation at the far end; most of it was used by people walking animals; it was not used for anything else. He said that the north-south path now came through the garage site, after Mr Cash had fenced in his land three to four years ago. He said that the land was used by those from Hady and those from Spital; he knew them and their animals. He also confirmed that that the games referred to had been played on the Playing Field; and the bonfire had been there (at the north-east corner). The references to plane flying were to one person who lived in Hady having used the field south of the path. The cycling on the Farmer's Fields (West) generally occurred along specific routes, to avoid the tall grass.
87. Mr Walker had on one occasion phoned Mr Chand, offering to buy his land (the Farmer's Field (West)), but in the course of a perfectly amicable conversation Mr Chand had made it plain that he did not want to sell.
88. In answer to questions from me, he had explained that there had been a corn crop on the southern field some 25 years ago, and a hay crop about two years later; but there had never been a crop on the northern field.



### *Evidence questionnaires*

89. In addition to the oral evidence of Mr Jackson and Mr Walker, Application VG 138 was accompanied by 44 questionnaires, completed by local residents in 2013. The addresses of those completing the questionnaires fall into three categories:

West of the Application Land (Spital)	Alexandra Road East (7), Hartington Road (1), Valley Road (2), Stanley Street (1).
South of the Application Land	Spital Lane (1), Smith Crescent (1), Spital Brook Close (1).
East of the Application Land (Hady)	Hady Lane (22), High View Close (4), Houldsworth Drive (1), Kenyon Road (1), Dalewood Close (1).

90. As for the nine questionnaires from those living in Spital (in addition to Mr Jackson and Mr Fred Walker), four were from people who had used the Land for more than 20 years, five from those who had used it for less. They all recorded the Land having been used for walking or dog walking, football or sports generally, most had noted children kids playing, a few mentioned kite flying and , sledging. None mentioned which part of the Land they had used for the various activities. But it is noteworthy that, in answer to question 3 (“by what name is this land known to you?”), those who had known it for longer referred to it as the Farmer’s Field, the Farmer’s Land, the Fields, the Line Bank, the Field, the Land, and the Heath; those who had arrived more recently did not volunteer a name.
91. I note that the Royal Mail Postcode Finder records some 225 addresses in the four streets noted above; the 11 questionnaires accordingly represent some 5% of those.
92. The three respondents living south of the Application Land (and referring to it as Hady Plantation and Hady Woods) had gained access to the Land from Spital Park, and used it for dog walking and football. There are in the region of 263 addresses in the three streets noted and Taylor Crescent; the three questionnaires thus relate to 1 per cent of those.
93. As to the 29 questionnaires from those living to the east of the Application Land (in Hady) – on Hady Lane itself or in the adjacent streets – they had referred to the Application Land as the Scrubs, the Old Tip, Hady Plantation, the Playing Fields, Hady Rec, the Paths, Hady Tip, Council Tip, Smith Land, The Fields, Hady Wood, Hady Wood Area, Hady Field, Hady Sports Field, Hady Lane Fields, Sports Ground, or Sid’s Field – those who had lived in the area longer generally referring to it as the Scrubs or the Tip, or some variation of those; the more recent arrivals preferring the Playing Fields of something similar; the only person in this group referring to the Land as “the fields” had previously lived in Valley Road (in Spital).
94. Those from Hady had used the Land, or seen others using it, for a similar pattern of uses, including walking, dog walking, nature study / bird watching, play / sport / football, kite flying, blackberry picking.
95. The Postcode Finder records some 416 addresses in the seven streets noted in the third sub-area above (which also includes Upper Lum Close, Harvey Road, Lee Road, Barnes Road and The Clough, from which there were no questionnaires). The 29 questionnaires accordingly represent some 7 per cent of those.

96. A few in each of the above categories mentioned using the Land as a route to walk to the school, or the bus stop; but I have discounted that (see [38], [39] above). Some of those recording use for “walking” or “dog walking” may have similarly been using the Land as short cut.
97. None of those filling in the questionnaires had had any contretemps with the owner/s of the Land; but a number had mentioned that the Scrubs had been fenced off so as to prevent access.
98. One or two deponents submitted photographs (generally showing local views, rather than activities taking place on the Land) to accompany their questionnaires, but otherwise no additional written evidence was supplied.
99. The area (hatched green) shown on the map submitted with Application VG 138 as Appendix B as the neighbourhood, by reference to which the application was based, included an area north of Hady Hill, centred on Hady Crescent. This area was omitted on the larger plan relied on at the inquiry, and I have accordingly ignored the one questionnaire from a resident of Hady Crescent.
100. No further questionnaires were submitted in support of Application VG 141.

### **Evidence and submissions in support of those objecting to the applications**

#### *Evidence and submissions in support of Mr Chand*

101. Dr Diwan Chand had been a medical consultant until 2011, and lived elsewhere in Chesterfield. He had purchased the land with a long-term intention to develop the land, but negotiations with the Borough Council came to nothing. In the meanwhile, it required no maintenance.
102. In his written statement, stated that in 1996 he had purchased the section of the Application Land that has been referred to in Application VG 138 as “the Farmer’s Fields (West)”. The previous owner had been a local farmer, a Mr Smith, who had taken a hay or grass crop from it. There was and is a footpath across the middle of his land, maintained by him and lit by the Council. There were and are paths around the western perimeter of the land, and some short cuts across it, but there is not continuous use by a significant number of local inhabitants.
103. In oral evidence he confirmed that he had first become aware of the land when visiting his friend Mr Talati, on various occasions since 1982; he had not seen a corn crop, but he had seen a grass crop made into pellets. He recalled the phone conversation referred to by Mr Walker, and one with Mr Fletcher, another neighbour. He used to see the land twice a year.
104. Dr Chand’s son, Mr Abishek Chand, confirmed his father’s evidence. Mr Chand acquired the Farmer’s Fields (West) from his father in 2003, when he was 23. He accepted that there were and are well-defined permissive footpaths across the land, linking to the path across the middle. He considered that there was any general recreational use of his land. He cast doubt on the evidence questionnaires he had seen, and suggested that they generally referred to the eastern part of the VG 138 Land.

105. In oral evidence, Mr Chand stated that he too had an idea that one day he might seek planning permission for his land. For the moment, he had visited it roughly once a year until he acquired it in 2003, and twice a year thereafter. He had seen people mainly on the footpath, but also elsewhere on the land – it depended on when he went. He had not cut the grass, any more than his father had.
106. Mr Talati has lived since 1982 in 77 Hady Hill, to the north of the Farmer's Fields (West); from his garden he has a clear view of the northern field. In a written statement, he said that when he had first moved in, the farmer would take a grass or hay crop from the fields, bringing a tractor onto the land via a narrow access lane adjacent to No 77. That stopped when Dr Chand purchased the fields in the mid 1990s. He had seen people using the public footpath, and occasionally cutting across the field from Valley Road to that path; but he had not seen any other use of the land.
107. Mr Craig Fletcher has lived at 75 Hady Hill since 2009. From his house he has a good view of the Farmer's Fields (West). He has seen people walking, and dog walking, but not taking part in other forms of recreation. He had sought, unsuccessfully, to purchase the fields from Mr Chand in 2010, but had been permitted to use the land.
108. Mr Talati and Mr Fletcher did not give oral evidence at the inquiry.

*Evidence and submissions in support of the County Council as landowner*

109. The County Council, in its capacity as freehold owner of the Playing Field and Hady Woods, noted that that land had been a landfill site for the disposal of mainly household waste, until its closure in 1981. Thereafter, a system of pipes had been installed to extract and control the resulting emissions of methane gas, which the Council was and still is responsible for monitoring and controlling. It accordingly considered that the registration of that land was incompatible with its statutory duty.

*Evidence and submissions in support of the Borough Council*

110. The Borough Council objected to the registration as a green of the part of the Hady Plantation immediately adjacent to Spital Lane – the far south-east tip of the VG 138 Land – on the basis that it had potential hope value for future development, which would be sterilised by registration. It also objects to the registration of the VG 141 Land on the same basis.
111. Mr Staniforth helpfully produced a number of documents relating to the planning history of the Application Land, the contents of which I have incorporated where appropriate in my analysis above (see in particular [48] – [52] and [56] – [65]). He also produced a planning permission, dated April 1984, for the Playing Field and the Playing Field Plantation – granted under the TCP General Regulations 1976 to the Borough Council – showing that the original use of that land was as playing fields and allotments.
112. He stated that there was no basis on which the Borough Council would seek to resist Application VG 138 from a planning point of view. As to Application VG 141, he explained that his impression of the Land – albeit only in recent years – was that it was largely overgrown and neglected, as a former garage site and car park. To support

this, he provided a number of photographs of the VG 141 Land and the area immediately surrounding it, showing its condition in 2013 – indicating that at that time it was simply vacant land with no particular use, crossed by a north-south path.

113. Mr Crouch, too, produced a number of historical documents, particularly in relation to the Application VG 141 Land. This showed that the site had been used for up to 40 garages, originally erected in the 1950s by the Coal Board for use by those in the neighbouring estate. They were since the 1970s let by the Borough council on yearly tenancies. However, over the years the condition of the Land had deteriorated, becoming increasingly used for fly tipping and then for vandalism. The last garage tenancy was terminated in 2007. Mr Crouch also provided a number of photographs of the VG 141 Land and the area immediately surrounding it, taken in around 2006, showing its run-down condition prior to the removal of the garages.
114. Mr Longley produced evidence as to the history of the VG 141 Land from 2006 to 2014, corroborating the evidence of Mr Crouch. The evidence of Ms Hilditch, largely from the Borough Council's rating records, also substantiated his evidence.
115. Mr Pashley gave written evidence as to the history of the Playing Fields. He explained that it had been laid out as playing fields since the 1980s, although it was never suitable for a multi-sport facility due to methane gas emissions from the former tip. The western part of the site had been planted as a woodland to commemorate the Queen's diamond jubilee.
116. Ms Pindham, in closing, submitted that Spital and Hady were entirely distinct communities; an area as large as the VG 138 Land would act as a draw to a large variety of communities. She pointed out that many of the activities, particularly on the VG 141 Land, were unlawful – including fly tipping. She suggested that much of the evidence as to the use of the VG 138 Land, and more especially of the VG 141 Land, supports (if anything) the registration of rights of way, but not village greens.

#### *Evidence and submissions in support of the Gypsy Liaison Group*

117. Ms Spencer objected on behalf of the Gypsy Liaison Group to the registration of the VG 141 Land, on the basis that the sole recreational use of the Land was as a place to walk through on the footpath (Path 129). She produced Google aerial photographs of the Land taken in 2000, 2006 and 2007, showing around a dozen garages.
118. She subsequently produced a written statement explaining that she had known and had known the Land over the last 30 years, and had visited it on several occasions, in the course of attempting to have it allocated as a traveller site. The site was surrounded by fences and hedgerows, and in use for lock-up garages, with concrete bases where the garages had been removed. There had been no facilities for recreational use. The last garage had been probably been removed between 2007 and 2011, and the site had since then been vacant.
119. Mrs Spencer attended the inquiry, and was available to cross-examined on her written material, but did not supplement it orally.

## Conclusions

### *General points*

120. I consider in turn each of the various areas of land that are the subject of one or other of the applications. Before doing so, I should make some general observations.
121. First, Application VG 138 relates to a very large area of land, comprising a number of sub-areas, each of which in itself might have properly been the subject of a separate application, supported by separate evidence. The wide variety of names for the land given by those completing questionnaires, and the absence of any more detailed supporting evidence, makes it difficult to be certain that they were all referring to the same land. This is particularly noticeable when comparing the evidence given by those living in Spital with that given by those from Hady.
122. Secondly, the failure of the Applicant in this case to turn up at the inquiry, or to send someone to manage the case on his behalf, makes it very difficult for the objectors and, more importantly, the Registration Authority to deal with any uncertainties arising. I have to accept, of course, that the Applicant may have been unable to attend on the allocated dates, but many applicants elsewhere have managed to obtain legal representation to pursue such applications. The registration of private land as a town or village green is a very draconian step, resulting in the owner effectively being deprived of all or most of its value. That is why the courts have made it plain that the case in support of an application must be strictly proved [43].

### *Application VG 138*

123. First, I have noted that it is permissible for a registration authority to exclude from consideration part of the land that has formed the subject of an application for registration [45]. I have explained why the Registration Authority in this case should exclude from its consideration the triangular area known as the Scrubs [51] and the Playing Field [55]. As for the remainder of the VG 138 Land, I consider each sub-area both on the basis of the use of that sub-area considered in isolation and also as part of a larger area.
124. The physical characteristics of the Hady Plantation – to the south of the old railway line – are such that I consider that it will not have been used for general recreation other than as a route from Hady Lane through the woods and down to Spital Lane. There is little evidence of any such activity taking place now [76]; and I have seen nothing to suggest that the position was any different in the past. And there are few references in the questionnaires that can be definitely considered to refer to the use of this area. I accordingly consider that no case has been made to justify the registration of this area as a town or village green, either on its own or as part of a larger area.
125. The Dismantled Railway also seems to be used primarily as a route, albeit no doubt at least in part as a recreational route. No doubt dogs and young children stray off the path from time to time; but I see little evidence of other general recreation, other than simply using the path to get from A to B, possibly in some cases as part of a circular walk. Again, there are few references in the questionnaires that can be definitely considered to refer to the use of this area. For lawful sports and pastimes Here too,

therefore, I consider that no case has been made to justify the registration of this area as part of a green.

126. As for the plantation referred to on the map at Appendix B as Hady Wood, inspection on site suggests that most of it is a relatively recent plantation, through which locals and possibly others walk, with or without dogs, on a relatively small number of defined paths. That is not to say that such paths are capable of registration as public rights of way – although they may be, and indeed prospective Path 129 is just such a path, cutting through the wood from the VG 141 Land down to the dismantled railway [64]. But there is little evidence of general recreational use other than on the few paths in this wood, just as there is little such evidence in the case of the newer Jubilee Wood.
127. I have noted that the character of the older woodland at the western end of Hady Wood is slightly different [73]. It looks as though this may have been used for more general recreation, presumably by local people. But there has been no written evidence sufficiently precise to relate definitively to this area; and no evidence as to how often it has been used, or since when. It is therefore conceivable that it might have been possible to make a case to justify the registration of this land as part of a green; but the evidence that has actually been submitted falls well short of what would be required to substantiate this.

#### *The Farmer's Fields (West)*

128. As for the two fields previously referred to as Farmer's Fields (West) – the land now owned by Mr Chand – this is slightly more problematic. I have noted that it is difficult to be certain that all those submitting evidence in support of Application VG 138 were referring to the same land. As a matter of impression, it seems likely that those living to the west – that is, in Spital – primarily used the two fields; certainly the names they gave the VG 138 Land as a whole are indicative of that [90]. But they did refer to taking part in or watching sports and football, which suggests that they also used the Playing Field. Similarly, those from the east – from Hady – used primarily the Playing Field and the Scrubs (again, see the names they gave the Land [93]); but there is little way to be certain from the questionnaires how much, if at all, they also used the two fields.
129. It is clear that the present use of the two fields (in 2016) is such that, if it could be shown (that is, “strictly proved” [43]) that it had subsisted for twenty years, and if it could be shown that such use was by enough people from a defined neighbourhood, and if it could be shown that it had been as of right, then it just might be sufficient to justify registration as a green. Certainly there is no suggestion that the fields are used for anything other than general recreation – indeed little to suggest what they are used for at all. Neither Mr Chand, the present owner, nor Dr Chand, his father, has cut the grass at any time since 1996 [105]. Nor is there any suggestion that they permitted anyone – other than, perhaps, Mr Walker – to use the land.
130. I consider it likely that Spital, defined as the four streets referred to above – Stanley Road, Alexandra Road East, Hartington Road and Valley Road – probably would together constitute a “neighbourhood” for the purposes of the 2006 Act. But I heard insufficient evidence on that matter to be certain one way or the other.

131. And the location of the fields is such that it is likely that they would be used by the residents of Spital, and possibly by a few from Hady, to walk dogs and play with children. It would be odd if they were not.
132. However, there are a number of problems. First, it is not clear how intensively the fields were used for agriculture, nor when such use stopped. Dr Chand indicated that the previous owner, Mr Smith, had taken a hay or grass crop from the fields – at least a grass crop from the north field, and possibly corn. Mr Talati stated in written evidence that Mr Smith would take a grass or hay crop each year, but that this had ceased when Dr Chand bought the land, in 1996. It is not clear from all this precisely when the agriculture ceased; not the extent to which (if at all) it prevented local people or others using the land. Unfortunately he did not attend the inquiry to clarify his statement on that point; but even if he had done so he would not have been cross-examined. I am therefore not willing to give too much weight to his evidence.
133. But it does seem that the fields probably were used for agriculture, although such must have finished at some point prior to the change of ownership of the land in 1996 – which was 17 years before the date of Application VG 138.
134. Secondly, even once the agricultural use of the fields had ceased, it is not clear how long it took for local people to start using them – either as a short cut, or for any other purpose. Indeed, were they using the fields while the crop was growing? And was that use tolerated or permitted by the farmer? There is no evidence whatsoever as to any of this.
135. It is also noteworthy that none of the questionnaires refers to the use of any of the land for farming. This could be because such use finished more than 20 years ago; or it could be because the respondents had simply forgotten it – or indeed that they deliberately ignored it. Again, in the absence of more evidence, we shall never know.
136. Thirdly, it is clear that a significant element in the use of the fields is by people taking a short cut from Point Y to the recreation ground or to one of the three streets to the west. Such use must, of course, be discounted in considering whether land can be registered as a green [38]. But it is far from clear how much recreational use there was in addition to such short-cut use; and the answer to that question may have varied over the years.
137. Fourthly, even the oral evidence that was produced was limited in its value. Mr Jackson, for example, stated that he had walked on the fields three times a day – but only until his dog died, in 2000. Thereafter he had only gone on the land a few times a year, to walk his daughter's dog.
138. I therefore conclude that it might just be possible to prove that the two fields are currently used in such a manner as to justify registration, on the basis of use by the inhabitants of Spital, but only subject to the significant caveats raised earlier [129]. But I am very mindful of the strictures of the courts to the effect that use of land as a town or village green must be “strictly proved” [43]. In the light of the concerns I have raised above [132] – [137], I am not satisfied that there is sufficient evidence to justify registration of the fields as a green.
139. I therefore see no basis on which to recommend that the register under the 2006 Act be amended to include the VG 138 Land or any of it.

### *Application VG 141*

140. It is clear from its history, and from even a cursory inspection of the land now, that the land that is the subject of Application VG 141 is completely distinct from the VG 138 Land.
141. The evidence offered in support of this application is supported by no evidence questionnaires other than those used to justify Application VG 138. Those questionnaires were completed, at least in theory, with reference to the use of the whole of the land shown on the map accompanying the questionnaire – which included both the VG 138 Land and the VG 141 Land. It is therefore wholly unclear which, if any, of the activities described as having occurred actually took place on the VG 141 Land.
142. However, doing the best I can, I have considered in particular the documentary and photographic evidence put forward by the Borough Council, both as to the present and past appearance of the land.
143. First, I note that the use of the garages on the VG 141 Land, for as long as they lasted, was probably in the most part by those entitled to use them under leases[113], [114]. That was not challenged by the Applicant. Such use was use by right, not as of right. Use of the land around and associated with the garages, for fly-tipping and other such activities, was not use for lawful sports and pastimes.
144. Secondly, there was and is a pedestrian route across the Land that was used to gain access from Hady Lane to the Playing Field and to the Scrubs. There was also a north-south pedestrian route across the Land, from the Playing Fields through Hady Wood and down to the Disused Railway (Path 129). But the use of land as a route from A to B does not count towards the establishment of a village green [38].
145. Thirdly, there is no specific evidence that there has been any other use of the VG 141 Land of such a character as to justify being categorised as lawful sports and pastimes. Certainly the land does not look now as though it would be conducive to such activities; and the historical photographs [113] do not suggest that there was much scope for such use, at least in 2006.
146. I therefore see no basis on which to recommend that the register under the 2006 Act be amended to include the VG 141 Land.

### **Overall conclusion and recommendation**

147. My conclusions in relation to the VG 138 land are as follows:
- (a) that the part of the Land shown as “The Scrubs / Farmers Fields” on the map included as Appendix B to the application has been correctly excluded from the land subject to the application by virtue of having been subject to a planning permission at the time Application VG 138 was made [51];
  - (b) that the use for sports and pastimes of the part of the Land shown as “Playing Field” on the map included as Appendix B to the application



(including the plantation (including Jubilee Wood) has been by right, not "as of right" [55];

- (c) that parts of the Land, namely the area shown as Farmer's Fields (West) and the older woodland at the western end of Hady Woods, may have been used as of right for twenty years until at least April 2011 by the inhabitants of Spital for lawful sports and pastimes, but that insufficient evidence has been adduced by the Applicant to prove that on the balance of probability [127], [138]; and
- (d) that the remainder of the VG 138 Land has not been used for lawful sports and pastimes, either by local inhabitants or otherwise, to such an extent as to justify its registration as a town or village green [124] – [126];

148. I therefore consider that none of the VG 138 Land is eligible to be registered as a town or village green, and I do not recommend that the register under the 2006 Act be amended to include any of it.

149. In relation to the VG 141 Land, I conclude, firstly, that the evidence proffered in support of Application VG 141 falls far short of being sufficient, in either its nature or its quantity, to establish a case to justify registration of any land as a green. Secondly, and in any event, insofar as it is possible to deduce anything from the evidence that has been put forward, I tentatively conclude as follows:

- (a) that the use of the garages on the Land, for as long as they lasted, was probably in the most part by those entitled to use them under leases, and thus use by right, not as of right [143];
- (b) that the use of the land around and associated with the garages, for fly-tipping and other such activities, was not use for lawful sports and pastimes [143];
- (c) that the use of the pedestrian route across the Land to gain access from Hady Lane to the Playing Field, and the north-south pedestrian route across the Land, was and is not such use [38], [144]; and
- (d) that there has been no other use of the Land of such a character as to justify being categorised as lawful sports and pastimes [145];

150. I therefore recommend that the register under the 2006 Act should not be amended to include the VG 141 Land.

**CHARLES MYNORS**

PhD, FRTPI, FRICS, IHBC, Barrister

31 May 2016

In the matter of the Local Government Act 1972 and  
the Commons Act 2006  
And in the matter of land at Hady and Spital,  
Chesterfield

---

**Report to Derbyshire County Council  
on the determination of Applications  
VG138 and VG141  
to register as a town or village green  
land at Hady and Spital, Chesterfield**

---

John McElvaney, Solicitor  
Head of Legal Services,  
County Hall,  
Matlock,  
Derbyshire, DE4 3AG

tel. 01629-538355  
(Sarah Boyle)

e-mail: [sarah.boyle@derbyshire.gov.uk](mailto:sarah.boyle@derbyshire.gov.uk)

31 May 2016

Chambers ref: 72031  
– report 1