

**APPLICATION TO REGISTER LAND KNOWN AS ERW GOCH FIELD
ADJOINING HAFAN Y WAUN, WAUNFAWR, ABERYSTWYTH
AS A TOWN OR VILLAGE GREEN UNDER SECTION 15(2)
COMMONS ACT 2006.**

**RESPONSE OF SIAN ELIN RICHARDS TO THE INSPECTOR'S NOTE
REGARDING THE PROCEDURE FOR CONSIDERATION OF THE
ABOVE APPLICATION**

1. Introduction

- 1.1 This is my statement made in response to the Inspector's note regarding the above, and specifically relating to the Statutory Incompatibility Issue. I reserve the right to submit further statements and evidence at future stages of this process.
- 1.2 As the Inspector states in paragraph 6 of her 'Note' the doctrine of statutory incompatibility (see *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2021] AC 194) relates to **a highly technical and specialist area of law**. Therefore, I would question whether one Inspector can make a final decision on this issue when the decision of the Supreme Court in 2019 (see below) was not unanimous with the justices ruling three to two in favour of allowing the appeals. Given the complexities involved in the Supreme Court decision and the fact that there were conflicting judgements made at that time, it is perplexing that the Inspector considers that it is appropriate to make a judgement on this issue.
- 1.3 I would also wish to convey my surprise that the Inspector has sought to request comments through written representations on this nuanced area of law. Given that there are significant areas of dispute on this issue, as shown by the differences of opinion between the justices at the Supreme Court, we would consider it prudent for the Inspector to hold a public inquiry. The Inquiry procedure would provide an opportunity for the formal testing of evidence through the questioning and cross examination of expert witnesses and other witnesses, and parties can have the opportunity to be formally represented by advocates. This is especially pertinent given that I am a lay person with no experience of highly technical and specialist areas of law such as this.
- 1.4 Nevertheless, I shall make further comments below on the issue of Statutory Incompatibility as it relates to the land known as Erw Goch Field adjoining Hafan Y Waun, Waunfawr, Aberystwyth SY23 3AY ("the Land").

2. The Case for The Landowner (Ceredigion County Council) – There is Statutory Incompatibility

- 2.1 Having regard to the Landowner's objection to the Application dated 28 September 2021 (see Appendix 1), it would appear that the basis of the Landowner's argument stems from the fact that the Land was acquired by the Council's predecessor's authority for education purposes and has been held as such thereafter, and that there is a Statutory Incompatibility between the local authority holding this land for education purposes and registering it as a Town or Village Green (TVG).
- 2.2 We are fully aware of the history of the acquisition of the land and for brevity I shall not go through this in detail, but it is clear that the land was acquired by the then Cardiganshire County Council to construct a new secondary school – the new Ardwyn Grammar School, and the land was conveyed to the Council on 29 June 1965. The Landowner's objection is, therefore, clear that "*all the evidence points to the land having been acquired and held for educational purposes*" (paragraph 7, Appendix 1). I agree, and it is wholly accepted that **at that time** [my emphasis] the land was acquired and held for educational purposes.
- 2.3 In support of the argument, the Landowner has drawn attention to the decision of the Supreme Court (see *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2021] AC 194) to reinforce the argument that the Land cannot be registered as a TVG due to its Statutory Incompatibility. Having undertaken my own research of this case law, this Supreme Court decision was based upon two conjoined cases: *R (on the application of Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs and another* and *R (on the application of NHS Property Services Ltd) v Surrey County Council and another* [2019] UKSC 58.
- 2.4 In summary, the *Lancashire* case concerned an application to register land next to a school as a TVG, and the land in question was held for educational purposes by the council. The school was not using all the land at the time of the TVG application but some of the land was used as a playing field and another part was being used to facilitate an extension to the school buildings. The *NHS* case was in relation to an application made to register an area of woodland next to a hospital as a village green. The land in question was held for healthcare purposes by NHS Property Services Ltd, and the NHS was not using the woodland at the time the TVG application was made.
- 2.5 The crucial point in the 2019 Supreme Court decision was the interpretation of 'statutory incompatibility' from the Supreme Court decision in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015]. In that decision the court found that the beach, which was within the harbour area, could not be registered as TVG as use as a TVG was incompatible with the statutory

purposes relating to maintenance and operation of the harbour for which the beach was held.

- 2.6 The 2019 Supreme Court judgement allowed the appeals by a majority of three to two – demonstrating conflicting points of view between the justices. The specific public interest contained in the statutory purposes for which the land in both cases was held outweighed the public interest in registering the land as TVG. In both the *Lancashire* and *NHS* cases, the Supreme Court held that the specific statutory purposes for which the land was held were incompatible with its use as a TVG. The court specifically identified that the test is not whether the land has been allocated by statute for statutory purposes, but that the land has been acquired (voluntarily or compulsorily) for statutory purposes.
- 2.7 If the Landowner (Ceredigion County Council) argues that the 2019 Supreme Court decision should be followed and the specific statutory purposes for which the land is being held (i.e for educational purposes) is incompatible with its use as a TVG, then it must follow that the same argument should be made for any other proposed use of the Land. For example, there would be Statutory Incompatibility between the Landowner (the County Council) holding this land for education purposes and granting planning permission for a housing development, and the specific public interest contained in the statutory purposes for which the land is being held outweighs any public interest in granting planning permission for housing development on the land.
- 2.8 What's good for the goose is good for the gander!
- 2.9 Clearly, therefore, if there is Statutory Incompatibility between the landowner holding this land for education purposes and registering it as a TVG, then there would inevitably be Statutory Incompatibility between the landowner holding this land for education purposes and granting planning permission for any other use, including, and importantly, housing development.

3. There is no longer any Statutory Purpose for The Land

- 3.1 Notwithstanding the arguments set out above, there is no dispute that the land was acquired by the then Cardiganshire County Council to construct a new secondary school – the new Ardwyn Grammar School - and the land was conveyed to the Council on 29 June 1965. However, a new secondary school (Penweddig School) has already been constructed at another location some 1 – 2 miles away from the Erw Goch land. As such, it could be argued that the public duty to retain the land for educational purposes has now passed and is no longer necessary or relevant.
- 3.2 If one reads the Supreme Court judgement, the public duties on the respective authorities were clear: Lancashire had a duty to safeguard the children under its care and promote their education. The health authority, through its property services company in the Surrey case, acquired and held the land in question for an NHS trust, and it was therefore responsible for

providing health care in the area. Consequently, the registration as a TVG in each case had the effect of sterilising the land for all time and meant that neither area of land could be utilised at any time for the intended purpose.

- 3.3 In the judgement, neither Lords Carnwath, Sales or Lady Black believed the Commons Act 2006 had been intended to frustrate the important public purposes for which the land was acquired. In their view statutory incompatibility did not centre on the use to which the land was to be put but on the purpose for which it was acquired. This provides a certainty to the argument where the acquired land is no longer required in the future, as is the case here.
- 3.4 Lady Arden and Lord Wilson issued dissenting judgments in the case, finding that the majority had interpreted the judgment in the Newhaven case too liberally. Lady Arden said that the landowner should be able to show "that the land is in fact also being used pursuant to [the statutory purpose], or that it is reasonably foreseeable that it will be used pursuant to those powers" in order to be able to resist an application for registration as a TVG. Lady Arden believed the test is more subtle, by asking whether the land in question is likely to be reasonably required for future use pursuant to the relevant statutory power.
- 3.5 It is clear in our case, that the land in question is no longer required for its intended purpose and is not likely to be reasonably required for future educational purposes pursuant to the statutory powers of Ceredigion County Council. The land is clearly no longer required for its intended purpose to construct a new secondary school.
- 3.6 It may also be argued that Ceredigion County Council is not under any statutory obligation to maintain or use its land and property in a particular way or carry out any specific activities on its own land. Therefore, registration of the land as TVG would not make it impossible for the Council to maintain its public functions (educational functions) in the future as these functions can be fulfilled elsewhere by the use of the Council's other property assets.

4. The Court of Appeal Judgement

- 4.1 Prior to the ruling of the Supreme Court on the conjoined cases the Court of Appeal made a ruling on the Lancashire and Surrey cases. I consider it is important for me to highlight to the Inspector the Court of Appeal's ruling in *Jones v R(NHS Property Services Ltd) & R(Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWCA Civ 721, and especially the way in which the ruling was made, and for the Inspector to take this into account when making her decision and recommendations.

- 4.2 The central question for the Court of Appeal was: what is the effect of statutory rights and duties on the registration of land as a town or village green?
- 4.3 The Court of Appeal made it clear that the critical test was whether or not the statutory rights or duties make the land incompatible for registration as a TVG. The test consists of three central elements, satisfaction of which weighs in favour of incompatibility:
- **There must be specific statutory purposes or provisions relating to the land.**
There clearly is not a specific purpose or provision for the land at Erw Goch, as the educational need to retain the land has now passed by the construction of a secondary school elsewhere.
 - **Parliament must have conferred on the landowner the powers to use the land for those specific statutory purposes, which are incompatible with the land's use as a town or village green.**
No such powers have been conferred to Ceredigion County Council as landowner.
 - **Registration as a town or village green must clearly impede, restrict or prevent the exercise of the statutory powers or duties relating to the land.**
The land is no longer required for its intended purpose and is not likely to be reasonably required for future educational purposes pursuant to the statutory powers of Ceredigion County Council. The land is clearly no longer required for its intended purpose to construct a new secondary school. Therefore, registration as a TVG would not impede, restrict or prevent the landowner from exercising its statutory powers or duties relating to the land as the land is clearly no longer required for its intended purpose.
- 4.4 In the conjoined appeals of *Lancashire County Council* and *NHS Property Services Ltd*, the Court of Appeal decided these three elements were not satisfied and the test of incompatibility was not met. This meant that in the Court of Appeal's judgement the land could be registered as a TVG in both cases.
- 4.5 As I have shown above, the three central elements of the test are also not satisfied in this case. Therefore, there is clearly no Statutory Incompatibility.
- 4.6 The Supreme Court's judgement obviously superseded the Court of Appeal, but it is the reasoning behind the ruling that I want to highlight to the Inspector, and this should continue to be relevant to this case.

5. The Local Development Plan and the Planning Application

5.1 I have set out above the reasons why I consider that the public duty to retain the land for educational purposes has now passed. I now wish to highlight to the Inspector that the landowner itself (Ceredigion County Council) has also come to this conclusion in 2013 when it formally adopted the Ceredigion Local Development Plan (LDP), and on 28 July 2021 when the professional planning officers of the Council recommended that a planning application for a residential development on the land should be approved at the Development Management Committee (Council Planning Application Reference: A201067 - *hybrid planning application comprising: A) Outline planning application with all matters reserved (except those included in full application below) for residential development to be developed in phases and associated works; B) Full application for residential development and associated works including public open space/play provision, a new spine road from Cefnesgair to Waunfawr Road, engineering and drainage arrangements, ecological mitigation, landscaping and associated works*).

5.2 I shall discuss this further below.

The Local Development Plan (LDP)

5.3 The fact that the Council, acting as Local Planning Authority (LPA), has allocated the land for residential use within the Council's Adopted LDP under Site Reference H0303 (see Appendix 2) confirms that, in the Council's own opinion, the land is no longer required for education purposes. If it were required, then one would have expected the land to be allocated in the LDP for education purposes and not residential development.

5.4 The Inspector will no doubt be aware of the lengthy process which has to be undertaken by any Council and LPA to prepare and adopt a local development plan. The process for adopting the current LDP would have taken many years prior to the adoption date in 2013 and this would have included taking many reports/preferred strategies and draft versions of the LDP to be agreed by Members of the Full Council and Members of various planning committees and other committees. If Members thought that the land should continue to be held for education, then they would have raised this at those early stages of plan preparation. Clearly, that did not occur.

5.5 At each stage of the LDP preparation process various departments within the Council, including the Council's legal and estates departments who have responsibilities for looking after the Council's land interests and land holdings, would also have been involved. Throughout this process those departments would have been well aware of the allocation of the Erw Goch field for residential use rather than education purposes.

5.6 If the land continued to be required for educational purposes and needed to be held by the County Council for educational purposes to meet its statutory functions at the time the LDP was prepared, then one would expect the land to be allocated for education use within the Adopted LDP. The Inspector will

note that this is clearly not the case here! Indeed, page 52 of the LDP which sets out the Education requirements/position for Aberystwyth (reproduced at Appendix 2) make no reference to the Erw Goch Land or the need to retain any land in the area for educational purposes associated with a new school.

- 5.7 It is also worth pointing out at this time that page 57 of the LDP (see Appendix 2) under the section 'Area (ha)' that there is a clear instruction that the land allocated for residential development should not include land that is currently used as playing fields. This is further confirmed within the highlighted paragraph on page 58 of the LDP that: the development will need to ensure that existing open space is protected and good access is maintained. An existing community provision is located on part of this allocated site, and that Policy LU22 of the LDP seeks to protect existing community provisions. I reserve the right to discuss this particular point in more detail within further stages of this process.

Planning Application

- 5.8 When the planning application was reported to the planning committee on 28 July 2021 the recommendation of planning officers to Members of the committee was to approve the planning application (see Appendix 3 for the full committee report).
- 5.9 The Inspector will also no doubt be aware of the sometimes lengthy planning application determination process which the LPA has to go through prior to making the final recommendation. As with the LDP various departments within the Council, including the legal and estates departments, would be fully aware of the planning application and the intention of the Applicant to gain planning permission to develop the land for housing.
- 5.10 One would expect those working in the Council's legal and estates departments (acting on behalf of the landowner) to be advising the Council's planning officers during the formal consultation process. The professional planning officers of the Council would then take this advice into account when making their recommendation. If the land continued to be required for educational purposes and needed to be held by the County Council for educational purposes to meet its statutory functions, then the Council would be expected to be recommending that the planning application be refused. The Inspector will note that this is clearly not the case here!

6. Conclusions and Recommendations

- 6.1 If the Inspector concludes that the 2019 Supreme Court decision should be followed and the specific statutory purposes for which the land is being held (i.e for educational purposes) is incompatible with its use as a TVG, then it must follow that the same argument should be made for any other proposed use of the Land. If there is Statutory Incompatibility between the landowner holding this land for education purposes and registering it as a TVG, then there would inevitably be Statutory Incompatibility between the landowner

holding this land for education purposes and granting planning permission for any other use, including, and importantly, housing development.

- 6.2 A new secondary school has already been constructed within Aberystwyth. Therefore, the public duty to retain the land for educational purposes is no longer necessary or relevant. The land is no longer required for its intended purpose to construct a new secondary school and is not likely to be reasonably required for future educational purposes pursuant to the statutory powers of Ceredigion County Council. Registration of the land as TVG would not make it impossible for the Council to maintain its public functions (educational functions) in the future as these functions can be fulfilled elsewhere using the Council's other property assets.
- 6.3 The Council, acting as LPA, has allocated the land for residential use within the Adopted LDP which confirms that, in the Council's own opinion, the land is no longer required for education purposes. If it were required, then one would expect the land to be allocated in the LDP for education purposes and not residential development.
- 6.4 If the land continued to be required for educational purposes and needed to be held by the Council for educational purposes to meet its statutory functions, the LPA would be expected to be recommending that the planning application for the development of the land for residential use is refused. However, this is not the case. In recommending that the planning application be approved the Council is confirming that the land is no longer required for educational purposes.
- 6.5 Having regard to the above, we respectfully recommend that:
 - A. If the Inspector finds there is Statutory Incompatibility between the landowner holding this land for education purposes and registering it as a TVG, then there is also Statutory Incompatibility between the landowner holding this land for education purposes and granting planning permission for any other use, including housing development; or
 - B. If the Inspector finds that there is no Statutory Incompatibility, then the application for a TVG should proceed to be determined by an independent Inspector at a Public Inquiry.

APPENDICES

1. Objection on behalf of Ceredigion County Council (Landowner), prepared by Annabel Graham Paul (Francis Taylor Building), dated 28th September 2021.
2. Ceredigion County Council Local Development Plan extracts.
3. Development Management committee report dated 28 July 2021 for planning application Reference: A201067.