



DERBY CITY COUNCIL

**PLANNING CONTROL COMMITTEE**  
**19 March 2009**

# ITEM 5

Report of the Assistant Director - Regeneration

## **Application to Register Land as a Town or Village green at Ainley Close, Alvaston. Ref DER/VG/2**

### **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 Ainley Close, Alvaston, Derby as a town or village green.

### **SUPPORTING INFORMATION**

- 2.1 Derby City Council, as registration authority, received an application dated 15 October 2007 from Mr J. Hulse of 7 Ainley Close, Alvaston, Derby, DE24 8DB 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.
- 2.2 The application site, as shown on the attached plan in Appendix A to Appendix 3, is approximately 582m<sup>2</sup> in area. It forms a rough 'U' shape enclosing the southern half of the carriageway of Ainley Close. The site is made up of:
  - the southern section of the footway which bounds the carriageway of Ainley Close
  - two grassed areas on either side of the closea perimeter footway which runs around the grassed areas and gives access to the eight residential properties.
- 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 29<sup>th</sup> August 2008. The public consultation period lasted for 6 weeks and ended on 10<sup>th</sup> October 2008. During this period, we received 6 letters objecting to the application. We received a later objection in February 2009 from the Council, as Highway Authority. We also received a letter in support of the application in November 2008.
- 2.4 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.

- 2.5 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.

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

### PROCEDURE

#### Procedure

Procedure on applications to register new greens made after 6 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 (Whitney) v Commons Commissioners**<sup>1</sup> 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**<sup>2</sup>.

## 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 registered as a green, and all the elements required to establish a new green must be “properly and strictly proved”<sup>3</sup>. All ingredients of the definition must be met before the land is registered.<sup>4</sup> 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.

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<sup>1</sup> [2005] 1 QB 282.

<sup>2</sup> [2004] Ch.253 [2004] EWHC 12 Ch

<sup>3</sup> 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

<sup>4</sup> Beresford [2004] 1 AC 889 per Lord Bingham at paragraph 2.

- **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.

## **APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN AT AINLEY CLOSE, ALVASTON**

### **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 Applicant**

Mr J. Hulse of 7 Ainley Close, Alvaston, Derby, DE24 8DB

Mr Hulse has retrospectively requested that his neighbours Mr and Mrs Winfield be made joint applicants. We do not, however, consider that he can legally add applicants as requested.

### **1.3 Date Application Registered:**

15 October 2007

### **1.4 The Land to which Application Relates:**

The application land is a small area of open space that was laid out in 1947, when Ainley Close is believed to have been constructed. The land is shown on the plan in Appendix A.

### **1.5 Owner of the Land:**

The land is owned by the City Council and held for the purpose of housing. It is presently managed by Derby Homes Limited.

### **1.6 Publicity and Consultation period:**

29 August 2008 -10 October 2008

### **1.7 Evidence submitted by Applicant in Support of Application**

- Application form
- Plan identifying land
- 22 public evidence forms in total. (18, from 12 households, were submitted with the original application form and 4 further forms were submitted during the public consultation period). The list of names and addresses are in Appendix C.
- Photographs including an aerial photograph

### **1.8 Response to Consultation:**

The Council received 6 letters of objection. 5 of these were from current residents of Ainley Close. Of these 5, 2 were from Ms Danielle Hartington of 7 Ainley Close and one was from 5 of the residents of Ainley Close. The 6<sup>th</sup> letter objecting to the application was from Councillor Paul Bayliss.

An objection was received from the City Council, as highway, authority. No objection has been received from the City Council, as landowner or Derby Homes Limited, which manages the application land.

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

### **2.1 The Application Site**

The application site itself, which is approximately 582m<sup>2</sup> in area, forms a rough 'U' shape enclosing the southern half of the carriageway of Ainley Close. The site is made up of:

- the southern section of the footway which bounds the carriageway of Ainley Close
- two grassed areas on either side of the close
- a perimeter footway which runs around the grassed areas and gives access to the 8 houses.

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.

### **2.2 Ownership/History and Maintenance**

The Close, together with the houses, is post war housing constructed in the late 1940s. The 1947 Ordnance Survey plan shows the existing houses together with the existing boundaries to the land.

The houses on the Close were originally owned by the Council and used for social housing. The Close was one of a number of streets constructed for Council tenants at this time. The Close is identical in design to the neighbouring Ashcroft Close, which is also off Thorndike Avenue.

All but one of the properties in the Close are now in private ownership. No. 7 was the first house to be sold in 1969 followed by 6 others up to April 1989. No. 3 is now the only property still in Council ownership.

The carriageway, footway and grassed areas of the Close, were adopted as highway on 8 November 1957.

The Council owns the land and maintains it through Derby Homes Limited. The residents have given evidence which suggests that they assist with the mowing of the grass. A caravan is normally parked on the grassed area on the eastern side of the Close.

The Council, as highway authority, also has maintenance responsibility for the land.

### **2.3 Legal Tests**

The burden of proof 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 15 October 2007, therefore the relevant period is **15 October 1987-15 October 2007**.

## **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 Hulse submitted 22 public evidence forms with his application from 23 people representing 14 households.

- 4 evidence forms are from long-term current residents of Ainley Close, the residents of nos. 7 and 8.
- 2 are from former residents of the close, Mr & Mrs Dean, who lived at no. 4 Ainley Close but now live in Lows Close, Chellaston.
- 4 evidence forms, were from the residents of nos. 4 and 14 Thorndike Avenue, were submitted in October 2008, together with a letter dated 9 October 2008, during the public consultation period.
- One evidence form was jointly completed by Mr and Mrs Mousley of Thorndike Avenue.
- The remaining 11 forms are from houses on Thorndike Avenue.

#### **3.1.1.1 Children playing & looking after children**

15 people (8 households) stated that they used the land in connection with children's playing activities or for looking after children who were using the land. Only 8 people said that they used the land for the 20-year relevant period.

R Kerry from 1978-2007  
 J Hulse from 1947-2007  
 I Hulse from 1947-2007  
 F Mosley from 1975-present  
 Mr and Mrs Mousley from 1964-present day (2007)  
 Mr N Winfield from 1960-present  
 Mrs P Winfield from 1960-2007

7 others also used the land for playing with children or looking after them.

Mr F Dean from 1959-2000  
 Mrs M Dean from 1959-2000  
 Mr C Mosley from 1977-1981  
 I Powell from 1954-1964  
 Mr J Powell from 1945-1964  
 Mr Hambling from 1990-2008  
 Mrs Hambling from 1990-2008

In their joint letter of objection, the residents of nos. 1-5 Ainley Close referred to children, from outside the close, playing and causing a nuisance on the land.

20 people stated that they saw children playing on the land.

#### **3.1.1.2 Socialising and talking to neighbours**

13 people (9 households) said that they used the land for socialising and talking to their neighbours. 11 people said that they used the land in the relevant period.

R Kerry from 1978-2007  
 I Hulse from 1947-2007  
 J Hulse from 1947-2007  
 Mrs Martin from 1973-2007  
 Mr F Mosley from 1975-present (2007)  
 Mr and Mrs Mousley from 1964-present day (2007)  
 Mr N Winfield from 1960-present (2007)

Mrs P Winfield from 1960-2007  
Mrs P Cheetham from 1953-2008  
Mr S Cheetham from 1953-2008

2 others said that they used the land for socialising and talking to their neighbours.

Mr A Hambling from 1990-2008  
Mrs P Hambling from 1990-2008

No one said they specifically saw socialising or neighbours talking despite most of the witnesses stating that they took part in this activity themselves.

#### **3.1.1.3 Dog walking**

2 people, Mr & Mrs Winfield, said that they walked their dogs on the land. They both said that they walked their dogs daily from 1960-2007, a period of time which included the relevant period.

17 people said that they observed dog walking on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.4 Bicycle riding**

Kathy Gedman said that she rode her bicycle on the land for 7 years but gave no dates of when this took place.

13 people said that they observed people riding bicycles on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.5 Community celebrations**

Both John and Irene Hulse said that they took part in community celebrations on the land, although this appears to be a street party at sometime between 1947 and 2007.

9 people said that observed community celebrations on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.6 Team games**

Mrs M Dean said that she took part in softball and bat and ball games on the land. It's unclear whether these were proper team games, but her use of the land was from 1959-2000 and did not cover the whole relevant period.

15 people said that they observed team games on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.7 Football**

Kathy Gedman said that she played football on the land for 7 years but gave no dates of when this took place. Mr Cooke and Ms Hartington, the residents of no. 2

Ainley Close, both made reference to children playing football in the close and balls hitting their door and car, in their letters of objection.

18 people said that they observed football being played on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.8 Cricket**

No one said that they played cricket on the land.

15 people said that they observed cricket being played on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.9 Rounders**

No one said that they took part in rounders on the land.

13 people said that they observed rounders being played on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.10 Walking**

No one stated that they used the land for walking.

16 people said that they observed people walking on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.11 Exercise**

2 people, Mr and Mrs Mousley, said that they used the land for exercise.

#### **3.1.1.12 Roller skating**

2 people said that they observed roller-skating on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.13 Making snowmen**

One person said that he saw people making snowmen. No indication of the identity of users was provided.

#### **3.1.1.14 Bird watching**

2 people said that they observed people watching birds on the land. No indication of frequency or identity of users was provided.

#### **3.1.1.15 Picnicking**

No one said that they picnicked on the land.

Mrs M Dean said that she had seen people picnicking on the land.

### **3.1.1.16 Carol Singing**

No one said that they took part in carol singing on the land.

15 people said that they observed carol singing on the land. No indication of frequency or identity of users was provided.

### **3.1.1.17 Drawing and painting**

No one said that they did drawing and painting on the land.

7 people said that they observed drawing and painting taking place on the land. No indication of frequency or identity of users was provided.

### **3.1.1.18 Maintaining land**

3 people, Mrs F Dean, Mrs M Dean and Mr J Hulse said that they helped to maintain the land by cutting the grass. Ms Hartington also made reference to the fact that people on the close had been maintaining the land.

Mr J Hulse said he had seen residents cutting the grass on the land.

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

In submitting the application Mr Hulse, the applicant, failed to provide any details to identify the locality or the neighbourhood within a locality on which his claim was based upon. In fact, on the application form, he had deleted the question which required this information.

Identification of the locality or neighbourhood is often provided by means of a plan although a description by which the boundaries can be clearly identified will suffice.

Rather than rejecting the application for that omission Mr Hulse, after having had the tests explained to him by the registration officer, was requested to clarify the extent of the neighbourhood he was seeking to rely upon and justification for such.

Mr Hulse responded to this request by a letter dated 23 June 2008, however he failed to provide a clear answer to the question, stating that; "The evident boundary of adult usage is that defined by the immediate streets: Thorndike Avenue & its 2 other closes, Radford Street & Garrick Street."; also referring to the catchment area of the local schools as well as making reference to persons using the land from as far afield as London Road and Harvey Road.

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

None of the users said that they were given permission to use the land. All of the users, except, Mr Brookhouse, said that they knew who the landowner was or that Derby City Council was the landowner.

Mrs Dean stated on her form that no one had given her permission to go on to the land. She stated "assuming that the greens in Ainley Close were public green spaces, we thought they were for the enjoyment of all of us." Mr and Mrs Mousley said that "permission wasn't needed for such small events."

## **3.2 Evidence Provided against Application**

The Council received 6 letters of objection. 5 of these were from current residents of Ainley Close. Of these 5, 2 were from Ms Danielle Hartington of 7 Ainley Close and one was on behalf of 5 of the residents of Ainley Close. The 6<sup>th</sup> letter objecting to the application was from Councillor Paul Bayliss. A list of those residents who objected to the application can be found in Appendix D.

**3.2.1** Mr Cooke stated that the applicant made the application because he was concerned about landownership issues. He also stated that the only accessible grass was the section outside his house at no. 2 Ainley Close as the grass on the other side of the close is used for parking cars. He did not want children being dropped off to play outside his home.

**3.2.2** Ms Hartington stated that she considered that the application was being made because the applicant was aware that she had the chance to buy or rent the area in front of her house from the Council. She considered that the small size of the land meant that events such as fairs, fates and galas could not take place.

**3.2.3** Mrs Smallman stated that the land was very small. She was also aware of a concern about future landownership in the close.

**3.2.4** Councillor Bayliss, local ward Member for Alvaston, stated “before the construction of Ainley Close, Thorndike Avenue and Ashcroft Close, the whole area was fields and at no time was it designated or intended to be a village green.

He questioned the possibility of holding large social events on the land and stated that “the land is not suitable for any games involving a substantial number of players.” He questioned whether cricket could be played on the land because of its small size. He also believed that the land “does not lend itself well to use for ball games, for the same reason.”

Councillor Bayliss also stated that Derby City Council was the landowner and that Derby Homes managed the land. He considered that social activities have been undertaken by local residents “by the consented licence of the landowner.” He also stated that residents have used the land “with tacit permission” of the Council.

He also suggested that the application had been made following the Council’s proposal to dispose of the community grass areas in the close.

**3.2.5** The residents of nos. 1-5 Ainley Close sent in a joint letter stating a number of reasons why they objected to the application but none of those offered evidence directly relevant to the application. They did, however, make the point that they considered that future landownership issues were the main reason for the application being made. They also made the point that the applicant has tried to deter children’s play in the past which contradicts his desire for a town or village green.

**3.2.6** 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.” In line with the regulations, I have informed the applicant of the Highway Authority’s comments.

### **3.3 Applicant’s response to objectors**

Mr Hulse, the applicant, submitted a 4 page handwritten letter dated 12th November 2008, which is included in Appendix F. He also included a letter of support from Mrs Peggy Winfield, the resident of no 8 Ainley Close, which can be found in Appendix E. Mrs Winfield had also completed an evidence form.

In his letter, he commented on the generic and specific points made by the objectors. He specifically disputed Councillor Bayliss’ argument that the residents had been using the application land with the permission of the Council.

He stated that the proposed sale of the application land to residents had “forced us into this application, in order to keep the use of the land as it has been for 60+ years.”

In order to make sure the applicant has had the opportunity to deal with all matters relating to his application, we have reconsulted him.

## **4. Findings of Fact**

In order to have the land registered as village green the applicant is 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.
- 4.2 ...on which for not less than 20 years...**In this case the relevant period is 15<sup>th</sup> October 1987-15<sup>th</sup> October 2007. There is limited evidence of use throughout this period.
- 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.

It is questionable, judging by the applicant's submissions, whether he fully understands the tests that he must meet. However, as the applicant, the onus inevitably rests with Mr Hulse to understand and meet those tests.

On the initial application, Mr Hulse failed to provide any information on this matter, in fact, he deleted the question. Having been given an opportunity of rectifying that omission, he responded by stating that "the boundary of adult usage is that defined by the immediate streets: Thorndike Avenue and its 2 other closes, Radford Street and Garrick Street." In addition, he also made somewhat vague references to "the school catchment area" although without specific reference to the school and also to use by persons as far afield as Harvey Road and London Road.

### **Neighbourhood**

In terms of the area identified constituting a neighbourhood for the purpose of the test. Neighbourhood suggests an identifiable area with sufficient cohesion. Simply identifying the immediate adjacent streets to the land where most users of the land are said to live, as the applicant has done, is therefore not considered sufficient for the purpose of establishing a neighbourhood.

There is nothing evident to suggest that the streets identified by the applicant form a single, separate, cohesive neighbourhood or can be viewed any differently in that regard from any of the other adjacent streets, nor clearly evident to be able to identify a particular neighbourhood that users may come from. The burden of establishing such however rests with the applicant.

Whilst reference is also made by the applicant to "the school catchment area", it is unclear what area this refers to. In some cases, a school catchment area might be relevant in identifying a neighbourhood, it is however unlikely to have great evidential weight in that regard and certainly will not by itself suffice for determining such.

### **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. A school catchment area or the streets named would accordingly not be a locality area for the purpose of the test.

The land is located within the ward of Alvaston, which is an administrative area of Derby City Council. The ward of Alvaston has a population of around 14,600 people, according to the latest UK Census data (2007). It stretches from the main north-south railway line just outside the city centre to the city boundary one way and from the River Derwent to the spider island roundabout on the junction of the A514 and Outer Ring Road, the other.

The application land is wholly located within the ecclesiastical parish of St. Mary's Church.



## **Conclusion**

The areas put forward by the applicant are, for the reasons given above, not sufficient in terms of cohesion and identity to be considered as a neighbourhood, nor can be considered as a locality for the purpose of the test.

Whilst no area capable of constituting a locality has been suggested by the applicant, the application site falls within the ward of Alvaston and ecclesiastical parish of St Mary's Church and the boundaries of the City of Derby, which are areas that can constitute localities.

The application can therefore be assessed against these localities for assessing whether the land has been used by a significant number of the inhabitants of any locality. The assessment of which is probably more appropriately addressed in conjunction with the assessment of use in 4.4 below.

### **4.4...have indulged in lawful sports and pastimes...**

#### **Children's play and looking after children**

Undisputed evidence was provided that children from Ainley Close and at times from Thorndike Avenue together with their friends played on the land throughout the relevant period, which sometimes was done under adult supervision. Such use is considered consistent with the nature and location of the land. We conclude that such use as described above did take place.

#### **Socialising**

Undisputed evidence was provided of persons from Ainley Close using the land for socialising throughout the relevant period. As with children's play this would be a use expected to occur on the land. We therefore conclude that such use as described above did take place.

#### **Dog walking**

Several witnesses claimed to have seen dogs being walked on the land, but gave no details as to the owners so as to enable a finding to be made. In fact, only one couple from Ainley Close claimed to have walked their dog on the land. Given the nature of the land one would expect such a use taking place, however given the surprisingly somewhat sparse evidence on this use, whilst accepting dog walking took place, it is not possible to attribute such to any particular group for the purpose of establishing use by inhabitants of a neighbourhood or locality.

#### **Community celebrations**

Only one couple the applicant and his wife said that they took part in any defined type of community celebrations, namely a street party. No specific date was given for this and it could well have occurred prior to the relevant period. No one else providing evidence referred specifically to this taking place, although others said that they had witnessed celebrations taking place. It is however unclear as to the nature of these activities their frequencies or when they occurred. If such events did take

place at all within the relevant period, the lack of evidential detail suggests that they were limited and at best infrequent.

### **Team games, football, cricket, rounders and other ball games**

The evidence suggests that such uses as described largely related to children's games. Photographs supporting this have been provided showing children playing cricket on the land. Reference is also made by 2 of the residents in Ainley Close, who object to the application, of ball games by children being a nuisance in the Close.

Only 2 people gave evidence that they actually used the land for these types of activities, however whether this was with other adults or primarily in the context of children's play is unclear. Given the size and nature of the land which limits the type of team games that could take place on the land and the fact that there is no specific reference in any of the other evidence to adult games of this nature taking place on the land we conclude that such activity was primarily in reference to children's games.

### **Walking, bicycle riding, roller-skating and exercise**

One person claimed to have used the land for cycling and 2 for exercising. No details of the context of such have been given and there is no supporting evidence from the other evidence forms for these uses. It is certainly not clear how the land could be used for cycling, except in the context of children cycling on the land.

A large number of those submitting evidence forms state they witnessed people using the land for walking, however no identities of the people seen were provided and the context of this activity is unclear. In the context of the land, it is more likely that such walking related to the usual day-to-day access to and from the Close than in a pure recreational context.

2 people also claim to have seen roller-skating. Whilst consistent with children play, no details were provided as to the nature context or individuals involved as to be able to place any great weight on such.

### **Bird watching, picnicking, carol singing, drawing and painting, making snowmen**

These were activities witnessed by a number of those completing the evidence forms, although no one claimed to have taken part in such and no details of who took part in such activities was provided. Given the context of the land these are all activities that are highly likely to have taken place, in the context of playing by children from the Ainley Close. In this context we accept that these activities are likely to have taken place however by their nature are likely to have been rare events or at best occasional.

### **Maintaining land**

3 people said that they helped maintain the land. Maintenance of land is not normally regarded as a recreational use.

## **Conclusion**

There is clear uncontested evidence that the residents of Ainley Close have used and enjoyed the land for recreational purposes.

Children from Ainley Close and at times from Thorndike Avenue together with their friends have undoubtedly played on the land, sometimes with adults or under adult supervision, throughout the relevant period if not for longer. It is reasonable to assume that such play included many of the activities described in the submitted evidence, namely; the various types of ball games described, use of bikes, roller skating, painting, drawing as well as more family orientated activities such as picnicking.

Adults from Ainley Close also appear to have used and enjoyed the land, although perhaps to a lesser degree than the children. Besides activities involving participation with their children, the land has provided an area for residents of Ainley Close to socialise as well as for individuals to do other leisure or recreational activities.

The type and nature of such activities are consistent with the type and nature of activities that one would expect to take place on this type of land. The land was, as far as can be ascertained designed to provide an amenity area for the residents of Ainley Close when the Close and surrounding estate was built. Other closes have similar areas. It is therefore not surprising to find that the residents of the Close have accordingly taken advantage by using such together with friends and neighbours.

The use by other persons beyond Ainley Close or Thorndike Avenue is on the evidence limited, and indicates such use, as there was, to be largely by children visiting their friends in Ainley Close.

There is no doubt however that the residents in Ainley Close and some residents in Thorndike Avenue have indulged in lawful sports and pastimes on the land for the relevant 20 year period.

This use however has to be judged in the context of a neighbourhood within a locality or the locality itself, and whether a significant number of inhabitants from such have indulged in such use. In this regard, referring back to the conclusions in paragraph 4.3 above, no appropriate neighbourhood has been identified. In terms of locality the smallest recognisable locality is the ward of Alvaston. Both in terms of numbers of users compared to population size and in terms of distribution of users within that locality, it cannot reasonably be said that a significant number of inhabitants indulge or have indulged in the land for lawful sports and pastimes or any other purpose whatsoever. Accordingly, for this reason the application must fail in terms of the land or any part of the land.

### **4.5...as of right...**

The Council's records show the whole of the application land becoming adopted highway in November 1957.

Although highway is capable of being registered as village green, it is not possible, by law, for the inhabitants to acquire such rights simply by indulging in sports and pastimes on the highway itself.<sup>1</sup>

As all of the land on which the claimed use arises has been highway since 1957, 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.

Although the events and intentions prior to 1957 when the land is said to have become adopted highway have limited bearing on the application itself, it is perhaps worth noting that, had the land not become adopted highway, one cannot escape the fact, that the land was part of the overall design of Ainley Close, a design reflected in nearby closes of the same period, when the Close and surrounding estate was built by the Council in 1947. Although no evidence has been provided of express permission being given by the land owner at any point during this time for persons to use the land, it is hard not to conclude that the land was specifically designed and intended to provide an amenity area for the residents of the Close, a fact that the applicant himself agrees. It is reasonable in these circumstances to imply that permission was being given to the residents to use the land for recreation and leisure including lawful sports and pastimes, by the Council, as housing authority at the time when it was first provided.

## **Conclusion**

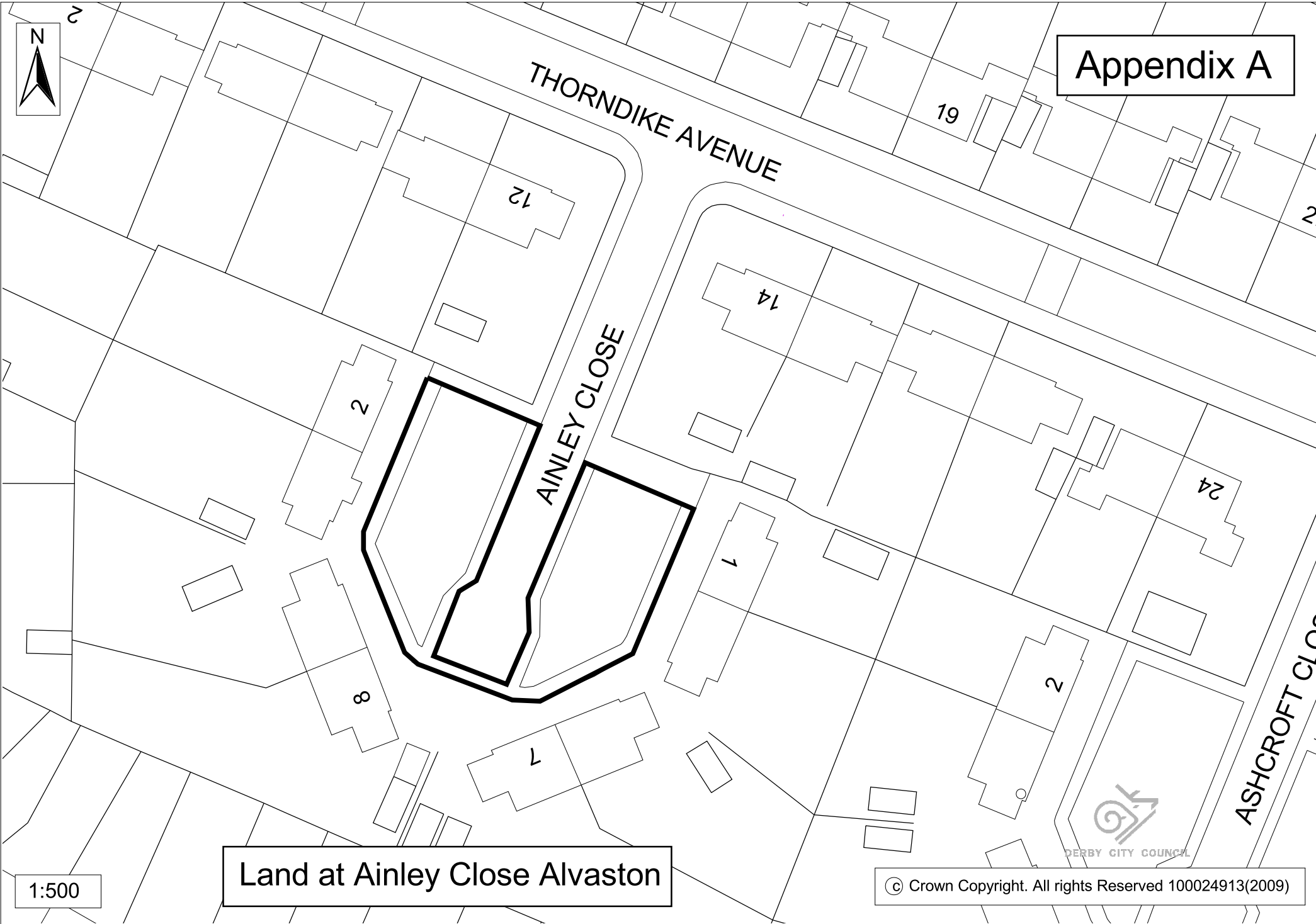
As all of the land on which the claimed use arises has been highway since 1957, it would accordingly not be possible for inhabitants of the locality to, by use of the highway alone, acquire a right to indulge in lawful sports and pastimes over such.

## **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.

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<sup>1</sup> See Common Commissioner decisions in re The Green, Hargreave, Suffolk (1979) 234D/79 and Lower Penn, Staffordshire (1980) 233/D/31

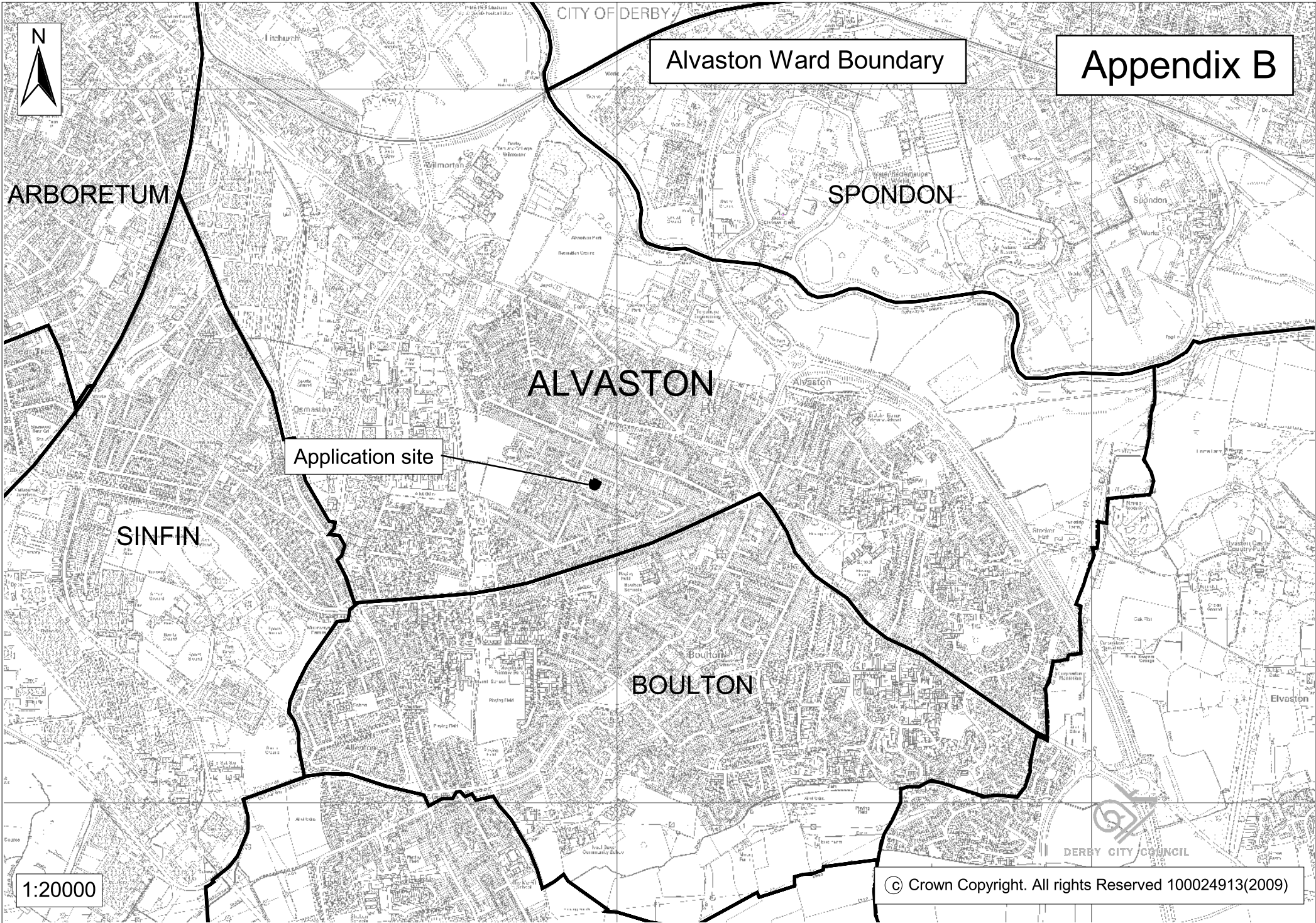


Land at Ainley Close Alvaston



Alvaston Ward Boundary

Appendix B



1:20000

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## **Appendix C**

### **Supporters of application who submitted public evidence forms**

Mr Paul Brookhouse of 36 Thorndike Avenue, Alvaston, Derby, DE24 8NZ  
Mrs Patience Cheetham of 4 Thorndike Avenue, Alvaston, Derby, DE24 8NZ  
Mr Sydney Cheetham of 4 Thorndike Avenue, Alvaston, Derby, DE24 8NZ  
Mrs Mary Dean of 17 Lows Court, Chellaston, Derby, DE73 6NJ  
Mr Frederick Dean of 17 Lows Court, Chellaston, Derby, DE73 4NJ  
Kathy Gedman of 10 Thorndike Avenue, Derby, DE24 8NZ  
Mr Ashley Hambling of 14 Thorndike Avenue, Alvaston, Derby, DE24 8NZ  
Phyllis Hambling of 14 Thorndike Avenue, Alvaston, DE24 8NZ  
Irene Hulse of 7 Ainley Close, Alvaston, DE24 8PB  
John C Hulse of 7 Ainley Close, Alvaston, DE24 8PB  
R Kerry of 5 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
Susan Kerry of 5 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
Mrs Martin of 33 Thorndike Avenue, Alvaston, Derby  
Mr C A Mosley of 32 Thorndike Avenue, Alvaston, Derby, DE24 8NZ  
Mr Frank Mosley of 42 Thorndike Avenue, Alvaston, Derby  
Mr Raymond & Mrs Jean Mousley of 3 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
Irene Powell of 11 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
Mr Joseph Powell of 11 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
L Thornhill of 51 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
Robert Thornhill of 51 Thorndike Avenue, Alvaston, Derby, DE24 8NA  
Mr Norman Winfield of 8 Ainley Close, Alvaston, Derby, DE24 8PB  
Mrs Peggy Winfield of 8 Ainley Close, Alvaston, Derby, DE24 8PB

## **Appendix D**

### **Responses opposing application**

#### **Letters**

Ms Danielle Hartington of 2 Ainley Close, Alvaston, Derby, DE24 8PB; 8 October 2008

Ms Danielle Hartington of 2 Ainley Close, Alvaston, Derby, DE24 8PB; undated

Mr M. Cooke, 2 Ainley Close, Alvaston, Derby, DE24 8PB; 18 August 2008

Mrs C. Smallman, 3 Ainley Close, Alvaston, Derby, DE24 8PB; 18 August 2008

Councillor Paul Bayliss, Council House, Corporation Street, Derby, DE1 2FS; 2 October 2008

Residents of Nos. 1, 2, 3, 4, 5 Ainley Close, Alvaston; undated

Derby City Council, as Highway Authority; 23 February 2008



## **Appendix E**

### **Response supporting application**

#### **Letter**

Mrs P Winfield, 8 Ainley Close, Alvaston, Derby; 12 November 2008

## Appendix F

### **Applicants' responses to responses opposing application**



Yan ret RB/CG  
Date 17/10/08

7, Ainley Close  
Alvaston  
Derby.  
DE24 8PB  
01332 752235

Re - 'Green' status for AINLEY CLOSE.

12/11/08

Dear Mr Brown,

Thank you for the copies of objections received for the above application. These are my comments on the objections.

• Councillor Bayliss:

He gives 3 reasons for opposition.

1. This is irrelevant.
2. He 'doubts' that you could play cricket, etc. "The land is not suitable" etc. Yes it is, & we have been doing exactly that for 60 years. He also says it is bounded on 3 sides by road. Has he actually seen it? It is nothing of the sort. It is bounded on all sides by residents' gardens, fenced or unfenced, in almost a complete circle. The only bit that isn't is the single road access thro' the middle of one side.
3. He may think we have had the permission of the Council to use it. Where is his proof? I have supplied about 23 testimonies all of which state no permission of any sort has ever been given.

His reasons for promoting the sale of this land to residents (which has forced us into this application, in order to keep the ~~the~~ use of the land as it has been for 60+ years) is claimed to be driven by the number of requests of the residents. But his Appendix 2 shows in fact only 2 houses of the 8 in Ainley Close have shown any interest in buying or leasing the land. Incidentally in Appendix 2 there is a blank line against 8, Ainley Close. In fact Mr & Mrs Winfield are completely against the land being sold off, & they & I have jointly prepared this application.

- Now to the objections from within Ainley Close.

The majority of these stem from a single source: N°2 Ainley Close — Mrs D Hartington & her partner Mr M Cooke — who account for 3 objection letters, plus 2 more sent to Cllr Baylis. It is Mrs Hartington, too, who has orchestrated the 'joint letter'. There is one other objection: from Mrs Smallman at N°3, who has also signed the 'joint letter'.

N°2 is the only house in the Close without a driveway & garage. In fact, in the diagram in the application, we have deliberately left on that side of the Close a strip of land, not included in the application, that allows for a driveway for N°2, exactly mirroring the driveway for N°1. Mrs Hartington was quoted for such a driveway by the Council not long after moving in, but did not go ahead & have it done. Consequently her vehicles have to be parked on the road. But if the application is successful she will therefore still have the same opportunity as now, to install a driveway & garage.

It is regrettable that these objection letters have included personal attacks on my supposed character, & have ascribed entirely spurious motives to me, in submitting this application. There is nothing to be gained by rising to them.

- Mr Cooke's letter shows that he doesn't seem to have grasped that the land in front of his house, beyond his front garden, is public land. He claims to be annoyed that I, & particularly the residents of Thandike Avenue, should be concerned with it. Currently we all own it: it is a public amenity. He has been here only a couple of years. No wonder people whose children played on it ~~for~~ years before he came here, & still appreciate its open aspect, object to it becoming his property. That's why they support the 'Village Green'

- Mrs Hartington's letters seem to boil down to being mainly concerned about a sudden influx of unwelcome outsiders who

will cause mischief. I too would be worried by that, but I believe it is no more likely than now. It is public open space now & would still be so if the 'green' application is successful. Claims of personally maintaining the public grass areas are not true. We have never seen it! That is not to say that most people in the Close have not done some maintenance on the odd occasion, ~~the~~ during the whole 60 year period, such as mowing a section of the public grass, but it is extremely rare, & never sustained. Not that this point has any relevance to the application.

- Mr Smallman's letter: again boils down to 'keep the close for the residents'; & that we who have made use of the public land for years & may continue to do so, should not object if it is sold off for their personal benefit. It's hard to credit the selfishness of this argument.

Also the letter contains several inaccuracies or plain untruths. The phrase "verbally abused" usually means sworn at. Since neither I nor my late mother, ever swear, we have never done so at her or any other children. However when her kids or friends have continually kicked footballs at our front door, naturally we've gone out to clear them off, as have every other resident in the close. It is a pity the parents don't teach their kids to respect other people's property. Again, though, I'm sure none of this has any relevance to the application. The 'tree incident' which she seems to have got completely wrong, concerned a lad climbing up my ornamental tree (again, on my property, not the public land) & breaking a particularly attractive branch. Her claims that she doesn't allow her children to play on the front (ie. in the close) is just laughable. That's almost always where they play, & most of the time perfectly properly. But why would she try & claim otherwise? That's what the Close is for! We want them to play in the Close.

- The joint letter (8 points)

1. As before. I've covered this aspect already.
2. This is just sensationalism. Vast speeds my foot! It is a cul-de-sac & 50 yards long!
3. Similar again to 1. The grass areas (always referred to as 'small' by the objectors, including Cllr. Bayliss, as if this will help to stop them being a 'green'), have always been the same distance from the same lounge windows. There are small front gardens as a 'buffer' zone. Nevertheless they have been used for play areas for many generations of kids. Why should the quality of life change, if by making the Close a 'green' this was guaranteed to continue into the future?
4. Just fantasy. Although one person submits the application, it is only after consultation & agreement with a whole bunch of like-minded individuals. Someone has to be the spokesperson.
5. All I've stressed is that in private hands, anything can happen. Councils change. Planning laws change. Owners change. 'Green' status guarantees us our open space in law.
6. Childish personal attack.
7. Hard to see how any of this is a valid objection. It is personal again, mostly untrue, & yet 5 people have signed it. It is very possible some of them have not taken the time to read & digest what they are signing. Two of the signatories are new to the Close, have no kids, & cannot know me at all: we've barely spoken half a dozen sentences.
8. Hyperbole again. Relatively speaking, we have had almost no incidents of nuisance or damage in this Close. The police must have records: they'll be hard pushed to find ours. I reckon anybody in real 'nuisance' areas would jump at the chance to have our peace & quiet.

Finally there's an additional letter from Mrs Winfield next door to me who seems concerned about attempts to personalise the issues, that you said you would also consider.

Yours faithfully John Huber