DERBY CITY COUNCIL

PLANNING CONTROL COMMITTEE
19 March 2009

ITEM 6

Report of the Assistant Director - Regeneration

Application to Register Land as a Town or Village green at Corden Avenue, Mickleover. Ref DER/VG/5

RECOMMENDATION

1. To accept the conclusions in para 5 for the reasons set out in the conclusions to paras 4.1 – 4.5 of Appendix 3, to reject the application to register the land or any part of the land at Corden Avenue, Mickleover, Derby as a town or village green.

SUPPORTING INFORMATION

2.1 Derby City Council, as registration authority, received an application dated 10 June 2008 from Mr Simon Telford of 1 Corden Avenue, Mickleover, Derby, DE3 9AQ, Ms Janette Jackson of 66 Manor Road, Littleover, Derby, DE23 6BR and Mr Anthony Hueck of 9 Corden Avenue, Mickleover, Derby, DE3 9AQ under Section 15(1) of the Commons Act 2006 and in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. Mr Telford submitted the application on behalf of all 3 applicants.

2.2 The application site, which is approximately 436m^2 in area, is of unknown ownership and is bounded by Corden Avenue and Uttoxeter Road. It is flat and grassed over with a notice board on one side. A plan of the site can be found in Appendix A to Appendix 3.

2.3 The Council considered the application to be duly made and posted public notices of the application on site and published one in the Derby Evening Telegraph on 29th August 2008. The public consultation period lasted for 6 weeks and ended on 10th October 2008. During this period, we received a number of emails and letters objecting to the application. We received a later objection in January 2009 from the Council, as Highway Authority.

2.4 A summary of the key points of the application and the evidence put in with it, the objections made to it and the applicant's response to these are summarised in Appendix 3 along with my consideration of the evidence submitted against the legal requirements for registering a Town or Village Green. Copies of all application, the evidence forms attached to it, the objections and applicant's response to it will be available at the meeting.

2.5 The regulations provide no specific procedure for consideration of the evidence. The decision on process is for the registration authority to determine. However, they must ensure that it proceeds to determine the matter in a manner that is fair to both the applicants and objectors. The appropriate options are therefore, to deal with it either by way of written representations or by way of a public inquiry. In terms of considering and assessing the evidence and the submissions it is felt that this application can adequately be dealt with by way of written submission.

2.6 Where the Council has an interest in the land subject to the application, which as the land is adopted highway, arises in this case, and there are matters requiring a fine balance of judgement being made, then whilst not a requirement, it would normally be desirable to appoint an independent party to give an assessment of the evidence. Whilst there is always some merit in having such an external assessment the particular application fails the legal tests on so many grounds, as detailed in the report in Appendix 3, that it is considered such an assessment would serve little purpose.

For more information contact:	Ray Brown, Senior Planning Officer, Tel 01332 255024, e-mail ray.brown@derby.gov.uk
Background papers:	None
List of appendices:	Appendix 1 – Implications Appendix 2 – Procedure Appendix 3 – Report summarising submitted material and commenting on it

IMPLICATIONS

Financial

1. None arising from this report.

Legal

2.1 The Council is the registration authority for the purpose of dealing with applications to register land as village greens under section 15(1) of the Commons Act 2006. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 provides for the process for dealing with applications.

2.2 The procedure for dealing with applications is set out in Appendix 2 to this report. The applicable legal tests for considering such applications are set out and explained in Appendix 3.

Personnel

3. None arising from this report.

Corporate objectives and priorities for change

4. The process adopted furthers the corporate priority of “Giving you excellent services and value for money.”

Appendix 2

PROCEDURE

Procedure

Procedure on applications to register new greens made after 6th April 2007 is governed by The Commons (Registration of Town and Village Green)(Interim Arrangements)(England) Regulations 2007.

Who can apply?
Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application
An application is made by submitting to the registration authority a completed application form in Form 44 signed by each applicant together with supporting documents.

In addition to identifying the applicants and the land to which the application relates the applicant is required in:

- Part 4 to state the statutory basis and qualifying criteria for registering the land
- Part 6 to provided details of the "locality" or "neighbourhood" of the application land. Few people completing the form are aware of the narrow technical meaning given by the courts to "locality" or what is required to demonstrate neighbourhood.
- Part 7 to provide justification in terms the land becoming a green

Accompanying documents

- The application form has to be verified by a statutory declaration in the form attached to form 44.
- There is no requirement that the application should be accompanied by any other evidence to substantiate the application although without such evidence being provided, at some stage of the process, it would not be possible to register the land as village green. Reg 3(b) in any event requires application be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control, or of which he has the right to production.

Evidence
The applicant is only required to produce evidence to support the application at this stage, if the registration authority reasonably requires him to produce it under reg. 3(d)(ii).

Preliminary consideration
After the application is submitted, the registration authority gives it preliminary consideration under reg. 5(4). The registration authority can reject the application at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- Where Form 44 has not been duly completed, or

- Where the application is bound to fail on its face, e.g. because it alleges less than 20 years use or where the supporting documents disprove the validity of the application

Publicity
If the application is not rejected on preliminary consideration, the registration authority proceeds under reg. 5(1) to publicise the application:

- By notifying the landowner and other people interested in the application land
- By publishing notices in the local area, and
- By erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors
Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement
Any objector has to lodge a statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the registration authority. However, the registration authority has discretion to admit late objection statements.

Determination of application
The regulations provide no specific procedure for consideration of the evidence. The decision on process is for the registration authority to determine. However, they must ensure that it proceeds to determine the matter in a manner that is fair to both the applicants and objectors.

The matter therefore can be dealt with by way of written representations or by way of an oral hearing.

The Commons Commissioners have no jurisdiction to deal with disputed applications to register new greens: **R (Whitmey) v Commons Commissioners**[1] and the regulations therefore appear to envisage that determination on registrations, including those in dispute' are matters for the registration authority to determine.

In certain cases where evidence is evenly balanced, where the authority has an interest or where points of law arise it may be appropriate to appoint an independent inspector to conduct an inquiry, a practice that has been approved by the courts, most recently by the House of Lords in **Oxfordshire** County Council v Oxford City Council & Robinson [2].

Procedural issues
A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The burden of proof lies on the applicant for registration of a new green. It is no trivial matter for a landowner to have land

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1 [2005] 1 QB 282.
2 [2004] Ch.253 [2004] EWHC 12 Ch

registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[3]. All ingredients of the definition must be met before the land is registered.[4] However, this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.

- **Defects in Form 44.** The House of Lords has held in the **Oxfordshire** case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4, provided that there is no procedural unfairness to the objectors. The issue for the registration authority is whether or not the application land has become a new green.

- **Part registration.** The House of Lords also held in the **Oxfordshire** case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green.

- **Withdrawal of application.** Also in the **Oxfordshire** case, the Court of Appeal held that the applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the applicant's wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view.

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3 R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in R (Beresford) v Sunderland at para. 2

4 *Beresford* [2004] 1 AC 889 per Lord Bingham at paragraph 2.

Appendix 3

APPLICATION FOR A TOWN OR VILLAGE GREEN AT CORDEN AVENUE, MICKLEOVER

1.1 **Application:**
Registration of land as Village Green under Section 15(1) of the Commons Act 2006 and in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

1.2 **Applicants:**

- Mr Simon Telford of 1 Corden Avenue, Mickleover, Derby, DE3 9AQ
- Mrs Janette Jackson of 66 Manor Road, Littleover, Derby, DE23 6BR
- Mr Anthony Hueck of 9 Corden Avenue, Mickleover, Derby, DE3 9AQ

1.3 **Date Application Registered** 10 June 2008

1.4 **The Land to which Application Relates:**
Land at Corden Avenue situated between the western boundary of 297 Uttoxeter Road and the footpath of Corden Avenue, which is shown hatched black on the plan in Appendix A.

1.5 **Owner of the Land:**
The major part of the land forms part of the highway verge, which is currently under the control and management of the City Council.

The freehold owner of the subsoil is unknown but in the absence of evidence to the contrary would be presumed to belong to the owners of the adjacent land at 297 Uttoxeter Road and would therefore revert to that ownership should the land in future cease to remain highway.

Part of the land was subject to a road closure order made on 13th November 2006 by the Secretary of State and has been fenced off to public access.

1.6 **Publicity and Consultation period:** 29 August 2008 -10 October 2008

1.7 **Evidence submitted by Applicants in Support of Application:**

- Application form
- Plan identifying land
- 22 public evidence forms in total. (20 submitted with original application from 20 households and 2 further forms during or just after the consultation period), list of names and names and addresses are in Appendix D.
- Plan identifying residences of those completing evidence forms
- Plan showing the boundaries of the locality/neighbourhood that applicant seeks to rely upon for establishing village green status.

1.8 **Response to Consultation:**

17 letters/emails (from 15 households) have been received from persons objecting to the application. The list of names and address are in Appendix E.

2. General Outline of Site, Site History and Applicable Legal Tests

2.1 The Application Site

The application site is shown on the plan in Appendix A.

The application site is approximately 436m^2 in area. In shape, it is roughly of rectangular strip.

It is bounded; to the east with the tarmac footpath of Corden Avenue; to the north with the tarmac path forming the junction of Uttoxeter Road and Corden Avenue; to the west by the fenced side boundary of 297 Corden Avenue; and to the south by the fenced side boundary of 1 Corden Avenue.

The site, which is level ground, comprises an area of mown grass.

A noticeboard, belonging to the Littleover Grange Hall Community Association is located at the northern end on the land in the approximate position marked on the plan. This is approximately 2 metres tall and stands approximately 1 metre in from the footpath.

A square section of the southern part of the site, which has an area of approximately 97m^2, is currently fenced off with tall metal fencing. The applicant has stated that the fencing has been in place since March 2008. See plan which shows the stopped up area in Appendix A.

There is a Definitive Map and Statement which covers the area in which the application land is situated but there are no public rights of way across the land shown on the map and statement.

There are no worn routes across the land.

2.2 Ownership/History and Maintenance

The land appears to have formed part of the highway verge since the building of the adjacent houses, which based on their style, would probably have been in the 1930s. The 1947 Ordnance Survey plan shows the existing houses together with the existing boundaries to the land which supports this assumption.

It is also shown in the Council's highway records as having been part of the highway and has been maintained by them as such. Severn Trent Water Limited has confirmed that there are 2 inspection chambers connecting to a 150mm combined sewer on the application land. A storage unit, believed to be owned by the local gas company, was sited on the land at some time in the past and was eventually removed. We have not been able to establish the exact dates when these actions took place.

The square section to the south which measures approximately 97 m^2, is currently fenced off preventing public access, was subject to a road closure order made on 13th November 2006 by the Secretary of State. The owner of 297 Uttoxeter Road claims to have erected this fencing in March 2008 prior to the making of the

application to register the land as village green, a claim which the applicants appear to accept.

The remainder of the land remains currently under the control and management of the City Council, as highway authority.

The freehold owner of the subsoil is unknown but in the absence of evidence to the contrary, a rebuttable presumption would arise whereby the subsoil would belong to the owners of the adjacent land at 297 Uttoxeter Road. Therefore, in the absence of evidence to the contrary, that part currently fenced off is likely to be presumed to have reverted to the ownership of the relevant adjacent property. The remainder of the land remains highway although should the land in future cease to be highway, it is likely that it would revert to the ownership of the adjacent landowner(s).

One of the applicants Mrs Janette Jackson, the Chairman of Littleover Grange Hall Community Association, claims that prior to the establishment of the local community centre in 1967, the community building "and any spare piece of land in the vicinity, was owned and held by Littleover Parish Council, on behalf of the local community." This however is not the case for the land in question and Mr Telford in his letter of 21st January 2009 on behalf of the applicants agrees that the land is highway save for the part fenced off which he agrees was highway prior to its closure.

2.3 **Legal Tests**

The burden of proofing that land is village green rests with the applicant to show on the balance of probability the requisite tests are met based solely on the facts.

If the tests are met then the land must be registered. If the applicant fails to meet those tests, the land cannot be registered. The desirability or not of having the land registered is not a relevant consideration.

The legal test that must be met for land to be registered is that it must be:

> "land on which for not less than 20 years a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged in lawful sports or pastimes as of right.

In applying the test the following should be noted:

- The relevant period is the "20 years" period immediately preceding the date of the application. The applicant needs to establish a degree of continued use through this period however there is provision for disregarding certain acts of the owner that interrupt the continuing use.

- "Significant number of inhabitants" means a significant number of users from an identifiable neighbourhood or locality, sufficient to establish a right attaching to that community as a whole. The numbers of inhabitants using the land compared with the size of the locality/neighbourhood in terms of area and population is highly relevant in considering this part of the test.

- “Locality”; - in the Common law definition associated with village greens locality is regarded as some division of the County known to law. A borough, parish or manor including an ecclesiastical parish can be regarded as a locality for this purpose, it is doubtful that ward boundaries would suffice. The relevant locality should be a single locality.

- “Neighbourhood within a locality”; - the defined neighbourhood has to be within a single locality. There is no specific definition of neighbourhood but there should be sufficient cohesiveness within the claimed neighbourhood as to be able to show a clearly identifiable community with sufficient ability to determine boundaries of that neighbourhood.

- “indulged in lawful sports or pastimes”;- whilst not all claimed uses of the land will fall within the term sports and pastimes the term covers a wide range of recreational activities and can cover walking with or without dogs and children play. It does not include activities where that activity is unlawful, for instance permitting dog fouling in no fouling areas.

- “as of right”; - means use without force, without stealth or without express or implicit permission of the owner.

2.4 **Relevant period**

In terms of assessing the 20-year user period the application was made on 10 June 2008 therefore the relevant period is **10 June 1988 - 10 June 2008.**

3. **The Evidence**

3.1 **Evidence in support of Application**

3.1.1 **Summary of Uses Claimed in evidence submitted in support of application**

Mr Telford submitted 22 public evidence forms with his application from 20 households. A list of those residents who submitted forms is included in Appendix D. 5 of these application forms were from persons who do not appear to have lived within the area identified by the applicants as the locality/neighbourhood.

3.1.1.1 **Walking**

9 people (8 households) stated they used the land for walking although only 2, M & G Hughes (1 household), claimed such usage throughout the full 20 year period. The periods of usage are as follows;

M & G Hughes;	1972-2008;
Mr Dixon;	once a week 1981-1993.
Mrs Goodman;	once a week 1989-2006, now occasionally.
Mrs Revell;	every day 2000-2008;
Mr Rooney;	weekly 2003-2008
Mr Shore;	every 4 weeks 1989-2008;
Mr Telford;	1 to 2 times a month 1995-2008;

Ms Rhoades; evidence form states weekly September 2003 - May 2003* (*presume this is meant to be 2008)

20 people, which included some of those who used the land for walking, stated that they saw other people walking on the land. No indication was given of whom these people were, where they were from numbers or frequency of use.

3.1.1.2 **Reading noticeboard**

10 people (8 households) stated they used the land to read notices on the noticeboard, 6 of which claimed to have used it during the 20-year user period. The periods of usage are as follows:

Mr & Mrs Pulley	1981-2008;
Mr Goodman	1989-2006
M & G Hughes	1972-2008;
Mrs Jackson	1956-2008;
Mr Revell	2000-2008;
Mr Rooney	2003-2008;
Mr Telford	1995-2008
Mr Warburton	(no dates given of use)

Mr Telford submitted 8 photographs of the noticeboard.

4 people stated that they saw other people using the land to read the noticeboard. No indication was given of who these people were, numbers or where they were from.

3.1.1.3 **Community activities**

5 people (4 households) stated they used the land for “community activities,” (specifically referred to as games, walking cycling and use of the notice board), all 5 using the land for such for the relevant 20 year period. However, 3 of the 5 live outside the area identified by the applicants as the neighbourhood. The activities that they reported are individually considered in the other parts of the observations on user evidence.

Mrs Ault; 1976 - 2008, playing games, walking, riding bicycles and putting notices on the noticeboard.

Mr Cunniffe; 1967 - 2008, playing games, walking, riding bicycles and putting notices on the noticeboard.

B & P Eagers; 1976 - 2008, playing games, walking, riding bicycles and putting notices on the noticeboard.

Mrs Jackson; 1956 - 2008, playing games, walking, riding bicycles and putting notices on the noticeboard.

All the witnesses, except for Mrs Jackson, said that these activities had taken place every day. Mrs Jackson said that the activities had taken place most days.

3.1.1.4 **Community Celebrations**

7 people indicated that they saw “community celebrations” take place on the land; all 7 for the 20 year relevant period. They were:

Mrs Ault (1976-2008);
Mr Cunniffe (1967-2008);
B Eagers & P Eagers (1967-2008)
Mrs Jackson (1965-2008)
Mr Britland (1980-2008)
Mrs Orme (1972-2008)

No indication has been given of the dates of any of these events, what the event involved, the frequency of such or who participated. 4 of the 7 people referring to these events live outside the area identified by the applicants as the neighbourhood.

3.1.1.5 **Children’s play**

5 people (4 households) stated they used the land for children’s play, none it seems for the 20-year relevant period.

Ms Rhoades and Mr Rooney; both of 55 Chain Lane said that they took part in children’s play from September 2003 - May 2008 with Ms Rhoades specifically stating that her children play there.

Mr Russell; previously of 5 Corden Avenue used the land from 1988-2000 occasionally but more when children, presumably his own, were younger. He included a photograph which is dated April 1996 of 2 young children playing in daffodils on the land.

Mr Telford; of 1 Corden Avenue between 1995-2008, helped children, presumably his own, with bike riding on the land. He submitted 2 photographs with his application dated May 2008 showing what are assumed to be his son and daughter riding their bicycles on the land.

Mrs Orme; of 69 Church Lane took her daughter to the land to ride her bicycle in the 1998-2008 period.

20 people said that they saw children playing on the land during the application period.

3.1.1.6 **Dog walking**

6 people (5 households) stated they used the land for walking their dog; 3 for the relevant 20 year period.

Mr Charnock;	occasionally between 1989-2008
Mr Dawson;	2/3 days a week between 1960-2008
Mr Hueck;	between 1965-2008
Mrs Plant;	daily between 1973-2008
Mr & Mrs Pulley;	every day between 1981-2008

All 24 people who submitted public evidence forms stated they saw dog walking on the land.

Mr Dawson also stated he picked up any rubbish from the land during his walk.

3.1.1.7 **Bicycling**

Bicycle use was claimed by:

Ms Rhoades and Mrs Orme, in terms of the activities previously referred to and described under the activity of Children's Play; and by
Mrs Ault, Mr Cunniffe; B & P Eagers; and Mrs Jackson as described under the heading of Community Activity.

18 people stated that they had seen bicycles riding on the land.

3.1.1.8 **Jogging**

Mr Dixon stated that he used the land for jogging as well as walking.

He stated he saw others jogging on the land. No indication of frequency or identity of users was provided.

3.1.1.9 **General Outdoor Recreation**

1 person, Mr Hueck stated he used the land for general activities and conversation with people during the 1965-2008 period.

Mr Telford submitted 3 undated photographs showing people running on the footway past the land and another undated photograph showing people running past the land with some children lying on the land.

Ms Rhoades stated she saw pushchairs being pushed on the land.

3.1.1.10 **Football**

9 people stated they saw football being played on the land. No indication of frequency or identity of users was provided.

3.1.1.11 **Carol singing**

9 people stated they saw carol singing on the land. No indication of dates, frequency or identity of users was provided.

3.1.1.12 **Kite flying**

8 people stated they saw kite flying on the land. No indication of frequency or identity of users was provided.

3.1.1.13 **Bird watching**

7 people stated they saw bird watching on the land. No indication of frequency or identity of users was provided.

3.1.1.14 **Drawing and painting**

7 people stated they saw drawing and painting on the land. No indication of frequency or identity of users was provided.

3.1.1.15 **Picnicking**

7 people stated they saw picnicking on the land. No indication of frequency or identity of users was provided.

3.1.1.16 **Cricket**

Mr Dawson stated he saw cricket being played on the land. No indication of frequency or identity of users was provided.

3.1.1.17 **Salvation Army band**

M & G Hughes stated they saw the Salvation Army band playing on the land.

3.1.1.18 **People enjoying flowers**

Mr Russell stated he saw people enjoying flowers on the land.

There is evidence in Mr Hughes photos dated April 1996 that Daffodils used to grow on the land.

3.1.1.19 **Team games**

Mr Dawson stated that he saw team games, (which may have referred to the cricket and football games that he had seen) taking place on the land. No indication of frequency or identity of users was provided.

3.1.2 **Neighbourhood/Locality submitted in support of application**

Submitted with the application, as required on the application form, were details identifying by reference to a plan the extent of the claimed locality/neighbourhood with respect to the application. A copy of that plan is attached in Appendix B.

Of those submitting forms in support, 18 (from 17 households) of the 22 who claimed to have used the land, live or have lived within the area identified. The other 4 users live outside the area but have connections with the Littleover Community Association, which has premises at Park Lane. Most of those claiming to use of have used the land live or have lived at the time of use in Corden Avenue, Chain Lane or in the streets adjacent to Corden Avenue.

3.1.3 **Evidence of use by claimed users as of right**

The evidence presented in support of the application is somewhat confused in terms of how users themselves viewed their use as being of right or otherwise. Many of the forms submitted in support are incomplete in this respect, others suggest that they were using the land under an assumed legal right vested in them by the former Parish Council and others suggest that they were using the land without permission of the owner or otherwise. In fact, the applicants are themselves at odds in terms of their own submissions on this issue.

3.2 **Evidence Provided against Application**

The Council received 17 objections (from 15 households) and another objection from Derby City Council, as Highway Authority. A list of those residents who objected to the application can be found in Appendix D. The objections are summarised as follows:

3.2.1 Mr Deakin stated that the applicants had submitted the application "to stop development of a piece of land near their properties" and that the proposed development adjacent to the site is seen as a threat to the purse strings of one of the applicants. He also stated that he knew the area reasonably well and that the land was insignificant and not a place where local people go to carry our leisure activities.

3.2.2 Ms Acheson stated that she had seen a report of the application in the Derby Evening Telegraph newspaper. She considered the application ridiculous and that it was made in order to try to prevent the construction of a dwelling house, which already had planning permission. She also said that she could not remember seeing any kind of social or recreational events taking place on the land and that she did not let her children play on the land when they were small.

3.2.3 Mrs Pickford stated that she had seen a report of the application in the Derby Evening Telegraph newspaper. She stated that she had lived in the area for 38 years and never witnessed recreational activities taking place.

3.2.4 Mrs Watts stated that she had seen a report of the application in the Derby Evening Telegraph newspaper. She stated that she had lived at her home for 21 years and had never seen anyone using the land as a meeting place of social area. She considered the land not big enough for activities and said that it has never been used for sports pastimes.

3.2.5 Mr Foster stated that he had seen a report of the application in the Derby Evening Telegraph newspaper. He stated that he had been a resident of Littleover for over 25 years and had passed the application land up to 3 times daily and at all houses and that with total honesty he had never seen the area being used by anyone other than the occasional dog walker. He disputed the applicant's claim that local residents regularly walked on the land or take part in activities on it. He said that land was too small and too close to main roads.

3.2.6 Mrs Bumford stated that she had seen a report of the application in the Derby Evening Telegraph newspaper. She stated that she had never seen children using the land as a play area and considered the reason for this being its proximity to a busy road. She had never seen anyone else using it for recreational purposes nor

had she seen any dog walkers. She did not believe some of the claims about activities that had taken place on the land.

3.2.7 Mr Tilford stated that she had seen a report of the application in the Derby Evening Telegraph newspaper. He said that over the last 4 years of passing the land on his way to work at Derby City General Hospital that he had never witnessed any social activities taking place on it.

3.2.8 Mr and Mrs Glover stated that they had lived at 293 Uttoxeter Road since 1966 and had never witnessed any sporting or other activity on the land. They also stated that neither their children nor grandchildren or their friends had ever expressed a desire to play on the land and that the land was not suitable for such activities anyway as it is near a busy main road. They stated that the land was not maintained by the Council until a few years ago and so the grass was allowed to grow freely. They also stated that the site used to house a large enclosure containing a gas valve.

3.2.9 Mrs Gardner stated that she had lived and worked in the Littleover area for over 20 years and had never seen the land used for any sporting activity. She had never seen children playing on it or standing on it. She stated that she had seen vehicles driving over the land to get around the traffic lights on the road junction.

3.2.10 Ms Simpson stated that she was an employee of a local private day nursery in Chain Lane from June 2004 to March 2008, which was close to the land in question. She stated that she walked passed the land at various times every day going back and forth to the bus stop. She stated that she had never witnessed the land being used for any purpose including sports.

3.2.11 Dr Nathan stated that he was a local GP who works in Littleover and Sinfin. He stated that he travelled home along Chain Lane and Corden Avenue 3 times per week on average. He stated that during his 14 years of passing the land he had occasionally seen a person walking past the land with their dog. He stated however that the land is not wide enough for ball games or flying kites and that it would be a hazard to road users. He stated that he had never witnessed recreational activity of any kind.

3.2.12 Mrs Marples stated that she had lived at 295 Uttoxeter Road from April 1998 to October 2006. She stated that during two periods of lengthy maternity leave she walked almost every day around the neighbourhood, virtually always passing the land. She stated that she had never seen any recreational activity on the land. She stated that she was aware of the noticeboard on the land but had rarely seen any notices posted on it. She said that during the 8 years that she lived at Uttoxeter Road that she had never heard of any community events in the area or received correspondence about them.

3.2.13 Mr Creasey stated that he had passed the land as a resident of Mickleover for 10 years and as a resident of Littleover for 9 years whilst going to and from work, and also whilst dropping off his children at; the nursery on Chain Lane; Wren Park School on Jackson Avenue; at college at Mickleover Campus; and at the swimming pool on Saturdays and Sundays. He said that he had never seen anyone stand on the land let alone use it for recreational purposes.

3.2.14 Mrs Loomes stated that as a resident of Uttoxeter Road and Littleover/ Mickleover for over 40 years and passed the land numerous times on a daily basis that she had never once witnessed anyone using their land for recreational or other purposes.

3.2.15 Mr Marples stated that he lived at 295 Uttoxeter Road from April 1998 to October 2006. He stated that he spent a significant amount of time in the rear garden of the property which overlooked the land. His rear windows also overlooked the land. He said that in all that time he had seen no one using the land for recreational purposes. He stated that he also used to jog and always used the footway. He stated that he disputes the application. He also referred to a gas container located on a concrete base at the southern end of the application land within the last 20 years.

3.2.16 Mr Marples stated that the planning application for a development to the rear of 297 Uttoxeter Road was made in April 2006 and that notices were posted about the proposed Highways stopping up order, for the small area of land fenced off, for two 6-week periods beginning on 18 September 2006 and 13 November 2006. He said no-one raised any objection to any of these proposals.

3.2.17 Mr Michael Thornton he lived at 297 Uttoxeter Road from 1979 to September 2006, a period of 27 years. He had seen people reading the noticeboard from the footway and the odd dog walker taking their dog on the land. Neither he nor his family had seen any other activities over the 27 years. He referred to what he considered to be extensive gas board equipment on the site until the mid 1990s. Mr Thornton also included a copy of the 2006 Highways Stopping up order for the southern section of the application land, as well as a copy of the decision notice for the proposed dwelling house to the rear of nos 295 & 297 Uttoxeter Road, Mickleover, Derby.

3.2.18 Mr Scott Thornton lived at 297 Uttoxeter Road for 21 years, from 4 years of age to 25. He never used the land for any type of play or recreation. He also recalled a large metal structure being on the land which he believed belonged to the gas company.

3.2.19 Derby City Council, as Highway Authority, has objected on the grounds that “the majority of the application area is public highway.” They submit that “Lawful use of the public highway cannot be made for sports pastimes and therefore the public highway is not registerable as a Town/ Village Green.”

3.3 **Applicants’ response to objectors**

Mr Telford submitted a 6-page letter dated 10th November, in response to the objections which is included as Appendix F. The letter summarises “recent” case law in relation to Village and Town Greens and additional photographs of the community notice board. In his letter, he set out the legal criteria he felt ought to be applied to the determination of the application, including some case study interpretation of the law, and how he felt the evidence met these tests.

He commented on both some of the generic and specific points made, including suggestions that; the site could not be used safely; that objectors stated that they had not seen any of the uses on the site and that the application is purely for financial gain.

Mr Telford also submitted a letter, dated 21st January 2009 in response to the letter of objection from Derby City Council as Highway Authority. He submitted that the Council was wrong in their submissions stating that there was substantive law supporting his submission that highway was capable of being registerable as a town or village green, and extracts in support of that submission.

In order to make sure that the applicants have had the opportunity to deal with all matters relating to their application, we have reconsulted them.

4. **Findings of Fact**

In order to have the land registered as village green the applicants are required to establish on the balance of probabilities that all of the application land has been used for a period not less than 20 years by a significant number of the inhabitants of the locality or of an identified neighbourhood within a locality have indulged in lawful sports and pastimes as of right and that every part of the application land should be registered as village green.

If however the Registration Authority concludes that the application must fail in relation to the whole of the land, it still must consider whether part only of the application land should be registered.

Application of tests

4.1 **Land…**the land to which the application relates is sufficiently and clearly identifiable so as to constitute "land" for the purpose of the test.

In terms of the history of the land, the evidence suggests that the land can be subdivided into 3 parts:

- one part, which for a period of time, had a container located on it

- another part, which was the subject of a road closure order in November 2006, and has been fenced off by Mr Michael Thornton, the former owner of no. 297 Uttoxeter Road, since March 2008, and

- the remaining part of the application land that has remained open and unrestricted in terms of access.

Conclusion

- as to that part of the land on which a container was sited for several years during the relevant 20-year period which in effect prohibited its use. This area though small cannot therefore be considered as being sufficiently available for use throughout the 20-year period to enable that area to be registered. For that reason, this part of the land should not be registered.

- as to that part of the land fenced off since March 2008, which appears as a result since that date to have prevented use. This fencing was erected prior to the making of the application, a fact accepted by at least one of the applicants. Strictly therefore the application in so far as it relates to this area of land should have been made under s15(3) or (4) and not as it has been under 15(2) which

relates to continued use of the land up to the date of the application. This however is considered as a procedural irregularity and treating the application as though made under either of the other subsections, it is considered, will not create any unfairness in this particular case.

4.2 **…on which for not less than 20 years…**In this case the relevant period is 11th June 1988 to 10th June 2008.

4.3 **…a significant number of the inhabitants of any locality or of any neighbourhood within a locality…**

The term significant number will in part depend upon the size of the locality or neighbourhood that the users come from. The onus being on the applicant to identify the locality or neighbourhood and show that there are significant numbers of those inhabitants using the land in question.

In terms of identifying locality/neighbourhood, the applicants have submitted a plan showing their proposed locality. This locality is shown on the plan in Appendix B. It is unclear whether this plan is submitted in terms of identifying the locality or the neighbourhood or perhaps both. The applicants have also not sought to explain how the boundaries shown on the plan has been derived. In addition, the applicants provided a map showing the current addresses of those giving evidence of their past use. From the evidence submitted 18 (16 households) of the 24 evidence forms are from persons claiming to have used the land whilst at the time living within the area identified. The main concentration of users is shown to live on Corden Avenue, Chain Lane and the streets immediately adjacent to those roads. In fact, most users live on Corden Avenue close to the land in question. Only 3 of those claiming use come from areas further a-field within the area identified by the applicant as the neighbourhood.

Locality

Locality as previously stated (see 2.3) should be viewed as an area known to law, normally in the form of a division or subdivision of the County such as a borough, parish or manor. As such, the area identified on the plan would not constitute a locality. It could, therefore, only be proposed as a neighbourhood.

The land is located within the ward of Littleover which is an administrative area of Derby City Council. The ward of Littleover has a population of around 14,000 people, according to the latest UK Census data (2007). It stretches from the Outer Ring Road to the city boundary one way and from the A38 to the edge of Blagreaves at Moorways Lane and Valley Road, the other and covers an area over ten times the size of the area of the applicant's proposed locality. See plan in Appendix C.

The application land is wholly located within the ecclesiastical parish of St. Peter's Church, Littleover. The locality for the land, suggested by the applicants, lies mostly within the St Peter's Church parish. A small section of the suggested locality, however, which lies to the north of Uttoxeter Road, falls within the ecclesiastical parish of St. John's Church, Mickleover. St Peter's parish is much bigger than the ward of Littleover in terms of size and population.

The political and ecclesiastical wards are much larger in area and population than the area that the applicant has sought to demonstrate significant use for, and therefore, given the very localised nature of those claiming use, which is primarily centred around Corden Avenue and the adjacent streets, it cannot sensibly be said that a significant number of inhabitants of Littleover ward or either of the ecclesiastical wards have used the land.

Neighbourhood

In terms of the area identified constituting a neighbourhood for the purpose of the test. Neighbourhood suggests an identifiable area with sufficient cohesion. Insufficient evidence has been provided to show the rational for the boundaries identified by the applicants or support the suggestion that the area can be viewed as a neighbourhood.

Even if the area proposed by the applicants was to be accepted as sufficient to constitute a neighbourhood, the approximate estimated population of the area based on the latest UK Census data (2007), would suggest at least 1,000 people living in the area. If we accept usage based on the evidence submitted, the usage in terms of the population as a whole is small. Unsurprisingly, given the nature of the land, the usage is primarily limited to the street where the land is situated. Little evidence has been provided to suggest beyond the odd individual that others in the wider neighbourhood use the land or regard it as having any community rights attaching to it. There is little evidence that it is used or serves the area identified as a whole in any general recreational way.

Conclusion

The applicants have failed to provide any reasons or justification to support their submission for proposing the area identified as sufficient to amount to a neighbourhood or locality and there are no obvious reasons on which to conclude that that area can properly be considered a neighbourhood for the purpose of assessing the application, nor can it be considered a locality for the purposes of meeting the legal tests.

The application site does, however, fall within the boundaries of the City of Derby, the ward of Littleover and the parish of St. Peter's Church, which are areas that can constitute localities.

The issue of significant use from the neighbourhood or locality is more appropriately addressed in conjunction with the assessment of use in paragraph 4.4 below.

…have indulged in lawful sports and pastimes…

The uses and activities claimed in the information provided by the applicant and listed in 3.1.2 are in general consistent with sporting use or recreational pastimes. The exception to this is the use attributed to the notice board. A notice board may well be informative but the display of notices or reading of such cannot reasonably be considered as a sporting or recreational activity, particularly where notices are advertising businesses or advertising events not directly associated with the land in question.

Unusually there are a significant number of objections from persons with no apparent direct interest in the land, although it appears that some of the objectors may have interests directly or indirectly in terms of the development of adjacent land, which the application may affect.

There is a significant conflict in terms of the evidence presented on use by the applicants and the evidence provided by those objecting to the application in terms of claimed uses.
In assessing the conflicting claims, it is appropriate to have regard to the site itself and surrounding area. The fact that objectors may not have seen activities does not mean that those activities did not take place, but it may well reflect on the frequency of such activities and the numbers involved in such.

The desirability or not of the use of the land for any of the uses is not relevant to the determination of the matter nor are issues raised regarding safety or appropriateness of such uses.

Dog Walking

In terms of exercising dogs, being an open grassed area next to a footpath in a residential area it is the type of area where one would expect those living in the immediate vicinity to exercise their dogs, and indeed some of the objectors support this claim. We have evidence of use by 5 households from the immediate vicinity during the period and it is reasonable to assume that others may also have similarly used the land. There is however no evidence that people came from further afield to exercise their dogs, which given the size of the land and the fact that it was near a busy road is unsurprising.

Children's Play

The nature of the land being close to a busy junction may well deter many from using this land for recreational purposes involving children. There is however sufficient evidence that some children living in Corden Avenue and Chain Lane have played on the land, although indications are, both in terms of the supporting information and the objectors information, that this has been limited in terms of the numbers of households and numbers of children involved.

Team games, football and cricket

The size, nature and location of the land do not make the land particularly desirable for regular organised team games, particularly cricket and football. It may however be sufficient to enable small-scale children's 'kick about' or 'bat and ball' games to take place presumably associated with the claimed children's play. Given the fact that no indication of frequency of such uses has been given and the objectors claim not to have seen such use whilst accepting such activities may have occurred, we conclude such activities were infrequent and at best occasional throughout the period, and in any event limited to certain nearby households.

Walking, Bicycling, Jogging, General Recreation

The applicant has provided evidence of some residents in the immediate vicinity regularly walking on the land, although only 1 household is able to claims such throughout the whole relevant 20-year period.

There is some suggestion by the applicant of bicycles using the land, although that appears to be limited to children playing on the land. We also have 1 person claiming to have jogged over the land.

Given the size nature and location of the land, it is unlikely that the land provides sufficient attraction to people in general to resort to it, simply to walk or to run on and around the land. It is also highly unlikely that other than in terms of the children's play the land would be used for cycling and if it was regularly used for such, one would expect physical evidence to exist of such use or to stroll with a pushchair. It may well be that people walked or ran over the land as part of a more general walking, running or cycling route, although if this was the case certainly in the case of cycling and running the footpath clearly would be the more commodious and likely used route, it is therefore hard to reconcile claims of cycling and jogging over the site with the nature of the site as an activity enjoyed by the general public.

Whilst accepting the use in terms of walking on the land by some residents in the immediate vicinity, the degree of use over the 20-year period has on the evidence provided been limited to a few individuals and has clearly not been significant enough to be noticed by those objecting to the application.

Picnicking/Kite Flying/Bird Watching/Drawing and Painting/Salvation Army Band/Enjoying Flowers

Various references were made by those supporting the application to having seen these activities taking place on the land have been made. There was no identification of user or frequency to be able to give any weight to such activities. It would not be unreasonable to expect the occasional picnic occurring and whilst the land isn't well suited to kite flying, potentially posing a hazard to road users, it wouldn't be unreasonable to conclude any of the listed activities may well have taken place on the odd occasion. However, even if these activities did take place, the objectors' evidence suggests that such use would be infrequent if not rare and in any event, they cannot be connected to any specific individuals or community.

Community Celebrations

Although reference is made by 7 people, who completed the evidence forms, to community celebrations taking place on the land, no indication has been given of the dates of any of these events, what the event involved, the frequency of such or who participated. 4 of the 7 people referring to these events live outside the area identified by the applicants as the neighbourhood. It is not possible therefore to assess the nature of these events but given that the evidence from the objectors and the lack of reference to such in the other questionnaires from residents, if the events did take place the extent, frequency and noteworthiness must be questionable.

Conclusion

There is sufficient evidence to conclude that people have used the land for recreational purposes relating primarily to walking, dog walking and children and

family play. The degree and frequency of use over the 20-year period, however is unclear. It appears that such use, as there has been, has largely been limited to a few households residing in close proximity to the land.

Hardly any use has been shown by inhabitants within the neighbourhood sought to be relied upon by the applicants or within any of the localities that the land would be situated within. The land has been shown in terms of use to be used at best by a few houses in close proximity to the land and has very little relevance in terms of actual usage to other parts of the claimed neighbourhood, or related localities. Taking account of these factors and the limited number of identified users over the 20-year period the applicants have failed to show significant use by inhabitants of that neighbourhood within a locality or by inhabitants of a relevant locality.

4.5 **…as of right…** In terms of the evidence submitted by the applicants, there appears some confusion in terms of ownership or rights to use the site, especially in relation to the notice board**.** Some of the people putting notices on the noticeboard say they do so in their role as trustees of the community association, who they consider have rights over the land. However, this is not the case for others.

The freehold title of the land is unclear but the Council records indicate that all of the land, up until the road closure in November 2006 of the area currently fenced formed part of the highway, as being highway verge. Since November 2006, the fenced off area has ceased to be highway and in the absence of evidence of title is under the normal rules on reversionary presumption, likely to have reverted to the ownership of the adjacent landowners.

Mr Telford, in his letter of 21st January 2009 on behalf of the applicants whilst agreeing that the verge is highway, rejects the Highway Authority's submission that "Lawful use of the public highway cannot be made for sports or pastimes and therefore the public highway is not registerable…" submitting that "It is not legally incompatible for highway to be registered as common/village green …".

Whilst Mr Telford is correct in terms of highway being capable of being registered as village green, it is not possible by law for inhabitants to acquire such rights simply by indulging in sports and pastimes on the highway itself[5].

As all of the land on which the claimed use arises is highway or has been highway until recently, it's status as such dating back to pre 1940, it would accordingly not be possible for such rights to arise.

Mr Telford suggests in his letter that the land although highway can be distinguished from the remainder of the highway being "waste verge". Whilst appreciating the physical difference identified, in law it either forms part of the highway or not and therefore is a point that has no relevance.

Even if it was possible for inhabitants to acquire rights to indulge in lawful sports and pastimes over a highway, the types of activities and uses described by the applicants particularly dog walking, walking, cycling and even arguably children playing are in the main consistent or incidental with the permissive use expected that

[5] See Common Commissioner decisions in re The Green, Hargreave, Suffolk (1979) 234D/79 and Lower Penn, Staffordshire (1980) 233/D/31

public would make use of the highway or the highway verges, and therefore as permissive uses could not be said to be users as of right.

Conclusion

As all of the land on which the claimed use arises is highway or has been highway until recently, its status as such dating back to pre 1940, it would accordingly not be possible for inhabitants of the locality to, by use of the highway alone, acquire a right to indulge in lawful sports and pastimes over such.

In any event uses such as walking, dog walking, cycling and jogging, as claimed are undoubtedly consistent with use generally as a highway and even use of the verge by families for play and recreation as described in the evidence would be expected and, provided not unlawful, could possibly be viewed as permitted.

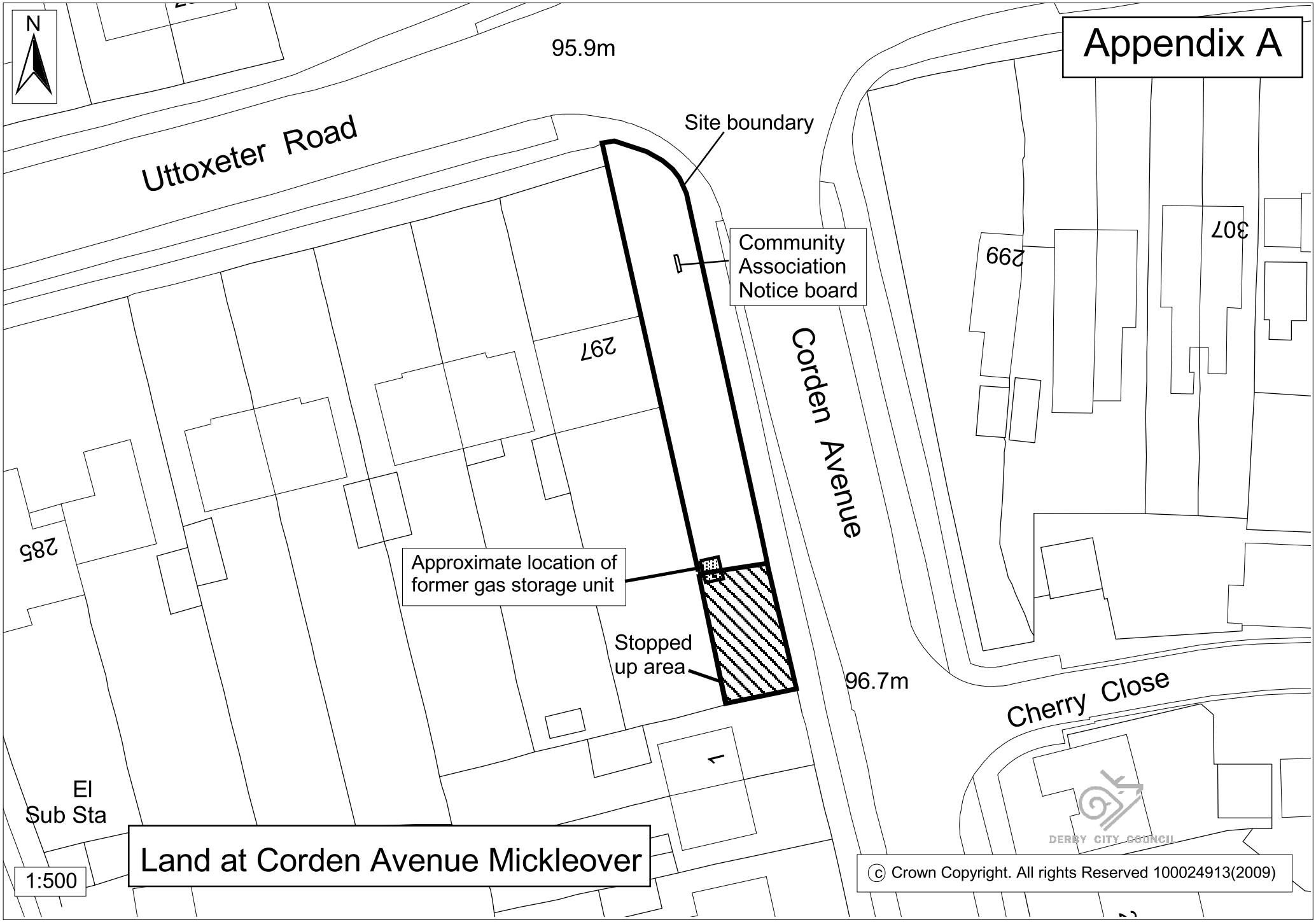
Accordingly, as a claimed use “as of right” has to be exercised without permission, any use which is permitted, which the majority if not all the uses claimed clearly are, cannot therefore have been exercised “as of right” whilst the land was highway.

Subject to the other tests, use “as of right” may have arisen in terms of the area fenced off, once that area ceased to be highway in 2006, however that claim would only arise after that area ceased to be highway and in terms of the tests would therefore not satisfy the relevant 20 year period.

5. Overall Conclusions and Recommendations

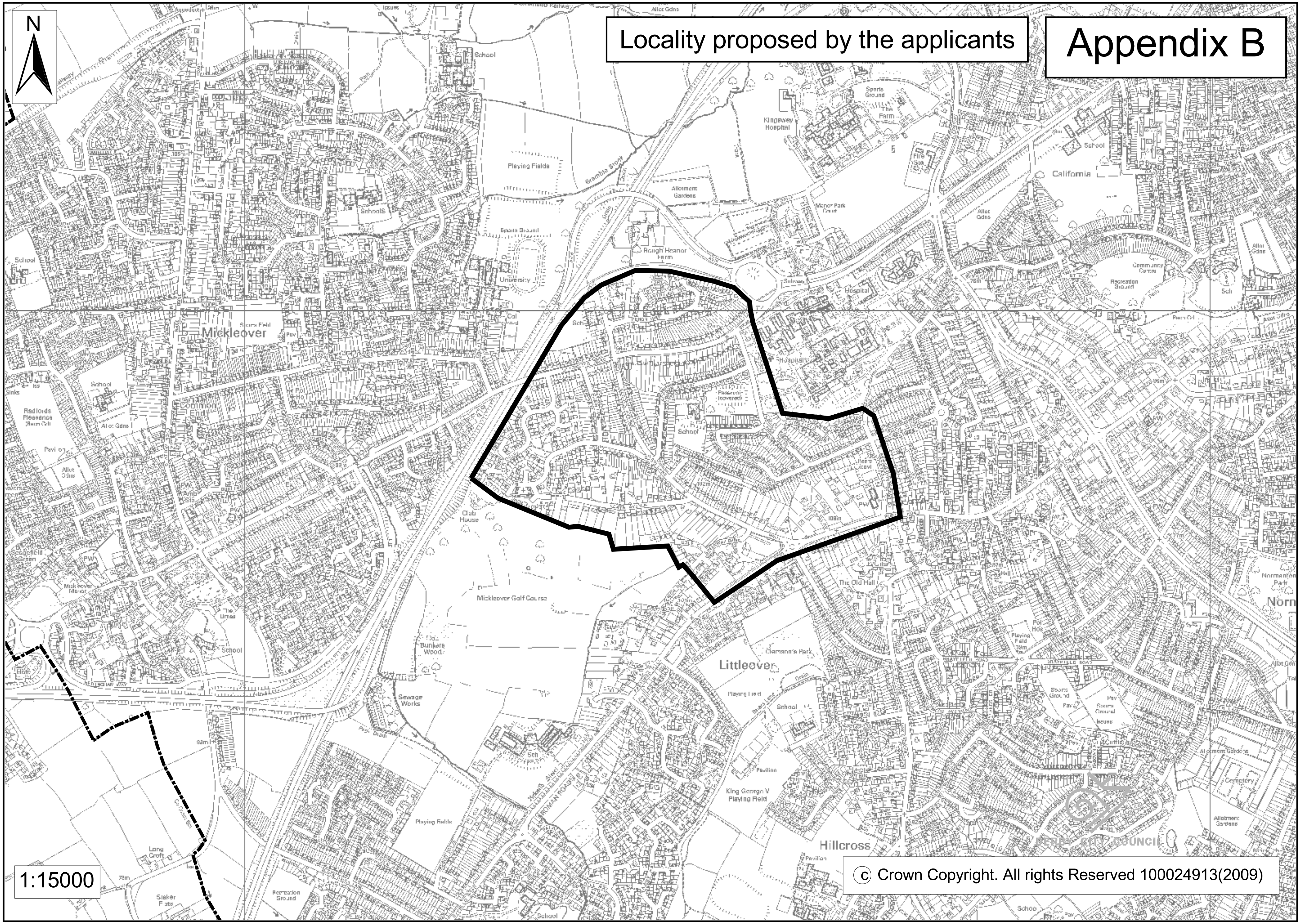
5.1 For the reasons outlined in the conclusions to 4.1 to 4.5, inclusive, the application to register the land as a whole as subject to this application should be rejected.

5.2 Further having also considered whether any part of the land subject to this application should be registered as village green it is concluded that for the reasons set out in 4.1 to 4.5, inclusive, that no part of the land should be so registered.

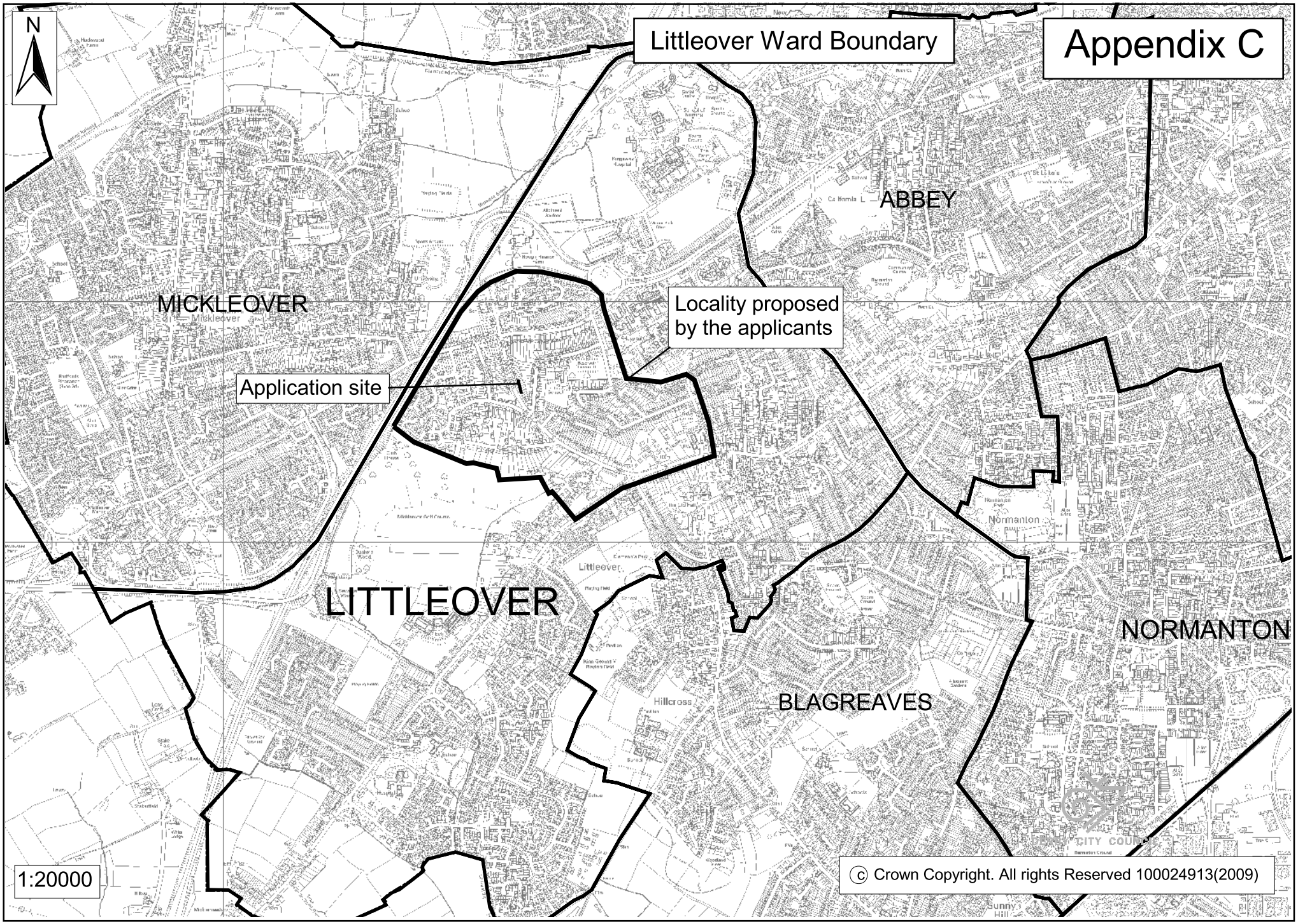


Appendix B

Locality proposed by the applicants



1:15000


Appendix C
Littleover Ward Boundary
N
ABBEY
MICKLEOVER
Locality proposed by the applicants
Application site
LITTLEOVER
NORMANTON
BLAGREAVES
1:20000
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Appendix D

Supporters of application who submitted public evidence forms

Mrs J Ault of 41 Jackson Ave, Mickleover, Derby, DE23 9AS
W J Britland of 32 Rowsley Ave, Derby, DE23 6JY
V Charnock of 67 Chain Lane, Mickleover, Derby, DE3 9AL
G Cunniffe of 14 Mostyn Ave, Littleover, Derby, Derby, DE23 6HW
R F Dawson of 13 Corden Ave, Mickleover, Derby, DE3 9AQ
Mr Jeff Dixon of 10 Elms Drive, Derby, DE23 6FF
B Eagers of 3 Eliot Road, Littleover, Derby, DE23 3FB
P Eagers of 3 Eliot Road, Littleover, Derby, DE23 3FB
Mrs E Goodman of 29 Muirfield Drive, Mickleover, Derby, DE3 9YA
Mr A Hueck of 9 Corden Ave, Mickleover, Derby, DE3 9AQ
M & G Hughes of 299 Uttoxeter Road, Mickleover, Derby, DE3 9AH
Mrs J E Jackson of 66 Manor Road, Littleover, Derby, DE23 6BR
Mrs A L Orme of 69 Chain Lane, Mickleover, Derby, DE3 9AL
Mrs Ruth Plant of 30 Corden Ave, Mickleover, Derby, DE3 9AP
Mr & Mrs Pulley of 7 Corden Ave, Mickleover, Derby, DE3 9AQ
Mrs K Revell of 5 Corden Ave, Mickleover, Derby, DE3 9AQ
Charlotte Rhoades of 55 Chain Lane, Mickleover, Derby, DE3 9AL
Mr Martin Rooney of 55 Chain Lane, Mickleover, Derby, DE3 9AL
J Russell of 73 Swanmore Road, Littleover, Derby, DE23 3ST
Mr Adrian Shore of 47 Muirfield Drive, Mickleover, Derby, DE3 9YA
Mr Simon Telford of 1 Corden Ave, Mickleover, Derby, DE3 9AQ
Mrs N Warburton of 2 Corden Ave, Mickleover, Derby, DE3 9AP

Appendix E

Responses opposing application

Emails

Mr Matthew Deakin of 47 Burlington Road, Derby; 31 August 2008
Ms Lynn Acheson; 1 September 2008

Letters

Mrs M Pickford of 591 Burton Road, Littleover, Derby; 3 September 2008
Mrs Maureen Watts of 65 Chain Lane, Mickleover, Derby; 3 September 2008
Mr R. Foster of 8 Lothlorien Close, Littleover, Derby; 4 September 2008
Mrs Kay Bumford of 12 Dean Close, Littleover, Derby; 6 September 2008
Mr J E Tilford of 38 Merlin Way, The Crescent, The Fairways, Mickleover, Derby; 8 September 2008
Mr D & Mrs S M Glover of 293 Uttoxeter Road, Mickleover, Derby; 25 September 2008
Ms Sarah Simpson of 47 Chambers Street, Alvaston, Derby; 1 October 2008
Dr P A Nathan of Meadow House, Church View, Derby Road Duffield, Derbyshire; 2 October 2008
Mrs Mandy Marples of 3 Meynell Court, Ashbourne Road, Kirk Langley, Ashbourne, Derbyshire; 4 October 2008
Mrs Sheila Gardener of 12 Golf Close, Littleover, Derby; 4 October 2008
Mr Paul Creasey of 9 Owlswick Close, Littleover, Derby
Mrs A M Loomes of 341 Uttoxeter Road, Mickleover, Derby
Martyn Marples of 3 Meynell Court, Ashbourne Road, Kirk Langley Ashbourne, Derbyshire.
Mr Michael Thornton of The Old Surgery, 38 Weston Road, Aston-on-Trent, Derbyshire.
Mr Scott Thornton of 23 Penhaligans Close, Chellaston, Derby.

Derby City Council, as Highway Authority; 16 January 2008

Appendix F

Applicants' responses to responses opposing application

Commons Registration Officer
R114
Derby City Council
Regeneration and Community
Roman House
Friar Gate
Derby DE1 1XB

Simon Telford
1 Corden Avenue
Mickleover
DERBY
DE3 9AQ

10th November 2008

Re: - Response to Objector Comments for Village Green Application DER/VG5

Firstly, I feel I need to restate the criteria/conditions for registering a new green,
The Applicant must show that, (1) a significant number of inhabitants (2) of a locality or neighbourhood have (3) indulged as of right (4) in lawful sports and pastimes (6) on the land (7) for a period of at least 20 years and continued to do so at the date of application, or where cessation of use occurred after the commencement of section 15 of the 2006 act on 6th April 2007, the application is made within 2 years beginning with the cessation of the use.

I believe it that the application form and supporting evidence documents have described sufficiently how this application fulfils the criteria for registration as a town Green / Common Land and I would like to take this opportunity to restate the how the criteria has been met.

Within the application and supporting evidence documents it has been clearly laid described how the land has been used by members of the locality/neighbourhood for sports and pastimes which conform to the acts requirements. The 30 or so evidence forms supplied with the application illustrate regular use of the land for taking dogs for walks, children playing, children cycling, the use of the Grange hall community centre notice board, both for posting and for reading the notices, Walking/taking of air, enjoying the flowers in the spring.
The evidence documents, I believe help to build a picture of use by a 'significant number of local inhabitants'. The interpretation of the word 'significant' could be open to debate; therefore I would refer to the high court case concerning McAlpine homes Versus Staffordshire county council. In this case it was decided that this did not mean 'a considerable or substantial number' since a neighbourhood might have a very small population. What matters, the court said is that the number of people using the land has to be sufficient to show that the land is in general use, by the local community, for informal recreation. I believe that this general use by the local inhabitants has been established within the evidence statements provided.
These activities have all been recognised in law as lawful sports and pastimes (refer to Appendix 3). The evidence statements show that the locals carrying out these activities have done so, as of right. That is to say, that they did not employ force to gain entry to the land, they did not seek permission to use the land and that they did not carry out their activities in secret. All of which I believe illustrates that point that they have indulged 'as of right' as required for the application. The activities mentioned are stated as having been carried out on the land approached directly from the pavement on Corden Avenue, the notice board is on this land

and therefore the posting and reading cannot have been carried out anywhere else, and photographs supplied with the original application show both children playing and children cycling on the land. The statements provided also give evidence to the fact that the land has been used for significantly more than the required 20 years. In fact the land has been shown to have been used for said purposed for over 35 year continuously. The point relating to cessation of use is a fairly mute point as in reality only about a third of the land has been fenced off to stop its use. The rest of the land is in use right up to today for all of the uses previously listed, so cessation of use is not actually the case. However if the point was made that cessation of use was to be considered. The fact is that the fencing was not erected until early 2008. The application being made also in 2008 shows that it was made within the required 2 years and thus is satisfactory.
I hope the brief statement above briefly illustrates the main substance of the application.

Having reviewed the letters of objection to the application, please find comments below relating to the specific points made.

Generic issues identified by multiple objectors
Road user hazard
Hazardous location / Child Safety
Inappropriate/questionable uses of the land
Not witnessed use

Comments in response to the generic issues raised
To the point raised regarding safe use of the land and that the continued use of the land posing a hazard of distraction to road users. Statements show that this land has been used in broadly the same manner for at least the last 40 years. I have enquired with more elderly local residents (Mr Hueck and Mr Dawson) and to their knowledge there has been neither a road accident nor a personal injury either on the land or the road adjacent during their residence in the locality due to the use of this land. Also, having read the Applicable rules, DEFRA guidelines and the governing act itself, I can find no part of any document that states that it is a criterion for the application that the land be considered safe. For these reasons I fail to see this as a valid concern,

A number of objectors raised the point about inappropriate uses for the land and express disbelief at certain claimed uses of the land, such as kite flying. The application for village green status does not require that all possible listed activities shown on the form have taken place, just a good number of them. It can be seen in the application for this village green that 'kite flying' is not one of the pastimes sighted as having been enjoyed on the land to the knowledge of the applicants. If in evidence statements, individuals have indicated that they have enjoyed pastimes or have witnessed certain pastimes, then that is their evidence to give. A point repeatedly made is that objectors had not personally witnessed use of the land. Having looked at the reasons for being in the area and thus the times and situations it is clear that a large number of those objecting have been travelling in cars to and from work presumably in the early morning or late afternoon. It would be my view that these are not the most appropriate time to expect the land to be used. It would be more reasonable to expect the land to be used in people's free time, which would more normally be at weekends, and in the evenings. Also the fact that people are driving in cars would suggest to me that they are concentrating on the road ahead and matters occurring away from the road are less likely to be on their mind or in their memory. How often would you notice something ordinary happening in your peripheral vision and recall it many days later? For these reasons I do not find

incompatible for the land to have been used as described and for people to have been in the area but not witnessed it and both to have legitimately occurred.
It also seems clear that some of the objectors have not taken the time to become fully conversant with the process or requirements and this may be confusing to the uninitiated.

Points Conceded by objector which support the case for Village / Town Green Application

Mr Creasey – Accepts Dog Walking takes place on the land
Mr Foster - Accepts Dog Walking takes place on the land
Mrs Bumford – Accepts Flowers are there to be enjoyed and use of the notice board take place on the land Mr Glover – Accepts use of the notice board and Dog Walking takes place on the land
Mr Thornton – Accepts dog walking takes place on the land, and also accepts that the flowers are there to be enjoyed there and also the use of the notice board on the land.

Objector Specific Points

Mrs Tilford – Has not witnessed use; but as travelling from Merlin way to City Hospital does not take you directly past the location this is not surprising.

Mrs Acheson has stated that Planning permission is granted. To make a point of order, the Application for development of the land to the rear of 295 & 297 Uttoxeter road is only conditionally granted. It is subject to a number of requirements, one of which is to ensure that "prior to the development coming into use, the parts of the site to be hard surfaced or used by vehicles (namely the grassed area on Corden Avenue) shall be drained and surfaced in a manner approved by the local planning Authority, and thereafter not be used for any other purpose". – given the fact that the ownership of the land which forms this part of the planning application requirement is unknown, but certainly not Mr Thornton, I find it hard to see that this condition can be dispensed and therefore the application is in doubt to proceeding.

Mr Deakin
As a point of order, Mr Deakin states that there is an underlying motive of financial gain in applying for village /town green status by one of the co-applicants. A review of the Derby City Council planning portal shows that there are two planning applications that are near the location of the village green application one on the plot to the rear of 295 and 297 Uttoxeter road, and one for 297 Uttoxeter road itself. I feel that this accusation is defamatory and for the record, it needs to be clearly stated that none of the co-applicants for the village / town green have an interest in either of these applications, and therefore the accusation that the application is financially motivated is clearly unhelpful and untrue.

Mr S.Thornton
Mr S. Thornton states that a number of years ago an ironwork cabinet containing British gas equipment was located on the land, and that this would preclude people from using the land. I fail to see how a cabinet renders the land unusable. This can clearly be seen to be the case in the photograph supplied with the evidence statement from Mr Hughes which shows children running on the grass and playing on the grass with the cabinet (Approx. 8 foot by 4 foot by 7 foot high) in clear view behind them. Speaking to two other more elderly local residents (Mr Hueck and Mr Dawson) who recall the cabinet prior to its removal, they have both walked, and continue to walk their dogs, enjoyed the flowers, passed the time of day, and used the notice

board all with the cabinet in place and without it in place. I think this evidence shown that the presence of an iron box is no inhibitor to the land use as described

Mrs Marples
Mrs Marples states that the notice board 'had very little on it'. In answer to this claim, as can be seen by the photographs supplied within Simon Telford's evidence statement. The photographs show use of the board with numerous items on it. The notice board is used by the local community to advertise both local small businesses and local entertainments including activities within the hall itself and other local community centres. This can also be endorsed by the supporting letters from Grange Hall committee members. I would go as far as to say that the notice board is indeed a very useful addition to the area being one of five notice boards spaced out around the perimeter of Grange Hall's vicinity. The notice board is regularly read by many local residents and community members. These facts are strengthened further by the fact that the littleover neighbourhood forum has authorised a small grant for Grange Hall community Centre to replace one of their boards and refurbish the rest which after almost 40 years of continued use are whilst still useable, looking a little tired. Surely Council funding sends a strong signal of support as to the importance of the boards to the local community
I have supplied a further 3 photographs which highlight the fact that the board is in constant and continuing use. A quick comparison of the original photos supplied as evidence against the ones supplied with these comments show that the majority if not all of the posts have changed, they relate to the local area and hopefully illustrates the ongoing nature of the use of the board and thus the land it lies upon.
Another less relevant point made by Mrs Marples is that Corden Avenue is a busy bus route. This is not the case for any of the city bus companies. Uttoxeter road is a bus route, but is relatively remote from the area of land in question.

Mr Marples
Mr Marples has implied that by allowing the village green application to be granted, derby city council would be exposing itself to reputational damage. I believe that there are two points to clarify here. Firstly this notion would imply that derby city council somehow has caretaker responsibility and a duty over this land. It has clearly been stated that the owner of the land is unknown, and conversations with the planning office have revealed that derby city council hold no receipt for this land and therefore clearly do not own the land anymore that anyone else and therefore clearly cannot be held responsible or account able for it or activities carried out on it any more than any other piece of land. Secondly having spoken again to Mr Hueck and Mr Dawson who have over 35 years of knowledge of the land and local area, neither of them can recall any accidents relating to the use of the land. If Town green / Common Land status is granted for this land, I do not expect that the use of the land will change from that of it's current and previous uses, Therefore on the balance of probability this risk does not warrant consideration.

Mr Marples has also stated that no-one objected to the planning application for the development of the land to the rear of 295, 297 uttoxeter road. This is incorrect; I (Simon Telford) made an objection. A copy of said objection is filed on the Derby planning portal along with the rest of the application documents (app. 01/05/00156 – file name, commentletter1). One of the points for objection was the fact that the land within part of the application was not in the ownership of the applicant, although this is not a consideration for planning applications. This land forms part of the application for village green status, to protect it for the ongoing use by the local community rather than be fenced off and out of public use. That being said, it has not stopped the ongoing use of the land, as can be shown in the photograph supplied as

evidence showing clearly children cycling on the land with the fencing being seen in the background, I am assured by Mr Dawson and Mr Hueck also that the fencing has not stopped them walking their dogs on the land either. The changing adverts and notices on the Grange Hall board mentioned earlier can also be used to show that the fencing has not stopped the use of the land for the previously stated purposes either.

Mr Marples also raises issue regarding the presence of the Ironwork cabinet – I would refer to the comments made in regard to Mr S Thornton.

Mr Marples has referred to conversations with PCSO's and local beat bobbies stating that this would be endorsed by a letter sent directly to the registrations officer from the PSCO's and officers in question. Having not received a copy of said letter with the objections pack, I have queried this with Mr Ray Brown (registrations officer) who confirmed to me that no such letters has been received (as of 10th November – well after the closing date for the consultation period). Since no supporting documentation has been supplied, this information is hearsay and cannot be accepted and valid evidence. However, I would refer to the previous comments regarding reputational damage and the fact that no accidents or incidents have occurred on this land for many years. Therefore I fail to understand why the police services consider that a change of land status would suddenly increase risks. The use of the land has been roughly the same for the past 40 years; I see no reason as to why it would suddenly become a place where accidents and injury are the norm due to a change of status.

As with Mrs Marples letter, Mr Marples questions Community cohesion. I would re-iterate the comments regarding grange hall notice board and that people do 'bump' into each other whilst going about their business (walking the dog, taking their children for a walk or bike ride, reading the notice board whilst out for a walk), and stop and chat on the land. I see all of this as a signs of a healthy vibrant community.

Mr Marples questions the application validity due to the erection of fencing on a part of the land. Firstly the fencing is only on part of the land, therefore the majority of the land is still available to be used. Secondly, partial fencing is not covered by any single subsection of section 15, therefore the best fit was selected and if this was incorrect then surely the application would have failed at the initial submission adjudication stage. And thirdly, the recent amendment of the act allows for land to be fenced and the application to be retrospective if the fencing is less than 2 years old, which it clearly is as it was erected in early 2008.

Mr Thornton

Mr Thornton has stated in his pre-amble that no objections were made to the planning application to develop the land to the rear of 295, and 297 and the land which forms part of this village / town green application. I would refer you to the comments made in response to Mr Marples similar statement.
Mr Thornton suggests that because there is a man hole cover on the land, the majority of activities cannot be carried out or enjoyed on the site. This can surely not be a real consideration.
Mr Thornton also refers to the ironwork box as a reason for not being able to use the land. I would refer you to the comments made in response to Mr S Thornton's similar statement.

Mr Thornton relates an account of a serious road accident attended by both police and ambulance services on the day that the Derby evening telegraph took photographs of myself and Mr Hueck on the land in relation to the news story about the village green application (Friday 29th August 2008). He tries to directly attribute the accident to the activity on the land being a distraction to the driver to support the argument that activity on the land is hazardous and distracting to passing motorists. The facts are that the accident took place some 50 metres further up the street, and nowhere near the land in question. It took place at approximately 2 o'clock in the afternoon in dry good weather. The accident occurred when a motorist hit the back of a car reversing off a drive. The photographs were taken at approximately 6 o'clock in the evening. The Facts of the accident can be verified by both the ambulance and the police services and also local residents. The time of the photography can be confirmed by the derby evening telegraph reporter/photographer (Claire Duffin). These facts show that Mr Thornton's proposition that the accident and the photography on the land in question are linked is clearly flawed.

Mr Thornton has also sighted Mr Hughes who lives at 299 Uttoxeter road as objecting to and supporting his point of view. This is incorrect and at odds with Mr Hughes opinion. This can be most obviously seen by the fact that Mr Hughes has submitted an evidence form in support of the application along with photographs showing use of the land.

Mr Thornton has suggested that the land is too small to be registered as a town green / Common Land. Having read and re-read the Act and all of the related information on the Defra website, I can categorically state that there is no size requirement or restriction, minimum or maximum. Therefore this point is to be considered irrelevant.

Please accept these comments for use in the decision making process for Village / Town Green Application DER/VG5
Also attached,
Photographs sheet 1 and 2
Appendix 3 showing past precedent legal cases accepting lawful sports and pastimes.

Best Regards

Simon Telford

Commons Registration Officer
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Regeneration and Community
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Friar Gate
Derby DE1 1XB

Simon Telford
1 Corden Avenue
Mickleover
DERBY
DE3 9AQ

21st[th] January 2009

Re: - Response to Highways Authority Objection Letter Comments for Village Green Application DER/VG5

Dear Sir,

Having read the objections raised by the Highways Authority, I would like to make the following responses to the points made.

The Highways Authority has identified that part of the application is highway; I would concede that this is the case. To clarify the make up of the land, the portion referenced in the application as having been fenced is now 'stopped up' and as such is no longer classified highway, the rest of the land therefore is still considered highway. I would like to further clarify to that by saying that highway consists on Carriageway, Footpath and Verge, and the area described in the application only relates to the land considered verge, and more precisely I believe it to be waste verge as it lies on the opposite side of the grassed carriageway verge and the footpath. The documents and plans submitted with the original application will clarify this point.

Further to this clarification regarding the land itself I would draw your attention to the excerpt shown below which is taken from the reference book, 'Getting Greens Registered' ISBN 978-0-946574-22-3 – This book is written by John Riddall MA (TCD) Who is a barrister and before his retirement was a senior lecturer in law at the University of Leeds. His books include *Land Law*, *Jurisprudence* and *Rights of Way: a guide to law and practice.* I hope this background information highlights that Mr Riddall is an authority on these matters and someone who's considered opinion should be taken seriously relating to the application of this act.

Highways

118 The 2006 act makes no reference to highway land. There is nothing to stop all or part of a highway being regarded as a town or village green if the circumstances justify this. Areas of open land alongside minor roads frequently do have a long-standing pattern of local recreational use, as opposed to one of mere passage from A to B. Many have already been successfully registered under the 1965 act.

119 Registration arguably has no effect on the highway status of the land. Equally, the 'public' status of a highway does not nullify a claim that all or part of it is a green, so long as it is clear that the recreational use (as opposed to a mere passage along the highway) which takes place there is primarily or exclusively by local people.[58] (See paragraph 44.)

[58] See for example the Commons Commissioner decisions in *re Medstead Village Green, Hampshire* (1979) 214/D/113 and in *re The Green, Hargrave, Suffolk* (1979) 234/D/79.

I hope this excerpt does not need expanding upon in its argument, but to paraphrase the point being made. It is not legally incompatible for highway to be registered as common land / village green and it has done many time since 1965.

The second issue made by the highway authority is that lawful use of the highway cannot be made for sports or pastimes therefore rendering the land unregisterable. I would refer to the previous point made, but also to the fact that evidence statements have been provided as part of the original application stating that various activities have been and still do take place in an open and free manner and at no time has anyone been challenged as to their right or permission, legal or otherwise.
I believe that this argument cannot stand up to scrutiny. If highway is made up of verge, footpath and carriageway, surely the law only really applies to the carriageway. Can children not run, play or ride their bikes on the footpath because it is technically part of the 'highway'? These are all considered in law as pastimes.

The Highways authority has stated that due to the size, shape and location of the land in question, namely near what it considers a busy road that it does not believe that the land lends itself to sports and pastimes. I would like to refer to the answer I gave in my previous letter concerning the rest of the objectors who made similar points.

These answers being,

1.) That there are legal definitions of sports and pastimes (which include children informally playing, walking and taking the air, walking a dog, but not necessarily for the benefit of the dog, enjoying the flora and fauna, community activities) all of these activities have taken place on the land in question by members of the local community for more than the last 20 years.
2.) Nowhere in the act is a minimum sizes or specific shape stipulated for the land to be considered for registration.

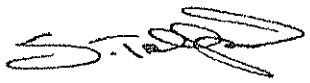
I would suggest that the just because the highways authority believes something and has stated its view, it does not change the law, or the criteria for conforming to the requirements of the application for registration.

I would also suggest that the inference being made is that the location of the land in question raises safety concerns. I would again re-iterate as in previous communications that neither I nor other members of the local community can recall any accidents or injuries taking place on this land in the last 20-30 years, and fail to see why a change of classification to the land would change that, and neither is it a material consideration for the application procedure.

I trust these points will be taken into consideration when reviewing the application.

Best Regards

Simon Telford



the application or, as previously explained at paragraphs 61 and 62, has ceased not more than two or five years before date of the application.

116 If the owner obtains the planning permission and then puts a fence round the land, and you submit an application to have the land registered, the landowner would, but for a provision in the 2006 act, have prevented registration, since use of the land for sports and pastimes has not continued up until the date of the application. Section 15 however provides that:

(a) where, on or after 6 April 2007,[55] the land has been used as of right by qualifying inhabitants for sports and pastimes for a period of 20 years and the landowner then erects the fence, an application to have the land registered may validly be made during the two years following the date of the erection of the fence (section 15(3));

(b) where, before 6 April 2007,[56] the land has been used for sports and pastimes for a period of 20 years, and (during this time) planning permission is given for development of the land but no construction work has been commenced, and the landowner then erects a fence, an application to have the land registered may validly be made during the five years following the date of the erection of the fence (section 15(4));

(c) but where before 23 June 2006, planning permission was given for development of the land, and construction work was commenced prior to that date, and the land has by reason of any works carried out in accordance with the planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes (or will, by reason of works proposed to be carried out in accordance with the planning permission, become permanently unusable by members of the public for these purposes), any application will fail in respect of such land (section 15(5)). It may, however , succeed in relation to any other land forming part of the application on which works have either not begun or although they have begun, have not rendered the land permanently unusable by members of the public, and will not do so.

Registration of a smaller area than applied for

117 As explained at paragraph 49 above, the registration authority may register a smaller area than that identified in the application if the evidence shows that the whole area does not qualify. The authority may decide that the application should be re-published, and that is a matter for its discretion.[57]

Highways

118 The 2006 act makes no reference to highway land. There is nothing to stop all or part of a highway being regarded as a town or village green if the circumstances justify this. Areas of open land alongside minor roads frequently do have a long-standing pattern of local recreational use, as opposed to one of mere passage from A to B. Many have already been successfully registered under the 1965 act.

119 Registration arguably has no effect on the highway status of the land. Equally, the 'public' status of a highway does not nullify a claim that all or part of it is a green, so long as it is clear that the recreational use (as opposed to a mere passage along the highway) which takes place there is primarily or exclusively by local people.[58] (See paragraph 44.)

Declarations

120 A landowner may be entitled to make an application to the High Court for a declaration as to whether his land is capable of being registered as a green.[59] If so, a decision of the court is likely to pre-empt any decision by the registration authority on a subsequent application (unless the facts have changed in the interim). If the landowner does attempt to

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[55] The date of the coming into force of section 15

[56] The date of the coming into force of section 15.

[57] *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 at paragraph 61 per Lord Hoffmann

[58] See for example the Commons Commissioner decisions in *re Maidstead Village Green, Hampshire* (1979) 214/D/113 and in *re The Green, Hargrave, Suffolk* (1979) 234/D/79.

[59] *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951, [2005] QB 282.

(d) 'in lawful sports and pastimes'

41 The effect of the adjective 'lawful' is to exclude sports or pastimes that are contrary to law, for example cock-fighting, badger-baiting or prize-fighting.

42 The courts have held that the taking of air and exercise comes within the ambit of 'sports and pastimes'. Other activities within the meaning of 'sports and pastimes' have been held to include the playing of organised games such as football and cricket (and the playing of such games informally), bowls, horse-riding, walking the dog, kite-flying, children's games, carol-singing, maypole-dancing, and the holding of community events such as fêtes and flower shows. Activities that have been accepted by the courts or the commissioners as within the meaning of sports and pastimes are listed in appendix 3.

43 There is no requirement that the same forms of activity must be exercised over the whole of the period of use on which the claim is made. Activities can vary according to the time of year or according to changing tastes or wishes. What is required is that some form of sports and pastimes have been exercised on the land for the requisite period. Neither is it necessary for there to have been sports *and* pastimes. One or the other will do.[25]

(e) 'on the land'

44 'Land' means all the land over which the inhabitants have indulged in lawful sports and pastimes, and can include any paths which cross the land (although the use must not have been confined to paths or tracks: such use would give rise to a public right of way and not a green). The fact that public rights of way, the surface of which belongs to the highway authority, exist across land will not preclude it from being registered as green, provided the use extends beyond them. Indeed, the actual route of a highway, or the verge of a made-up road, are capable of being part of a green.

45 As explained above (paragraphs 37-40), the fact that the land is owned by a local authority is, of itself, no bar to its registration as a green.

46 It does not matter that different parts of the land have been used for different recreational purposes—cricket on one part, kicking a ball around on another, and walking and taking the air on the rest.

47 Further, provided that the area claimed is clearly defined, it will not be a bar to registration that not every part of the land has been used for sports and pastimes. Thus the area registered can include surrounding land if this can fairly be regarded as part of the same land that has been used for lawful sports and pastimes—but it may mean that the area eventually registered is reduced. See paragraph 49.

48 It will be no bar to registration that not all of the land is accessible all of the time. For example, at times parts may be covered by dense undergrowth or by blackberry bushes.[26] In wet weather, parts may be swampy. Or parts may be made temporarily inaccessible owing to such works of improvement by the owner as drainage or levelling, grass-cutting or planting. But any activity that causes substantial interference with the use of the land for sports and pastimes, for example tipping, unless purely transient (as for mowing and rolling a field), will prevent registration.

49 It is thus a matter of fact to be decided according to the circumstances in each case whether the whole area claimed as green has been sufficiently used to support the claim. Applicants should focus the claim on land for which good evidence of general use can be adduced. However, the Open Spaces Society advises that, if in doubt, apply for a greater area since the registration authority can always reduce the area to be registered.[27]

50 The land claimed as village green must be identified by a boundary drawn on a map submitted with the application. See further

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[25] See *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 at pp 356F–357E.

[26] But where the land was 'largely overgrown with trees, brambles, nettles and other vegetation' it was unreasonable for the registration authority to have decided that the whole of the area claimed had been used for sports and pastimes. *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975 at paragraphs 30-33.

[27] *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 at paragraph 62 per Lord Hoffmann.