Re: Application to register Longthorpe Field as a Town or Village Green (RSN5812)

And

Section 15(2) of the Commons Act 2006

Addendum to Preliminary ruling regarding statutory compatibility

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1 The purpose of this Addendum is to provide my response to submissions made on behalf of the Applicant on my preliminary ruling of 13 July 2015.

Relevant Background

2 The full background to this matter can be found in my preliminary ruling dated 13 July 2015 and I will not repeat it here. In summary, as the Inspector appointed by Peterborough City Council ('the Council'), acting in its capacity as Registration Authority under the Commons Act 2006, I considered an application under section 15(2) of the Commons Act 2006 to register Longthorpe field in Peterborough ('the Application land') as a Town or Village Green ('TVG').

3 In the light of the Supreme Court's decision in R (Newhaven Port and Properties Ltd.) v East Sussex CC [2015] P&CR 7 ('the Newhaven case'), I directed that the Applicant and LEA (as primary Objector) provide formal submissions on the issue of statutory compatibility as it might apply here. Those parties provided the following submissions:

23 April 2015	Submissions on behalf of the Applicant made by Public Law Solicitors
27 April 2015	Submissions on behalf of the LEA made by Stephen Morgan
7 May 2015	Applicant's submissions in response to the LEA made by Public Law Solicitors
11 May 2015	LEA's submissions in response to the Applicant made by Stephen Morgan

4 It can be noted that the Applicant and his representatives were provided with and made use of 2 opportunities to make submissions as part of that process.

5 Having considered the submissions made by both parties, I provided a preliminary ruling dated 13 July 2015 in which I set out my view and my reasons for considering that the Application land is held and used for a specific statutory purpose and there is an incompatibility between use of the Application land as part of Longthorpe Primary School and registration of the land as a TVG. On that basis, I recommended to the Council that the application for registration be refused.

6 The Council then took steps to place the matter before its Planning and Environmental Protection Committee for consideration. However, before that Committee could take place, further submissions on my preliminary ruling on behalf of the Applicant (dated 14 September 2015) were sent to the Council.

7 By a letter dated 18 September 2015, the Council through me invited the LEA to make submissions in response to those of the Applicant in the interests of fairness. The LEA provided those submissions dated 30 October 2015.

8 I have now read and considered both parties' submissions dated 14 September 2015 and 30 October 2015 respectively. The Applicant's submissions do not change my view that, applying the principle in the Newhaven case, the principle of statutory incompatibility applies here. There is an incompatibility between the use of the Application land as part of Longthorpe Primary School for educational provision, and registration of the land as a TVG.

9 I summarise the Applicant's contentions below and respond accordingly. Where I have not dealt with a point below, it is because I consider that it is already covered within my preliminary ruling and / or does not require further comment.

This case is wholly different from Newhaven. There is no evidence that it is operational land, and it would appear to be land simply adjacent to a school and sometimes used by a school.

10 In my view, this represents a misreading of the scope and applicability of the Newhaven case. I agree with the LEA that at the heart of the Newhaven case is the identification of a conflict between two statutory regimes. The Court found that there was statutory incompatibility between the 2006 Act and the statutory regime in that case (para. 94). I do not consider that the

applicability of the principle of statutory incompatibility is limited to statutory undertakers or to operational land as appears to be suggested by the Applicant.

11 The Court in the Newhaven case made the point that the issue does not rest solely on the powers of the statutory body but rather on the incompatibility of the use of the land with the operation of s.15 of the 2006 Act (para. 93). Although the Court distinguished the cases referred to by the Registration Authority, it did so because the land in those cases was not acquired and held for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green (paras. 98-100). The cases were not distinguished because the land was held by a local authority per se and I do not read the Newhaven case as precluding the application of the principle to such bodies.

12 As the LEA have pointed out, local authorities can only act pursuant to statutory powers and there is nothing to prevent the principle of statutory incompatibility from applying to them.

13 Thus in my view it is not enough for the Applicant to argue that the facts in the Newhaven case were wholly different since it is the principle of that case which falls to be applied. It is not a principle which can apply only to a statutory undertaker and / or only to operational land.

There is a fundamental difference between a statutory power to promote primary education (etc.) and a statutory purpose requiring land to be held for an operational use, such as a port.

14 Again, in my view, this contention interprets the scope of the Court's judgement in Newhaven too narrowly. It is not restricted to cases where the statutory purpose requires the land to be held for an operational use such as a port, and I agree with the LEA's interpretation that the essential consideration arising from the Newhaven judgement is whether there is any conflict with TVG registration and the statutory purpose for which the land is being held by a body, whether a public body or otherwise. It is the application of the principle of statutory incompatibility to TVG registration which is the foundation of the judgement in Newhaven and which falls to be applied in this case.

The land was not acquired, held or used for a specific statutory purpose; there is no specific statutory purpose.

15 As I set out in paragraphs 19 and 20 of my preliminary ruling, from its original transfer in 1973, the Application land was transferred as part of the school land to public bodies responsible for educational services. The provision of education is a specific power for which the land was acquired and in my view it is clearly a power that is for a specific statutory purpose as meant by the Court in the Newhaven case. Certain statutory purposes under which the LEA as education authority is empowered, and sometimes under a duty, to act were set out and considered in my preliminary ruling at paragraph 21. Whether or not these are "general" functions of an education authority (as the Applicant seeks to suggest), in my view the point is that they are functions which fall within the specific statutory purpose for which the land is held and used, namely the provision of education. This is distinct from the mere ownership of land by a public authority which has broad development powers, which the Court in the Newhaven case indicated would not be caught by the statutory incompatibility principle.

Incompatibility with the use as a TVG is not demonstrated

16 As the LEA has noted, the safeguarding of children is a statutory duty of the education authority and the means by which that is to be achieved are a matter for its discretion as education authority. The incompatibility of the effect of carrying out that statutory duty and the exercise of TVG rights of use of the Application Land is at the heart of this Application as it is the proposed fencing of the Application Land in pursuance of that duty which led to the Application being submitted. The LEA's need to exclude members of the public in the exercise of its functions with a view to safeguarding the welfare of children would also readily conflict with TVG rights in my view.

17 It is the incompatibility between the use of the Application Land by the LEA as a public body responsible for educational services and TVG use which is relevant, and in my view the suggestion that the uses could co-exist misses the point. The examples of use of the Application Land for educational services are clear examples of where incompatibility would arise with TVG use and the suggestion that the uses could co-exist is undercut by the reason why the Application was made in the first place. In essence, the Applicant claims that the uses can co-exist but without any enclosure or constraint on use of the Application Land. I agree with the LEA that such a position is untenable.

Alternatively, the evidence must be tested before a decision can be made.

18 I have nothing to add to my preliminary ruling at paragraph 27 on this issue. There are specific obvious examples of self-evident conflict in my view and no inquiry is required to explore the issues further.

19 In those circumstances, I maintain my recommendation to Peterborough City Council that the application for registration under section 15(2) of the Commons Act 2006 be refused.

ASITHA RANATUNGA
23 November 2015

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