Commons Act 2006 – TVG Application Reference NVG37

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COMMONS ACT 2006

APPLICTION MADE UNDER S.15(2) OF THE COMMONS ACT 2006 BY LIAM HOLMES AND SIMON ANDERSON

LAND DESCRIBED AS COLLEGE FIELDS. ROLLESTON ON DOVE, STAFFORDSHIRE.

REGISTRATION AUTHORITY REFERENCE: NVG37.

SUMMARY OF LEGAL ARGUMENTS FOR THE OBJECTOR

Introduction

1. Pursuant to the Inspector's amended directions, paragraph 11.5, the Objector has set out a summary of the legal arguments on which it intends to rely at the forthcoming public inquiry.

Qualifying Period

2. The application is made pursuant to s.15(2) of the Commons Act 2006. The application is dated 9 April 2013. As such, the relevant qualifying period must include the 20-year period between 9 April 1993 and 9 April 2013.

The Standard and Burden of Proof

3. The burden of proving all relevant parts of the qualifying requirements set out in s.15(2) rests with the Applicants.
4. The standard of proof is the balance of probabilities. However, when evaluating the evidence, the decision maker should have regard to the guidance given by Lord Bingham in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, para.2.

The Qualifying Requirements

5. The application having been made under s.15(2) of the 2006 Act, the Applicants must demonstrate:
    a. That the land has been used for lawful sports and pastimes;

b. By a significant number of the inhabitants of a locality or of a neighbourhood within a locality

c. As of right;

d. For a period of not less than 20 years ending with the date of the application.

Use of the land for lawful sports and pastimes

6. The Applicants must demonstrate that the land was used for the whole of the relevant qualifying period.

7. As a matter of fact, for a material part of the qualifying period, the land was laid out and was used for sports and recreation by students and others associated with the College of which the land formed a part.

8. Aerial photographs show the layout of the application land, including the presence of maintained playing pitches and other sports facilities.

9. Those parts of the land so laid out would not and could not have been used for lawful sports and pastimes by local inhabitants when in use by the College.

10. It follows therefore that it cannot sensibly be concluded that the whole or indeed any material part of the land has been used for lawful sports and pastimes throughout the whole of the relevant qualifying period.

11. This is not a case of co-existing uses. The majority of the land cannot sensibly be claimed to have been available for use or indeed used when laid out as playing pitches and when so used by the College. A relationship analogous to *R (Lewis) v Redcar and Cleveland BC* [2010] 2 AC 70 or in *TW Logistics v Essex County Council* (2018) 3 WLR 1926 does not arise.

12. Moreover, any trespassory use of the land post-closure of the College which is relied on by the Applicants and which involved use of worn paths or circuits within or around the land would not amount to a lawful sport or pastime (see *Oxfordshire County Council v Oxford City Council & Robinson* (2006) 2 AC 674; *R (Laing Homes Ltd) v Buckinghamshire County Council* (2004) 1 P&CR 36).

Use by a significant number of local inhabitants

13. The Applicants rely on the Parish of Rolleston on Dove (application form part 6).

14. A parish can amount to a locality.

15. However, there is required to be demonstrated use throughout the qualifying period by a significant number of inhabitants of that locality, so as to demonstrate "general use by the local community" (see *R (McAlpine Ltd.) v Staffordshire County Council* [2002[2 PLR 1 at para.71.
16. The evidence submitted in support of the application in numerical terms fails to cross this threshold.

Use *as of right*

17. Use *as of right* requires use without force, stealth or permission
18. No issue of use by stealth arises here.
19. With regard to use by force, physical force is not required. Use following steps taken by a landowner to resist trespassory use is sufficient to render use other than as of right (see *Lewis* above).
20. In the present application, the evidence demonstrates that in the late 1990s and again in 2005 notices were erected around the land to prohibit trespass. The terms of those notices are set out in evidence and those terms were arrived at following legal advice. The purpose of the notices erected in 2005 was clearly in response to trespass and was intended to prevent acquisition of adverse rights. The erection of these notices took place alongside a practice of consistent refusal by the landowner to permit community use of its land. It also took place alongside the submission of a declaration pursuant to s.31 of the Highways Act 1980 the effect of which was to resist accrual of public highway rights. The erection of such notices was in and of itself sufficient to render any trespass forcible (see *Winterburn v Bennett* [2017] 1 WLR 646).
21. Moreover, the evidence demonstrates that the land was enclosed by fencing and hedges during the qualifying period. Some entry onto the land via gaps created in the fence and hedges is suggested in evidence. Fencing of land is a further means by which trespass can be resisted. Entry onto land via gaps created in hedges or fences is such as to render entry forcible. This is the case even through an individual may not have created the gap in the fence or hedge personally (see *Taylor v Betterment Properties Limited* (2012) P&CR 3).
22. Some community groups were given permission to use College facilities. Such use would be permissive and not therefore as of right.

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10 February 2019.

The Queen on the Application of Alfred McAlpine Homes Limited v Staffordshire County Council

CO/2653/2001

High Court of Justice Queen's Bench Division The Administrative Court

17 January 2002

Neutral Citation Number: [2002] EWHC 76 (Admin)

2002 WL 45309

Before: Mr Justice Sullivan

Thursday 17th January, 2002

Representation

Mr H Wolton QC and Mr R Green (instructed by Laytons) appeared on behalf of the Claimant.

Mr C Mynors (instructed by Staffordshire County Council) appeared on behalf of the Defendant.

JUDGMENT

MR JUSTICE SULLIVAN:

1. This is an application for judicial review of a decision by the Staffordshire County Council's regulatory committee at a meeting on 23rd May 2001 to accept an application for the registration of land at Ladydale Meadow, Leek, as a town or village green for the reasons set out and in relation to the land defined in the report of an independent inspector, Mr Vivian Chapman of counsel, dated 25th April 2001.

The Statutory Framework

2. The Commons Registration Act 1965 ("the Act") makes provision for the registration of common land or town or village greens. As amended by section 98 of the Countryside and Rights of Way Act 2000 , section 22(1) of the Act defines a town or village green as follows:

> "'Town or village green' means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or which falls within subsection (1A) of this section.
>
> "(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either —
>
> "(a) continue to do so, or
>
> "(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

3. As at the date of the inspector's report no provisions had been prescribed but that is of no consequence since paragraph (b) of subsection (1A) has no relevance for present purposes.

4. The council is under a duty as registration authority to maintain a register of common land and a register of town or village greens (see sections 1 to 3 of the Act).

5. Section 13 deals with the amendment of registers:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where —
>
> > "(a) any land registered under this Act ceases to be common land or a town or village green; or
> >
> > "(b) any land becomes common land or a town or village green ..."

6. The High Court has power to order rectification of registers under section 14.

> "The High Court may order a register maintained under this Act to be amended if —
>
> > "(b) the register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;
>
> "and, in either case, the court deems it just to rectify the register."

7. The relevant regulations are the Commons Registration (New Land) Regulations 1969 , as amended ("the Regulations").Regulation 3(1) provides:

> "Where, after 2nd January 1970, any land becomes common land or a town or village green, application may be made subject to and in accordance with the provisions of these Regulations for the inclusion of that land in the appropriate register and for the registration of rights of common thereover and of persons claiming to be owners thereof."

8. An application must comply with the requirements set out in regulation 3(7). These include in paragraph (a) the requirement that an application must be:

> "In Form 29, 30, 31 or 32 as appropriate."

9. Form 30 must be used where application is made for the registration as a town or village green of land which became so registerable after 2nd January 1970. The form requires the applicant or applicants to describe the land which is the subject of the application. In part 3 of the form the applicant must give:

> "Particulars of the land to be registered, ie the land claimed to have become a town or village green."

10. And must give the name by which the town or village green is usually known, the locality and the:

> "Colour on plan herewith".

11. Regulation 5 deals with the disposal of applications. Paragraph (4) provides:

> "Subject to paragraph (7) below, a registration authority shall, on receipt of an application,--
>
> > "(a) send a notice in Form 33, 34 or 35, as appropriate, to every person (other than

the applicant) whom the registration authority has reason to believe (whether from information supplied by the applicant or otherwise) to be an owner, lessee, tenant or occupier of any part of the land affected by the application, or to be likely to wish to object to the application;

"(b) publish in the concerned area, and display, such a notice as aforesaid, and send the notice and a copy of the application to every concerned authority;

"(c) affix such a notice to some conspicuous object on any part of the land which is open, unenclosed and unoccupied, unless it appears to the registration authority that such a course would not be reasonably practicable.

"(6) Every concerned authority receiving, under this regulation, notice and a copy of an application should forthwith display copies of the notice, and shall keep the copy of the application available for public inspection at all reasonable times until informed by the registration authority of the disposal of the application.

"(7) Where an application appears to a registration authority after preliminary consideration not to be duly made, the authority may reject it without complying with paragraph (4) above, but where it appears to the authority that any action by the applicant might put the application in order, the authority shall not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

12. Regulation 6 relates to the consideration of objections and provides in paragraph (1):

"As soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority shall proceed to the further consideration of the application, and the consideration of statements (if any) in objection thereto, in accordance with the following provisions of this regulation."

13. Those provisions require inter alia that copies of the objections to the application must be sent to the applicant, who must be given a reasonable opportunity of dealing with the matters contained therein.

14. Regulation 7 determines the method of registration and provides in paragraph (1):

"Where a registration authority accepts an application, it shall make the necessary registration, following as closely as possible whichever of the Model Entries 4 and 7 to 12 may be applicable, with such variations and adaptations as the circumstances may require ..."

Factual Background

15. The factual background is set out in some detail in the inspector's report. It can be summarised as follows. The town of Leek has a population of about 20,000. Open country comes close to the centre of the town in the southeast sector. Within that sector is Pickwood Hall, a mansion which stands on a hill, surrounded by trees. To the west of the hall there is a large field of about 20 acres, known to local people as Ladydale Meadow. The meadow was formally part of the parkland of the hall. It slopes steeply down to a valley on the west and streams run down the west and south sides of the meadow to meet at the southwest corner. Two public footpaths, numbers 26 and 27, run down from the centre of Leek to meet near the northwest corner of the meadow, and at that point just outside the meadow there is a ancient well known as Lady of the Dale, or Ladydale Well. From there a public footpath runs from the well in a southerly direction on the west side of the stream down the valley. Also near the well there is a stile which gives access to Ladydale Meadow. From the stile a private right of way crosses the meadow in an east-west direction and passes through a pair of stone gateposts at the edge of the woodland surrounding the hall. At the southwest corner of the meadow there is a pair of stone gateposts, from which a disused carriage drive climbs up and across the meadow to the hall. The meadow consists of rough, unimproved grassland and is wet towards the bottom of the valley.

16. To the west of the valley there is a housing estate known as the Ladydale Estate. There are 71 houses within the estate, with a population of some 200. The meadow was allocated as part of a proposed housing site in the Staffordshire Moorlands local plan, which was adopted in 1998. In 1999 Alfred McAlpine Homes (Northwest) Limited applied for planning permission to build 24 houses on the meadow. The council failed to determine the application within the prescribed period and so McAlpine appealed to the Secretary of State. Following a public inquiry the inspector allowed the appeal and granted planning permission on 30th June 2000.

17. The application under the Act was made on 27th October 1999 by a Mr Brown and a Ms Kerr. The application described the land claimed to have become town or village green as follows:

> "Name by which usually known: Ladydale Meadow.
>
> "Locality: as shown on map. Exhibit (A).
>
> "Colour on plan herewith: outlined in yellow."

18. The plan had attached to it explanatory notes which said that:

> "The area in question is outlined in neon yellow.
>
> "It is marked on the northern boundary by a marked public footpath and a dotted black line.
>
> "To the east, we would like the area registered to be as far as the line marked in red on the map.
>
> "To the south, again, following the black dots and public footpath to the junction with the line marked in red.
>
> "To the west, still following the dotted line alongside the stream, back northwards to the footbridge near the Ladydale Well."

19. The description said that the area comprised a gently sloping meadow and near the bottom of the slope there was an area of wetland encompassing a seasonal pond.

20. The inspector described the boundaries of the application. He noted that the obvious intention of the applicants was to try to trump the outstanding planning application, but continued:

> "However, it appears to me that the motive of the applicants is legally irrelevant to the question whether the application land has become a town or village green, although it is a factor to be taken into account when assessing the credibility of the witnesses who gave evidence in favour of the application."

21. He then dealt with procedural matters.

22. One of the applicants appeared in person on behalf of those who supported the registration of the meadow as a town or village green. He called witnesses and submitted numerous written statements. Mr Wolton QC appeared for the objectors and called a witness and submitted a written statement.

The inquiry ran over two days and the inspector received final submissions in writing, having held an accompanied site view.

23. In part 4 of his report the inspector set out both the old and the new definition of town or village green. By the new definition, I mean the definition as amended by section 98 of the Countryside and Rights of Way Act 2000 (see above). At the inquiry there was some debate as to whether the old or the new definition should be applied. The inspector's view was that he should apply the new definition and for the purposes of this hearing the parties are agreed that he was right to do so.

24. The inspector then set out the evidence for the applicants. He noted by way of introduction that 16 witnesses gave oral evidence for the applicants and in addition the applicants relied on numerous written statements. The inspector set out the evidence in considerable detail and analysed it with meticulous care. Mr Wolton very fairly accepts that he cannot challenge the inspector's summary of the witnesses' evidence nor the inspector's assessment of the credibility of the witnesses. He does challenge the conclusions that the inspector drew from the evidence.

25. It is unnecessary for present purposes to rehearse all the evidence for the applicants in detail. The inspector concluded that two of the 16 witnesses were really of no assistance in relation to the matter that he had to decide. Of the remaining 14 witnesses, six were able to give evidence covering the whole of the 20-year period. The remaining eight witnesses were able to give evidence which dealt with varying periods. One witness, for example, was able to give evidence going back to late 1980. Another witness was able to speak of what had occurred in the 1930s. Another had not moved to Pickwood Hall until November 2000. Since the inspector referred, in particular, to the six witnesses who were able to give evidence in relation to the whole of the 20-year period, it is sensible to refer very briefly to what he said about those witnesses.

26. First there was Mr Yates, who had been born in Leek in 1931 and lived there all of his life. For the last nine years he had lived on the Ladydale Estate. The inspector said that he gave evidence that, for 20 years or more, he had regularly walked in the meadow and in more recent times with his dog. He had seen other people walking on the meadow.

> "Since moving to the Ladydale Estate he sees people walking on the meadow on most of his visits. He recognises up to 15 of the people as from the Ladydale Estate, although some come from further afield."

27. The inspector said that Mr Yates's evidence was not wholly consistent, but he accepted the broad thrust of his evidence, to the effect that he had been using the meadow for informal recreation without the permission of the landowner on a frequent basis for more than 20 years and that many others had been doing the same.

28. Mr Northcott was born in 1967 and had lived in Leek all his life. Since 1990, he had lived on the Ladydale Estate. He said that he had used the meadow for informal recreation for well over 20 years. As a child, he remembered playing hide and seek all over the meadow. He acquired a dog, or possibly a dog acquired him, in 1990 and he walked it twice a day in the meadow until it died in 1998. The inspector records him saying:

> "On many occasions he had seen other people in the meadow, adults walking with or without dogs, and children playing. He recognised some as his neighbours."

29. Mr Fisher was born in 1946 and had lived in Leek since 1974. He lived in another part of the town but he walked through Ladydale Meadow five or six times a year and in the 1980s he and a friend, together with their children, used to go sledging in the meadow. He said, when walking up the hall footpath he had seen other dog walkers, usually to the right of the hall footpath. The inspector refers to the hall footpath as the footpath that leads from the stile across the meadow towards the hall.

30. Mr Malkin was born in 1933. He was away from Leek for some years but returned in 1957, married and had children, and he regularly walked in the meadow with his children and subsequently his grandchildren. He had retired seven years previously and since then he had walked in the meadow five to seven days a week, before then ten to 20 times a year. He had picnicked on the meadow, but not in the last 20 years. He said he had seen many other people using the meadow, mostly walking and exercising dogs. He had seen children and adults sledging on the meadow in the

snow.

31. Mr Hobson was born in Leek in 1962. He moved in 1990 to Ladydale Close on the Ladydale Estate. He gave evidence that he had used the meadow for recreation since he was seven or eight years old. He had used it more as a child and as an adult, and rather less as a teenager. On about half of his visits there were other people walking with or without dogs.

32. Mr Allen was the last of the six witnesses whose evidence covered the whole of the 20 years. He had moved to Leek in 1979, lived in the Ladydale Estate, and since 1979 he said he had used the meadow for walking his dog every other day and also for golf practice. He said he saw other people on the meadow about twice a week and usually they were walking with or without dogs. He thought that the general use of the meadow had not changed much over the last 20 years, except that there were more dog walkers.

33. In addition to the evidence of those witnesses, other witnesses gave evidence of their use of the meadow over a relatively long period, for example Mr Lloyd, who had lived at Pickwood Cottage since October or November 1980. Since he had a private right of way to go across the meadow, the inspector quite rightly concluded that his evidence could not prove the use of the meadow by himself or his family.

> "However [he added], Mr Lloyd's evidence does show frequent use of the lower half of the meadow for informal recreational use by other people back to late 1980."

34. A Mr Gilman had in 1939 been taken to Ladydale Well by his aunt and he said that the aunt, who was a head mistress took children annually to the well and they ate their picnic in the meadow. The inspector said that this tended to show that the meadow was accessible to the public before the war, but it was not evidence of use by local people. Mr Gilman also gave hearsay evidence about what he had been told by local people as to what the workers from the mills used to do in their breaks from work.

35. In addition, there was, for example, a Mrs Lee, who had moved into the Ladydale Estate in 1983. Her house overlooked the meadow and she said that, when she moved in she saw people using the meadow. She talked to her neighbours and they expressed general views to her about how the meadow could be used. She used the meadow for walking the dog, walking with her family, picnics, blackberrying and sledging in the snow. When she used the meadow, there was usually somebody else using it as well, and she had seen people every day from her windows using the meadow.

36. The applicants submitted written evidence. The inspector said that evidence had to be approached with considerable caution. Much of it was very vaguely expressed. It was unclear what period it covered or precisely to what land it related and it had not been tested by cross-examination. He added:

> "However, even giving full weight to these qualifications, it can be said that the written evidence is largely consistent with and supportive of the oral evidence given by the applicants' witnesses, to the effect that many local people from Leek have been using the Meadow for informal recreation for more than 20 years without permission or objection."

37. The inspector referred to two videos, which he did not consider threw any light on the issues in the application. He then dealt with the evidence for the objectors. One witness gave oral evidence, a Mr Deaville. It is unnecessary to do more than say that the inspector was not particularly impressed by Mr Deaville's evidence. A written statement by Mr Watson, a landowner, was put by Mr Wolton. As to that, the inspector said:

> "As it was not possible for the applicants to test Mr Watson's evidence by cross-examination, or for me to see and assess the demeanour of Mr Watson as a witness, I prefer the evidence of the applicants' witnesses, whom I had the opportunity to see and hear, and who were fully and properly tested by Mr Wolton's robust but fair cross examination."

38. In the light of all that evidence the inspector reached the following findings of fact:

"7.1. Substantial use has been made of Ladydale Meadow for informal recreation for more than 20 years before the application and still continues. A number of the applicants' witnesses were able to give evidence covering the whole of the 20-year period, ie Mr Yates, Mr Northcott, Mr Fisher, Mr Malkin, Mr Hobson and Mr Allen.

"7.2. Informal recreation has mostly been walking with or without dogs and children's play.

"7.3. The persons who have enjoyed informal recreation on the Meadow have almost always walked to the Meadow from their homes in Leek. Inevitably, more have come from parts of Leek close to the Meadow, and in particular the Ladydale Estate, than from parts of Leek which are further away, but there was evidence of users from all over Leek. This is not surprising because the Meadow is within easy walking distance from the centre of Leek and is situated beside the Ladydale Well, which is a well known local attraction.

"7.4. The majority of recreational users have entered and left by the stile, although some people have used the Carriage Drive Gate, which was rarely locked and sometimes open.

"7.5. Recreational users have not confined themselves to particular routes on the Meadow but have wandered all over the Meadow, although they have tended to use the application land more than other parts of the Meadow.

"7.6. There have been no signs forbidding entry to the Meadow and no one has turned recreational users off the application land.

"7.7. Recreational use of the Meadow has been open and users have not sought or obtained permission to use the Meadow.

"7.8. The reason why the Meadow has been used for informal recreation to a substantial extent for a long period is based upon a combination of a number of factors:

"(a) an absentee landowner,

"(b) land of little agricultural value,

"(c) an agricultural licensee with limited interest in the land under a succession of seasonal grazing licences,

"(d) its situation close to Leek on the edge of a residential estate and beside the local attraction of Ladydale Well,

"(e) inviting access over what looks like a stile for public use, and

"(f) the absence of signs or any other action to dissuade entry."

39. The inspector concluded that:

> "On the above findings of fact, the applicants have proved that the land falls within the new definition of town or village green."

40. He then went through the various elements of the definition, starting in paragraph 8.1 with "land". He said that:

> "Although the plan accompanying the application is imperfect, I think that it is easily possible, giving the benefit of any inaccuracy to the objectors, to identify the land which is both subject to the application and is proved to have been used for recreation by local people for more than 20 years.
>
> "The northern boundary will be the northern edge of the Half Footpath, which is easily identifiable on the ground.
>
> "The southern boundary will be the fence or stream bank, whichever is the more northerly at any point.
>
> "The western boundary will be the fence or stream bank, whichever is the more easterly at any point.
>
> "The eastern boundary will be a line drawn due south from the gateposts at the eastern end of the Hall Footpath.
>
> "It seems to me irrelevant whether the applicants might have been able successfully to apply for registration of a larger area. The registration authority has simply to consider the land which is the subject of the application."

41. He concluded that the land had been used for informal recreation for not less than 20 years, and that conclusion is not subject to challenge. He then dealt with the question of "a significant number of the inhabitants of any locality", saying:

> "'Significant' is rather an imprecise word but it is an ordinary word in the English language and there is little help to be gained from trying to define it in other language. It seems to me that it is really a matter of impression. In my view, the evidence shows that the recreational use of the application land has been by a significant number of the inhabitants of Leek."

42. He then concluded that Leek was a locality for the purposes of the Act. That conclusion is not challenged. He went on in paragraph 8.4 to consider the test, "... any neighbourhood within a locality", saying:

> "Further, it seems to me that there has been 20 years' recreational use of the application land by a significant number of the inhabitants of the Ladydale Estate.
>
> "In my view, the Ladydale Estate is a 'neighbourhood'."

43. He set out his reasons for reaching that conclusion, which is not challenged.

44. He then dealt with the question of whether the informal recreation spoken of by the applicants fell within the statutory description, "... indulging in lawful sports and pastimes ...", and concluded that it did. He dealt with the question of whether it had been "... as of right ..." He said that the use of the meadow for informal recreation by local people continued. He recommended that:

> "... The registration authority should accede to the application in relation to the land defined in para 8.1 above but should reject the application in relation to the rest of the application land."

45. That recommendation was accepted by the regulatory committee of the council.

46. On behalf of the claimants, Mr Wolton QC described the effect of the Act as draconian. Registration would result in the landowner in the present case being unable to use his land in a beneficial manner. Not merely the planning permission obtained for residential development on part of the meadow, but also the ability to use the meadow to obtain access to other land with residential planning permission to the south would be frustrated by registration. Such interference with a landowner's rights required the most careful scrutiny and could be justified only upon the basis of the most cogent evidence.

47. He referred to *R v Suffolk County Council, ex parte Steed [1996] 75 P & CR 102* . Lord Justice Pill, giving the leading judgment of the court, observed at page 111:

> "I approach the issue (of registration of a town green created by prescription) on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ... The test for considering whether the rights are established is a stringent one as stated earlier in this judgment. That provides protection for those with an interest in the land. The registration procedure, as laid down in the regulations, provides further protection by imposing duties upon a registration authority to send, publish and affix notices (regulation 5.4) and conferring the right to object (page 115)."

48. Although the decision in Steed, that there must be a subjective belief in the prescriptive right, was overruled in *R v Oxfordshire County Council, ex parte Sunningwell [2000] AC 335* , Lord Hoffmann, who gave the leading speech in that case, did not suggest that a more relaxed approach to the determination of applications for registration under the Act was appropriate.

49. Against this background Mr Wolton challenged the council's decision to accept the inspector's recommendation on two grounds. Firstly, whilst there was no issue that a number of inhabitants of Leek and of the Ladydale Estate had used the meadow for informal recreation for 20 years, there was no evidence to support the inspector's conclusion that the number of inhabitants so doing was significant. His conclusion to that effect was really no more than speculation. Secondly, there was no power to accept an application for registration in relation to part only of the land included in the application. The registration authority had power to accept an application in respect of the whole of the land applied for or to reject an application.

50. In relation to the first point, it is submitted on behalf of the claimant that, in the context of the Act, the words "significant number" of the inhabitants of any locality or of a neighbourhood meant that the number had to be considerable or substantial. The inspector had fixed the population of Leek at 20,000 and that of the Ladydale Estate at around 200. Only six witnesses were able to give evidence covering the whole of the 20-year period. All of the six had lived in the locality of Leek for that period but only one of them had lived on the Ladydale Estate for the full 20 years. Thus, one had the position of six witnesses out of a town with a population of 20,000; alternatively, one witness out of a neighbourhood with a population of 200. These numbers simply could not be regarded as being in any way significant.

51. Mr Wolton analysed the evidence of these six witnesses in some detail, as indeed he did in his written closing submissions before the inspector. He submitted in essence that, although these witnesses gave general evidence about the use of the meadow, none of them condescended to the number of people from Leek or from the Ladydale Estate who had actually used the meadow over the full 20-year period. Other witnesses had given evidence but they had not been able to speak as to the full period of 20 years. Plainly there had been an increase in dog walking over recent years but as to what had occurred in earlier years, that was really pure speculation.

52. So far as the written evidence is concerned, that had to be approached with considerable caution. The inspector had been correct to say that much of it was vaguely expressed and it was unclear what period it covered or to what land it related. Moreover, it had not been tested in cross-examination. Mr Wolton accepted that, in principle, such evidence could corroborate other oral evidence but, he submitted, there was nothing of substance or significance to corroborate. It simply was not possible to derive from the totality of the oral or written evidence the proportion of people from Leek or the Ladydale Estate who, for the past 20 years, had been using the meadow for recreation, let alone to determine whether that proportion was significant or not. The inspector's conclusion that the statutory

definition had been met was therefore Wednesbury unreasonable.

53. Mr Wolton referred to Lord Hoffmann's speech in the *Sunningwell* case. At page 168 of [1999] 3 WLR Lord Hoffmann had said this:

> "My Lords, I pause to observe that Lord Blackburn does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been ... 'openly and in the manner that a person rightfully entitled would have used it ...'."

54. Thus, the question had to be asked: how would the user described by the witnesses before the inspector have appeared to the owner of the land? The picture here was of occasional or casual use, largely for dog walking. It was not a picture of use by a sufficient number of persons to be representative of the inhabitants either of Leek or of the Ladydale Estate.

55. Turning to the second matter, the inspector's recommendation that a reduced area of land be registered, it was submitted on behalf of the claimant that, where an application is defective because, for example, the land to which it relates is not shown on the evidence to be wholly common land or town or village green, then the registration authority may either reject it or invite the applicant to amend it. The registration authority has no power itself to amend an application. The registration authority's sole function is to consider the application and the objections to it. If, having done so, the application satisfies the relevant statutory requirements, then the registration authority may accept the application, but if the statutory requirements are not made out, the registration authority has no option but to reject the application. There is no power in either the Act or the Regulations for the registration authority to approve a different area of land from that which appears in the application.

56. Mr Wolton referred me to a report by Mr Gerard Ryan QC on another non-statutory public inquiry into Spring Common, Huntingdon. In that case it seems that a property known as Spring House had been included in the application. Mr Ryan said this in his report:

> "It is also objected that if a claim for registration of a green is not supported by evidence justifying the claim in respect of the whole green, but possibly only as to a part or parts, the registration must be rejected. I find nothing in the 1965 Act or the New Land Regulations which justifies another view. In this context a somewhat technical but nevertheless important issue stems from the inclusion within the boundary of the claimed green of a property at the northern of the Eastern Meadow known as Spring House. This is, I understand, owned by a local authority and is currently being renovated to fulfil either a social services or an educational function. Extensive work was being carried out there on the day I inspected Spring Common. It was conceded at the end of the Applicant's case that the inclusion of this property was an error."

57. Mr Ryan then referred to the dicta of Lord Justice Pill in the *Steed* case, which I have quoted above. He continued:

> "An implication of the learned Judge's observations must be that the unjustified and admittedly erroneous inclusion of a separate substantial property within the boundary of a claimed green becomes a serious issue. Moreover a commons registration authority is not in my view empowered by the legislation to amend a claim to accord with the evidence put forward to support it. I conclude that the erroneous inclusion of Spring House and its curtilage in this claim comprises an incurable defect which is fatal to it. It is obviously important that both a claim form and accompanying plan are prepared with great care: the inclusion of Spring House on this plan seems attributable to carelessness."

58. A little later on in his report he said that the power of the registration authority under the Regulations:

> "... is then to accept or to reject the application on the basis of the material before it; that must mean the application as presented and objected to. A modified application might not, for example, attract an objection which is otherwise relevant. It is the applicant who decides what to claim.
>
> "The limit of the Authority's power in the context of the perfecting of an application is contained in Regulation 5(7) which enables it to reject, at the outset, an application which does not comply with the New Land Regulations. Although the error made here may be regarded as leading to a small defect in this application in terms of the area claimed, it is nevertheless a significant and in my view an incurable defect which is fatal to the application."

59. It is fair to note that in that case Mr Ryan also concluded that the evidence tendered was not sufficient to establish use for lawful sports and pastimes for the whole of Spring Common throughout a 20-year period.

60. On behalf of the defendant Mr Mynors submits that, in respect of the first ground of complaint, it is inevitable in cases of this kind that much, if not the whole of the evidence available is going to be assertions, whether made orally or in writing, as to what has taken place in the past, possibly many years earlier. It will be very rare indeed to find anyone who has been present upon the relevant land for the whole of the 20-year period or who has direct knowledge of what occurred every day on the land over that period. Inevitably, people will be saying what they remember doing themselves and what they remember seeing other people doing many years ago. Whether a significant number of the inhabitants of a locality are said to be engaging in activities on a particular piece of land must be very much a matter of impression. It is for that reason that registration authorities, confronted with contested applications of this kind, regularly cause non-statutory inquiries to be held by inspectors who are experienced in this branch of the law. In the present case Mr Chapman's very considerable experience in this branch of the law is not in dispute.

61. Mr Mynors points out that inspectors, in assessing the quality of evidence, will be perfectly well aware of the underlying motives of many of those supporting an application for registration; that is to say that they wish to prevent development from taking place. The inspector in the present case expressly acknowledged that fact. He points to paragraph 7.1 of the inspector's report, where the inspector referred to the six named witnesses who were able to deal with the whole of the relevant 20-year period, but submits that the evidence of those witnesses was supplemented by the evidence of other witnesses, who could give evidence, not over the whole of the 20-year period, but in respect of a greater or lesser part of it. He acknowledges that such evidence of itself could not be conclusive as to the use of the land over the whole period but submits that, taken together with the evidence of the six named witnesses, it was strongly corroborative.

62. Moreover, he points out that there was no evidence of change of ownership of the land or of some other change, for example the erection of fences, the pulling down of a stile, the falling into disrepair of a bridge, which might have suggested that the pattern of use of the land would be likely to have altered at any time over the 20-year period.

63. He points to the general location of the land, its accessibility by footpath from the centre of Leek, and its proximity to a local attraction. He submits that, on the totality of the evidence, it was not in the least unreasonable for the inspector to conclude that those using the meadow were from a locality, Leek, or from a neighbourhood within the locality: Ladydale Estate.

64. It being acknowledged that the inspector was perfectly entitled to conclude that a number of the inhabitants, whether of Leek or the Ladydale Estate, had been using the meadow for informal recreation over a 20-year period, in considering whether that number was a significant number, the inspector rightly declined to define the word "significant" in other terms. The inspector correctly pointed out that "significant" was an ordinary word in the English language and that what was significant in any particular case was very much a matter of impression. The council did not accept that "significant" in this context necessarily meant considerable or substantial. Even if it did, expressions of that kind were equally imprecise. He submitted that what matters is that the number of people using a piece of land is sufficient to indicate that their use of the land signifies that the land is in general use by the local community for informal recreation, rather than, for example, occasional use by individual persons as trespassers.

65. So far as the area to be registered is concerned, Mr Mynors submitted that it was plain from paragraph 8.1 of the inspector's report that, however the land was to be defined, the inspector did not intend to allow any land outside the application land to be included. He was seeking:

> "... to identify the land which is both subject to the application and is proved to have been used for recreation by local people for more than 20 years."

66. Later on in that paragraph the inspector said that the registration authority had simply to consider the land which is the subject of the application and that it was irrelevant that an application might have been successfully made in respect of a larger area. In any event the council had no intention of registering any land that was outwith the boundaries of the application land. The council did, however, intend to cut down the area to be registered by drawing in the eastern boundary. In summary, the council contended that it was entitled to register less than was applied for.

67. Mr Mynors accepted that there is no explicit power, either in the Act or in the Regulations, for the registration authority to register as a town or village green only part of the land which was the subject of an application, but he submits that such express authority is not necessary because an application for the inclusion of an area of land within the register must of necessity involve a claim that each and every part of that land is eligible to be registered. He submits that it would be wholly artificial if, in order to be on the safe side, an applicant had to split up the land which he wished to see registered into a number of smaller areas and apply separately for the registration of each of those smaller areas. There would appear to be no good reason why a registration authority, having considered the evidence on behalf of the applicant and the objector, should not be able to say that it accepted that part of the land that was the subject of an application was registerable, but had concluded that the remainder was not. That would not be contrary to the purpose underlying the Act and the Regulations, which was that the land the subject of the application should be defined so that proper notice could be given to owners, lessees, tenants or occupiers so that they could object to the application, if they wished to do so. If all such persons had been notified and had an opportunity to state their view, then no one could be prejudiced if the registration authority, in the light of all the evidence, registered a lesser area. He accepted that, if the registration authority sought to go outside the area applied for, prejudice might arise because those who might wish to object would not have had or might not have had notice of the application.

68. By way of analogy he referred to the fact that planning authorities regularly grant permission for a lesser form of development than that which has been applied for. In the case of *Wheatcroft v Secretary of State for the Environment [1982] Journal of Planning and Environment Law at page 37* , Mr Justice Forbes had endorsed such a practice, provided what was permitted was not substantially different from that which was applied for. Mr Justice Forbes added that, in deciding whether or not what had been permitted was in substance not that which was applied for, one had to consider the extent to which those who might wish to object to a lesser form of development had been consulted and and had an opportunity to express their views.

69. Mr Mynors has pointed out that the court is permitted by section 14(b) of the Act to rectify the register where it appears to the court that no amendment or a different amendment ought to have been made. He submitted that, whilst the court in such cases might simply be rectifying an error made by the registration authority, the words would be equally apt to cover a case where a different amendment to the register was found to be appropriate on the evidence.

70. Finally, on a practical note, he submitted that there would be little sense in preventing the registration authority from registering a smaller area. Inevitably, the inspector's report would be released to the applicants for registration and to the objectors. If the registration authority was compelled to say that, as a result of the inspector's conclusion that a lesser area should be registered, it had no power to accept the registration, the practical consequence would be there would thereupon be a fresh application for registration of the smaller area. The inspector's report would be evidence in any further inquiry into that fresh application and, absent any material change of circumstances, precisely the same result would be reached, save that a great deal of time, trouble and money would have been expended. He submitted that, as a matter of discretion, the court should not quash the council's decision, since it would cause no prejudice to the claimants.

My Conclusions

71. Dealing firstly with the question of a significant number, I do not accept the proposition that significant in the context of section 22(1) as amended means a considerable or a substantial number. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. In my judgment the inspector approached the matter correctly in saying that "significant", although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.

72. The inspector concluded in paragraph 7.1 that substantial use had been made of the meadow for informal recreation for more than 20 years before the application. He referred specifically to six of the witnesses who could give evidence covering the whole of the 20-year period. Mr Wolton's criticisms of the inspector's conclusions are not well founded. It is quite unrealistic to refer simply to the six witnesses or to deal with the matter on the basis that they are only six out of 20,000 or one out of 200, and that such numbers are not significant. I accept that, if all of those six witnesses had said that they had not seen others on the land over the 20-year period, then it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant. But the fact of the matter is that they did not give such evidence: they were able to give evidence, not merely about what they did themselves, but what they saw others doing on the meadow over the 20-year period.

73. It is difficult to obtain first-hand evidence of events over a period as long as 20 years. In the present case there was an unusual number of witnesses who were able to speak as to the whole of the period. More often an inspector at such inquiries is left with a patchwork of evidence, trying to piece together evidence from individuals who can deal with various parts of the 20-year period. In the present case, however, the evidence of the six witnesses who were able to cover the whole 20-year period was amply supported by many other witnesses who dealt not simply with the last few years but with a very considerable part of the 20-year period, some of them going back almost 20 years, some going back to times before the 20-year period began.

74. If there had been anything to suggest circumstances might have changed — a change of ownership, a change in the physical condition of the land, fences erected, bridges broken down, gates locked — then there might have been some substance in Mr Wolton's submissions. But there is no evidence to suggest that there was any relevant change that might reasonably lead to the conclusion that evidence about what was happening, say, 15 years ago was not relevant for the purpose of deciding what was happening 20 years ago.

75. In addition to the oral evidence, the inspector had the written evidence. Clearly, he had to treat that evidence with caution because it was not subject to cross-examination but, having looked at the totality of that evidence, he was entitled to conclude that it was largely consistent with and supportive of the oral evidence given by the applicant's witnesses to the effect that many local people from Leek had been using the meadow for informal recreation for more than 20 years without permission or objection.

76. In addition, the inspector was entitled to have regard to the matters set out in paragraphs 7.3 to 7.8 of his report; that is to say, the meadow is within easy walking distance from the centre of Leek. There are footpaths leading to it. It is beside the Ladydale Well, which is a well-known local attraction. It is very easy to get into the meadow from Ladydale Well over the stile. There is also the Carriage Drive Gate, which the inspector concluded was rarely locked and sometimes open. There were no signs forbidding entry and generally the surrounding circumstances were entirely consistent with the contentions of the applicant's witnesses that people were using it for informal recreation: there was an absentee landowner; the land had little agricultural value; the agricultural licensee had a limited interest; and so forth.

77. In short, all of the pieces of evidence referred to above fitted together and pointed in the same direction. That is to say that there had indeed been use for 20 years or more by a significant number of the inhabitants of Leek and of the adjoining estate. Far from being a unreasonable conclusion based upon speculation, the inspector's conclusion is in my judgment amply supported by a

painstakingly careful analysis of all the evidence before him.

78. Turning to the second matter, following discussions between the parties, it is clear that the council does not propose to register any land that is outwith the application site. It proposes to register a smaller area than was applied for. It is plain from paragraph 8.1 of the inspector's report that he did not intend that additional land, ie land outwith the application site, should be registered. As he said, what he was trying to do was to identify land which was both the subject of the application and proved to have been used for recreation by local people. So the concerns expressed by the claimant that land outwith the application site might be registered are not made out.

79. Does the council have power to register a smaller area than applied for? It is perfectly true that there is no express power in either the Act or the Regulations to register a smaller area of land. I have set out the relevant enactments above. The Regulations require that the application must be in a particular form, and that form requires that the land the subject of the application should be identified. However, it has to be recognised that those who make applications for registration are not necessarily expert cartographers. Plainly, they will not have the benefit, as the inspector did, of being able to consider all of the relevant evidence for and against registration of a particular parcel of land.

80. What is the purpose of identifying the land in the application? The answer is, so that the registration authority can give appropriate notice to owners, lessees, tenants or occupiers, or to others who might wish to object to an application to register. It seems to me that, provided the boundary is not altered in such a way as to defeat that purpose of defining the land in the application form, for example by including land which might be owned, tenanted or occupied by others, there can be no sensible objection to the registration authority cutting down the extent of land to be registered.

81. Mr Ryan's decision is readily understandable on the facts. In that case it would appear that a significant building which, on any basis, could not form part of a town or village green, had been carelessly included in an application. One can well understand that such an egregious error might have been fatal to that particular application, but that is very different from the facts of the present case. The applicants sought the registration of Ladydale Meadow. There was debate as to the extent to which they had used the whole of the 20 acres of the meadow. The inspector found that they had not used the whole of it. There is no question of carelessness or of the inclusion of a parcel of land that could not on any basis form part of a town or village green. Moreover, what is of importance is that no prejudice to the claimant in the present case has been suggested.

82. Mr Wolton submits that the *Whoatcroft* case is not analogous to the present case because a planning permission will generally confer benefits upon the landowner, whereas a registration as a town or village green will be detrimental to an owner's interests. Provided the registration authority does not step outside the boundary of the application and provided the landowner, tenant and occupier have had ample opportunity to make their representations, it is difficult to see why, as a matter of common sense, the registration authority should not be able to register a lesser area, provided it is not substantially different from that which has been applied for. There is no substantial difference here, only a more accurate definition of the boundaries in the light of all of the evidence. I accept Mr Mynors' submission that it is implicit in an application to register an area of land that the applicant is saying that each and every part of that land is registerable as a town or village green. It would be quite artificial to require an applicant to split up the application site into a number of smaller parcels.

83. Even if I am wrong about this and the registration authority does not have power itself to register a lesser area than that applied for, this court has a discretion as to whether or not to grant relief. As a matter of discretion I can see no useful purpose being served by quashing the council's decision to register a lesser area. The only consequence would be that the applicants for registration would be able to put in a fresh application to register the lesser area. The inspector's report recommending registration of that lesser area would be public knowledge and would plainly be evidence that could be put forward at any further inquiry, if there were to be one, and, absent any material change of circumstances or new evidence, precisely the same conclusion would be reached. Thus it seems to me, absent any prejudice to the claimant on the facts of the present case, it would be pointless to grant relief on such a limited basis.

84. For these reasons, this application for judicial review is dismissed.

MR MYNORS: My Lord, I am grateful. In those circumstances the registration authority defendant council seeks its costs against the claimant in this matter.

MR JUSTICE SULLIVAN: Yes. Are you asking for summary assessment? Have you put in a schedule of costs?

MR MYNORS: We have not. I am instructed that the solicitors for the two parties have agreed that a summary assessment should not be sought but should be taxed, if not agreed.

MR JUSTICE SULLIVAN: That is a relief at this time in the afternoon. Yes, shall we find out if Mr Wolton agrees?

MR WOLTON: My Lord, I have two matters to deal with. I will deal with costs first of all. First of all, the general principle. I make one point in mitigation of the claimant's liabilities and that is, of course, that the resolution which is the subject of this challenge is accepted as having to be changed, in that we are going forward to a further resolution, which will be yet a further instance of a different plan for a different registration. Even accepting your Lordship's points in respect of the discretion that should be exercised by the court, nonetheless, to some extent that matter remains in issue. That is all I can say about costs.

As to the agreement between our respective instructing solicitors, what my learned friend has said is absolutely correct.

My Lord, I have one other matter to mention, and that is to seek your Lordship's permission to take this matter to appeal, if that decision is made. The implications of your Lordship's decision for the house building industry, let alone landowners, could be extremely considerable and as such it is a matter to which we would like to give further consideration.

MR JUSTICE SULLIVAN: What do you say about that, Mr Mynors?

MR MYNORS: Certainly so far as the council's power to register a lesser area —

MR WOLTON: My Lord, that is — if I may interrupt ··· not, as I see it at the moment, a matter in respect of which we would pursue the challenge. It is solely in respect of ·····

MR JUSTICE SULLIVAN: Solely in respect of the first matter?

MR WOLTON: Yes, that is — I must reserve my position obviously, depending on instructions —

MR JUSTICE SULLIVAN: Yes, of course.

MR WOLTON: — but that is how I see it at the moment.

MR MYNORS: In my submission, certainly on the basis of Mr Wolton's second submission — those made to you after the luncheon adjournment today ····· to a large extent they relate to the perceived injustice of the legislation, rather than the application of the legislation in a particular way. That may be a matter which obviously is taken up in another forum by others in another way, but it seems to me that the legislation as it stands has been properly administered in this particular case, for the reason that your Lordship has indicated. I entirely understand those who feel that it seems bizarre and strange and other adjectives that one could imagine that it should be for local residents walking dogs to defeat house building which has been given planning permission. But that is obviously not a matter which Parliament has seen fit to put in the hands of the registration authority. The registration authority only administer the Registration Act as best they can. That is the only comment I would make. Obviously it is a matter for your Lordship.

MR WOLTON: That is, with the greatest respect, wholly mistaken. It is not a situation of saying that we do not like the legislation; it is a matter of saying that these words, "the significant number", are new. Insofar as the earlier legislation is concerned, there are ample authorities to indicate that the numbers in question were considerably different from those which have been argued in this case and as such it is a new part of the legislation, which, with respect, requires clarification.

MR JUSTICE SULLIVAN: Yes. Thank you very much.

The application is dismissed. The claimants are to pay the council's costs which are to go for detailed assessment, if not otherwise agreed. I think it is appropriate to give permission to appeal to the Court of Appeal, not because I think the appeal stands a good prospect of success, but because I think there are other special circumstances. That is to say, this is a new provision and if Mr Wolton wishes to ascertain the Court of Appeal's views on the new provision, then he should have liberty to do so.

MR WOLTON: I am obliged, my Lord.

MR JUSTICE SULLIVAN: Thank you all very much and I do apologise for keeping you waiting so late.

Status: [I] Mixed or Mildly Negative Judicial Treatment

*573 R. (on the application of Laing Homes Ltd) v Buckinghamshire CC

Queen's Bench Division, Administrative Court

8 July 2003

[2003] EWHC 1578

[2004] 1 P. & C.R. 36

(Sullivan J.):

July 8, 2003 [1]

Agricultural land; Commons; Crops; Grazing; Public rights of land; Registration; Villages

Real property—commons···registration of village green—— Commons Registration Act 1965 ···—whether use of land by landowner incompatible with right claimed—frequency of user required—admissibility of public statements made by users as to the existence or otherwise of the right asserted—what can constitute a locality···effect of registration—whether confers rights on local inhabitants

H1 Laings were the owners of three adjacent fields, in part crossed by public footpaths, and held since 1963 as part of their land bank. In April 2002 the council resolved to register the land as a village green, on the basis of an Inspector's report which concluded that the local inhabitants had enjoyed substantial recreational use of the land, for lawful sports and pastimes, as of right for at least 20 years. A farmer, under a grazing licence granted by Laings, had used the land for light grazing during the first few years, and for an annual cutting of hay for half of the 20-year period. The Inspector determined that such use of the land was not inconsistent with his finding. Laings brought judicial review proceedings to quash the council's resolution, challenging the approach taken by the Inspector in a number of respects.

H2 **Held**, allowing the claim, and quashing the resolution, (i) The question of whether a particular use of land by a landowner was incompatible with the establishment of a village green was a matter of fact and degree. (ii) The proper approach was to ask whether those using the fields for recreational purposes were interrupting the farmer's use of the land in such manner, or to such an extent, that Laings should have been aware that the recreational users believed that they were exercising a public right. They were not. So long as local inhabitants' recreational activities do not interfere with the way in which a landowner has chosen to use his land, there will be no suggestion to him that they are exercising or asserting a public right to use his land for lawful sports and pastimes. (iii) The use of land for growing and cutting a hay crop was inconsistent with the village green rights asserted (as was harvesting any other crop). It was not comparable to mere grass cutting. The preparatory steps taken to grow the hay crop (harrowing, rolling, fertilising) would tend to discourage lawful sports; and the gathering of the crop *574 (mowing, bobbing, wind rowing, baling, stacking, loading and removal), would interrupt the use or enjoyment of a field "as a place for exercise and recreation". (iv) It was not necessary to show that the use by the inhabitants of land for lawful sports and pastimes was sufficiently frequent throughout the day, as opposed to frequent at certain times and infrequent at others. (v) Regarding the use of the fields by walkers with or without dogs, it was important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way, and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields. (vi) In deciding whether a user has been indulging in lawful sports and pastimes on land openly and in a manner that a person rightfully entitled would have used it, public statements made by that user as to the existence, or otherwise, of the right are admissible for the purpose of deciding how the matter would have appeared to the owner of the land. (vii) The question of what is the relevant locality, or if appropriate neighbourhood within a locality, is a matter of fact for the registration authority to determine. (viii) The applicant was not required to commit himself to a legally correct definition of the locality or neighbourhood. The reference to locality in Pt 3 of Form 30 did not require an applicant to identify the locality whence the inhabitants claiming to have indulged in lawful sports and pastimes on the application land came. (ix) Ecclesiastical parishes were capable of constituting qualifying localities.

H3 *Obiter* , (a) as a registered village green, the land would be subject to s.12 of the Inclosure Act 1857 and s.29 of the Commons Act 1876 , either by virtue of the use of the land for not less than 20 years as a village green, whether or not registration had taken place; or once the fields were actually registered as a village green (it was unnecessary to decide which). (b) the 1965 Act merely enabled land to be placed on a register as a village green, with a view to future legislation conferring rights over such land, and did not itself confer rights on local inhabitants.

Cases referred to:

***575**

(1) *Bright v Walker (1834) 1 C.M. & R. 211*

(2) *Caerphilly County Borough Council v Gwinnutt (unreported)* .

(3) *Fitch v Fitch (1797) 2 Esp. 543*

(4) *Fitch v Rawling (1795) 2 H.Bl. 393* .

(5) *Hua v Whiteley [1929] 1 Ch. 440*

(6) *Mann v Brodie (1885) 10 App.Cas. 378*

(7) *Massey v Boulden [2003] 2 All E.R. 87*

(8) *Mills v Silver [1991] Ch. 271*

(9) *Ministry of Defence v Wiltshire County Council [1995] 4 All E.R. 931*

(10) *New Windsor Corporation v Mellor [1975] Ch. 380*

(11) *Patel v W.H. Smith (Eziot) Ltd [1987] 1 W.L.R. 853*

(12) *R. on the application of Alfred McAlpine Homes Ltd. v Staffordshire County Council (2002) EWHC 76*

(13) *R. v Oxfordshire County Council Ex p. Sunningwell Parish Council [2000] 1 A.C. 335*

(14) *R. v Suffolk County Council Ex p. Steed (1995) 70 P. & C.R. 487*

(15) *White v Taylor (No.2) [1969] 1 Ch. 160* ***575**

(16) *Wilson v First County Trust (No.2) [2001] 3 W.L.R. 42*

(17) *Wren v DEFRA [2003] EWHC 2667*

Legislation referred to:

Commons Act 1876

Commons Registration Act 1965

Countryside and Rights of Way Act 2000

Human Rights Act 1998

Inclosure Act 1857

Rights of Way Act 1932

Commons Registration (New Land) Regulations 1969

H6 **Application** to quash the resolution of the council made on April 8, 2002, to register the subject land as a village green under the Commons Registration Act 1965 .

H7 **Representation**

Charles George, Q.C. , Paul Hardy and Jeremy Pike for the claimant.

Stephen Morgan for the defendant.

James Maurici for the Interested Party, the Secretary of State for the Environment, Food and Rural Affairs.

JUDGMENT

Introduction

1 In this application for judicial review the claimant, Laing Homes Limited ("Laings") challenges the decision of the defendant, the Buckinghamshire County Council ("the Council") as the Registration Authority for the purposes of the Commons Registration Act 1965 ("the Act") to register a block of land consisting of three fields at Widmer Farm, Widmer End, High Wycombe, as a village green.

2 Two of the fields, Field 1 (the eastern of the two) and Field 2 (the western) are situated within the Civil Parish of Hughenden (Widmer End Ward). Field 3 which is to the south of, and contiguous with Field 1, is within the Civil Parish of Hazlemere.

3 The combined area of the three fields is 38 acres. They form part of a larger area, Widmer Farm, which was acquired by Laings in 1963 as part of its land bank, with a view to developing it for residential purposes in the medium-long term. In common with many other land banks held by house-builders, Widmer Farm adjoins the edge of a built up area: the urban area centred on High Wycombe, is about 6 kilometres away to the south-west.

4 To the north of Fields 1 and 2 is residential development at Widmer End and fronting onto North Road. The gardens of the North Road properties back onto Field 1, which also abuts residential curtilages along its eastern boundary. Field 2 abuts one residential curtilage to the north, but is mostly separated from the gardens behind the housing along North Road by three smaller fields (Fields 4, 5 and 6) which also form part of Widmer Farm. Access to North Road can be obtained via Field 6. At its northeastern corner Field 3 abuts a few residential curtilages, but most of its eastern boundary is separated by a public footpath ***576** (FP11) from the grounds of two local authority schools. The other three sides of the school grounds are surrounded by extensive residential development. To the south and west of the fields there is agricultural land. To the west of Field 2, and separated from it by another field, a bridleway, BW67, runs southwards from Grange Road, off North Road.

5 In 1973 a farmer, Mr Pennington, who had a farm at Brill, some 20 miles away, between Aylesbury and Bicester, was granted a grazing licence of Widmer Farm. The farmhouse was sold off in 1976. In the early years Mr Pennington kept cattle in the fields. His original intention was to graze the pasture land fairly fully, and to this end he made extensive efforts to fence the farm to keep his cattle in and trespassers out. However, repeated problems with trespass caused him to give up keeping cattle in the fields in 1979. He continued to keep some cattle in the three smaller fields (Fields 4, 5 and 6) until about 1982. The cattle would from time to time pass through the northern part of field 2 to get between Field 5 and Field 4, where there was a water trough. Thereafter, Mr Pennington took an annual hay crop from the fields until the early 1990s.

6 On the June 12, 2000 an Inspector confirmed (with modifications) the Buckinghamshire County Council (Footpaths at Widmer End in the parishes of Hazlemere and Hughenden) Definitive Map Modification Order 1999 ("the Footpath Order"). The effect of the Footpath Order was to modify the Definitive Map and Statement for the area by the addition of a number of footpaths, around the edges of Fields 1, 2 and 3 (cutting some corners), across Fields 5 and 6 leading to North Road, and continuing alongside the boundaries of the field to the west of Field 2 to BW67.

7 On the August 25, 2000, Mr Wainman, on behalf of the Grange Action Group ("GAG"), applied for the three fields to be registered as a village green. GAG is a voluntary grouping of a number of local organisations, including parish councils and residents' associations.

8 The Council, as Registration Authority, appointed Mr Alun Alesbury of Counsel as an independent inspector ("the Inspector"). Following a pre-inquiry meeting on the June 5, 2001, he held a public inquiry at Widmer End on six days between the November 5 and 13 and made an accompanied site visit on the November 14, 2001. In his report dated the March 22, 2002 the Inspector's overall conclusion was:

> "(i) that there has been for at least 20 years before August 25, 2000 recreational use (for "lawful sports and pastimes") of the three fields in question at Widmer Farm, by the inhabitants of the locality best described as the Ecclesiastical Parish of Hazlemere;
>
> (ii) that this recreational use has been substantial for at least the said 20 years, and has been predominantly by the inhabitants of the locality I have referred to;
>
> (iii) that this recreational use has been carried on as of right, openly, without force, without permission express or implied, and not in defiance of any prohibition." (para.15.1 Inspector's Report, unless otherwise indicated, further references in parenthesis are to chapter or paragraph numbers in the Report.)

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9 Accordingly, he recommended that the Council should accede to GAG's application (15.2). On the 8th April 2002 the Council's Regulatory Committee, following a lengthy discussion, accepted the Inspector's recommendation and resolved to register the three fields as a village green.

10 In these proceedings Laings seek a quashing order in respect of the Regulatory Committee's resolution ("the domestic law challenge"). They also seek a declaration under s.4 of the Human Rights Act 1998 that ss.13(3) and 22 of the Act are incompatible with Art.1 of Protocol 1 to the European Convention on Human Rights ("the Convention") ("the human rights challenge").

The Statutory Framework

11 The purpose of the Act was "to provide for the registration of common land and of town or village greens; to amend the law as to prescriptive claims to rights of common; and for purposes connected therewith".

12 The relevant provisions are as follows:

> Section 1 provides that, "There shall be registered ... land ... which is common land or a town or village green", and rights of common over such land.

13 After the end of a period to be determined by the Minister (which expired on July 30, 1970), s.1(2)(a) provides that:

> "no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered."

14 Where common land is registered under the Act but no person is registered as the owner under the Act, subs.1(3) provides that:

> "it shall be vested as Parliament may hereafter determine."

15 Registration Authorities, defined by s.2 , are required by s.3 to maintain:

> "(a) a register of common land; and
>
> (b) a register of town or village greens."

16 Section 10 deals with the effect of registration:

> "The registration under this Act of any land as common land or as a town or village green, or of any right of common over such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only."

17 Section 13 makes provision for the amendment of registers:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where —
>
> (a) any land registered under this Act ceases to be common land or a town or village green; or
>
> (b) any land becomes common land or a town or village green; or
>
> (c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed;"

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18 The High Court is given power by s.14 to order rectification of the register.

19 Section 19 gives the minister power to make regulations prescribing the form of the register, and for related matters, such as the procedure to be adopted by registration authorities in dealing with applications for registration.

20 Section 22(1) defines village green as follows:

> "'town or village green' means [a] land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of a locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years."

21 It is usual to add paragraphs [a--c] for ease of reference in cases of this kind, and to refer to the three types of village green as class [a], class [b] and class [c] village greens.

22 The Commons Registration (New Land) Regulations 1969 ("the Regulations"), made under ss.13 and 19 of the Act, deal with the procedures under which land becomes common land or a town or village green.

23 Regulation 3 provides:

> "3
>
> (1) Where, after 2nd January 1970, any land becomes common land or a town or village green, application may be made subject to and in accordance with the provisions of these Regulations for the inclusion of that land in the appropriate register and for the regulation of rights of common thereover and of persons claiming to be owners thereof.
>
> 3
>
> (4) An application for the registration of any land as common land or as a town or village green may be made by any person, and a registration authority shall so register any land in any case where it registers rights over it under these Regulations."

24 An application to register land which became a village green after January 2, 1970 must be made on Form 30 (Reg.3[7][a]). Part 3 of the Form asks for:

> "Particulars of the land to be registered, i.e. the land claimed to have become a town or village green.
>
> Name by which usually known
>
> Locality
>
> Colour on plan herewith"

25 Part 8 requires the applicant to list the supporting documents sent with the application. The explanatory notes to the Regulations give examples of documents which may be required; they include

> "8
>
> (3) Where the land is stated to become a town or village green by the actual use of the land by the local inhabitants for lawful sports and ***579** pastimes as of right for not less than 20 years, and there is a declaration by a court of competent jurisdiction to that effect, an office copy of the order embodying that declaration."

26 Regulation 5 prescribes the procedure to be accepted by the registration authority in disposing of an application. On receipt of an application notice has to be given to the owner and occupier (para.5[4][a]) and to the public (para.5[4][b] and [c]). Under para.5(7) the authority may reject an application if it appears after preliminary consideration not to be duly made,

"but where it appears to the authority that any action by the applicant might put the application in order, the authority shall not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

27 The background to the enactment of the 1965 Act, and the manner in which it dealt with village greens was explained by Carnwath J. (as he then was) in *R. v Suffolk County Council Ex p. Steed (1995) 70 P.&C.R. 487* , between 489 and 494. His survey of the historical material makes it plain that the 1965 Act was intended to be the first stage in a two-stage legislative process. As a first step, the registers would establish the facts, as to what land was, and was not, common land or a town or village green, and provide a definitive record. In the second stage, Parliament would deal with the consequences of registration: defining what rights the public had over commons or town or village greens so registered: see s.13 (above).Section 15(3) enabled Parliament to "hereafter determine" the number of animals that could be grazed where a registered right of common included grazing rights.

28 In *New Windsor Corporation v Mellor (1975) Ch. 380* (cited by Carnwath J. at 492), Lord Denning M.R. hoped that the second stage legislation "will not be long delayed" (392).

29 In 1995 Carnwath J. pointed out that 30 years after the passing of the Act nothing had been done to advance the promised second stage legislation. Eight years further on Parliament has made detailed amendments to the first stage legislation, but has still not grappled with the second stage.

30 Section 98 of the Countryside and Rights of Way Act 2000 (CROW) merely amended the definition of town or village green in s.22(1) of the Act, as follows:

"98

(2) In subsection (1), in the definition of "town or village green" for the words after "lawful sports and pastimes" there is substituted "or which falls within subsection (1A) of this section."

98

(3) After that subsection there is inserted —

(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either—

(a) continue to do so, or ***580**

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

31 The amendment came into force on January 30, 2001. The revised definition in the new subs.(1A) makes it clear that the application land must have been used by a *significant* number of the inhabitants. An applicant need not prove that all of the inhabitants used the land, conversely, use by only a few of the inhabitants will not suffice. To this extent the new definition makes explicit the test that had hitherto been adopted in practice by the Courts. The second change, enabling the inhabitants to be not merely of any locality but also of any neighbourhood within a locality, is potentially significant: cf. the decision of Harman J. in *Ministry of Defence v Wiltshire County Council (1995) 4 All E.R. 931* at 937. However, the Inspector concluded that s.22 as originally enacted applied to GAG's application, which was made on the August 25, 2000, notwithstanding the fact that the amended s.22 had come into force well before the inquiry commenced in November 2001 (paras 12.1–12.7).

32 Mr George Q.C.on behalf of Laings submitted that the Inspector's approach was correct, and referred to an *obiter dictum* of H.H. Judge Hwyl Mosely (sitting as a Deputy Judge of the Queen's Bench Division) in *Caerphilly County Borough Council v Gwinnutt, unreported,* . Mr Maurici on behalf of the Secretary of State for the Environment, Food and Rural Affairs, as an Interested

Party also submitted that the Inspector's approach was correct. While not submitting that the Inspector erred in this respect, Mr Morgan on behalf of the Council reserved its position, pointing out that other inspectors had adopted a different approach: see *R. (on the application of Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC Admin 76* , para.[23].

33 Before turning to the Inspector's Report it is helpful to mention the nineteenth century legislation relating to village greens.

34 Section 12 of the Inclosure Act 1857 provides, in part:

> "12 Proceedings for prevention of nuisances in town and village greens allotments for exercise and recreation
>
> And whereas it is expedient to provide summary means of preventing nuisances in town greens and village greens, and on land allotted and awarded upon any inclosure under the said Acts as a place for exercise and recreation: If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof ... forfeit and pay, in any of the cases aforesaid, and for each and every such offence, over and above the damages occasioned thereby, any sum not exceeding [level 1 on the standard scale] ..."

35 Section 29 of the Commons Act 1876 reinforces s.12 in cases where a town or village green or recreation ground has a known or defined boundary, as follows: ***581**

> **"29 Town and Village Greens**
>
> "29 ... An encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the Inclosure Act 1857 , he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned."

The Inspector's Report

36 The Inspector's Report is a model of its kind: detailed and comprehensive. It is not possible to do it full justice and keep this judgment within a manageable length. In 22 chapters extending to just over 100 pages the Inspector introduces the application and GAG (Ch.1), describes the application site (Ch.2), sets out the legal basis of the proceedings (Ch.3), identifies the principal issues (Ch.4), analyses the information to be obtained from twenty-two aerial photographs with dates between 1962 and late 1999 (Ch.5), introduces the evidence (Ch.6), sets out in great detail the evidence of each witness called by GAG (Ch.7) and by Laings (Ch.8), records the submissions made on behalf of GAG (Ch.9) and Laings (Ch.10), and then sets out his own conclusions on the Human Rights Act challenge (Ch.11), CROW (Ch.12), "Locality" (Ch.13), and the Principal Issues (Ch.14).

37 Although the Inspector said that he had concentrated on trying to convey "the flavour of the evidence", and that his report did not purport to be "an exhaustive summary of every single witness" (para.6.5), the report does in fact give a very full account of all the witnesses' evidence. In addition to that evidence, the Inspector had regard to the material accompanying the application, which included numerous questionnaires completed by local people (para.6.1), and

to written proofs of evidence prepared for intended witnesses who did not attend the inquiry (due to a desire not to prolong the inquiry and because of personal availability problems) (para.6.3). With one exception, relating to the Inspector's approach to "locality" in Ch.3 (see below) Laings do not seek to challenge Chs 1–10 of the report as an accurate statement of the evidence given, and submissions made, by the parties.

38 Laings' challenge is confined to the Inspector's conclusions in Chs 11, 13 and 14 of the Report. Chapter 12 in which the Inspector concluded that the new section introduced by CROW was not applicable (see above) is not challenged. Rather than set out lengthy passages from Chs 11, 13 and 14 of the report I will refer to the relevant extracts when considering the grounds of challenge. Such references will, of necessity, have to be highly selective given that the Inspector's conclusions occupy over twenty pages of his Report.

39 Although the decision to register the three fields as a village green was taken by the Council, not the Inspector, there is nothing to indicate that the Council did not accept the Inspector's findings, reasoning and conclusions. Thus, the domestic law ***582** challenge focussed upon the Inspector's report. Before turning to the grounds of challenge it is necessary to consider the effect of registration.

The effect of registration

40 Mr George submitted that analysing the effect of registration raised two preliminary issues:

> (i) Whether the Act conferred rights on the local inhabitants, or whether it merely enabled the fields to be placed on a register as a village green with a view to future legislation conferring rights over land?
>
> (ii) Whether a registered village green is subject to s.12 of the 1857 Act and s.29 of the 1876 Act ("the nineteenth century legislation")?

41 On issue (i) conflicting views have been expressed in the Court of Appeal. In the *New Windsor* case (above) Lord Denning M.R. said (*obiter*) of the 20-years user referred to in s.22(1)

> "But the difficulty about this 20-year user is that the act does not tell us what rights, if any, ensue to the inhabitants by virtue of a 20-year user. It enables the land to be registered as a town or village green, but that mere fact of registration confers no right. And at common law 20-year use gives no rights ... All is left in the air. The explanation is that Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens. This Act twice refers to matters which 'Parliament may hereafter determine': see section 1(3)(b) and 15(3). I hope that another statute will not be long delayed. But, if there should be delay, I would be tempted to infer from this Act of 1965 that Parliament intended that all land registered as 'town or village green' should be available for sports and pastimes for the inhabitants: and that all land registered as 'common land' should be open to the public at large: so long as that did not interfere with the rights of the commoners or injure the pasture: and that it should be managed and maintained by the local authority at their expense: see sections 8 and 9." (391H–392G)

42 Browne L.J. agreed at 395G:

> "I also agree that as the Act stands, without further legislation, such use confers no rights on the public."

43 Brightman L.J. agreed with Lord Denning and Browne L.J. (at 395H)

44 A contrary view was expressed (*obiter*) by Pill L.J. in *R. v Suffolk County Council Ex p. Steed (1995) 70 P. & C.R. 487* at 113–115:

> "I find it difficult to conclude other than that Parliament intended, in section 22 to open the way to the creation of new rights ... The analogy is not exact but I see class C as a way of establishing rights just as section 1(c) of the Rights of Way Act 1932 (now s.31 of the Highways Act 1980) provided a means of proving the existence of a highway ... An actual dedication need not be proved. I would construe the class C definition as having the same effect in making proof of the appropriate use sufficient to create a right."

**583*

45 Schiemann and Butler-Sloss L.JJ. agreed (at 116).*Steed* was overruled by the *House of Lords in R. v Oxfordshire County Council Ex p. Sunningwell Parish Council [2000] 1 A.C. 335* , but issue (i) (above) was left open by Lord Hoffmann at 347C:

> "It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent upon the point."

46 All of the parties before me contended that the approach of Lord Denning in the *New Windsor* case was correct. I can deal briefly with this issue because, whatever rights may or may not have been conferred by the Act on the inhabitants of the locality, there is no dispute between the parties that, as a registered village green, the three fields will be subject to the nineteenth century legislation. As Lord Hoffmann observed at 347C of the *Sunningwell* decision:

> "... registration would prevent the proposed development because by section 29 of the Commons Act 1876 encroachment and or enclosure of a town or village green is deemed to be a public nuisance."

47 Laings contend, in answer to issue (ii) above, that the nineteenth century legislation will apply once the fields are registered as a village green. The Council and the Secretary of State submit that the nineteenth century legislation applies by virtue of the use of the land for not less than twenty years as a village green, whether or not registration has taken place. For the purposes of the domestic law challenge it does not matter which of these submissions is correct. There is no dispute that the nineteenth-century legislation imposes very severe restrictions upon a landowner's use of land that has been registered as a village green. For the purpose of considering the human rights challenge (below) it is not strictly necessary to decide whether, in addition to these severe restrictions upon the landowner, the Act has conferred rights, or merely the prospect of future rights upon the inhabitants of the locality. That said, if forced to choose between the two approaches I would follow *New Windsor* rather than *Steed* .

48 The only reference in the Act to 20-years user is in s.22(1) , an interpretation section, which merely defines "town or village green ... in this Act unless the context otherwise requires." The remainder of the Act is not concerned with amending existing or conferring new rights, but with the registration of existing rights. In this respect it is to be distinguished from the Rights of Way Act 1932 which was "An Act to amend the law relating to public rights of way, and for purposes connected therewith." When Parliament wishes to confer a new right, particularly a right over another person's property, it does so in express terms. Whilst it might be tempting to infer from the delay of nearly 40 years that Parliament intended that all land registered as a town or village green should be available for sports and pastimes for the inhabitants (see Lord Denning at 392F of *New Windsor*), I do not consider that such an inference can properly be drawn given the clear terms of the Act. If the second phase of legislation is to be introduced it must be done by Parliament, and not by the courts adopting a strained interpretation of the first-phase legislation.

49 As stated above, there is no issue between the parties that, whether by reason of 20-years use or by virtue of the fact of registration, as a registered village green the ***584** three fields would be subject to the nineteenth century legislation, which would impose very severe restrictions upon Laings' use of the land, effectively removing its potential for residential development. It is unnecessary to resolve the narrow area of dispute between the parties, whether the nineteenth-century legislation applies by virtue of registration, or as a consequence of 20-years user, for the purposes of determining the domestic law challenge.

The domestic law challenge

50 In his submissions Mr George grouped the six grounds of challenge in the Claim Form under four heads, as follows:

> (1) On the evidence as recorded by the Inspector, once the use of the footpaths around the edges of the fields was discounted, there was insufficient evidence of use of the entirety of the three fields for lawful sport and pastimes over the 20-year period beginning in August 1980, from which Laings could reasonably have deduced that those using the fields were asserting a right to use them as a village green. The Inspector had failed to carry out a field-by-field analysis of the recreational use of the fields excluding the use of the footpaths as such by walkers with or without dogs.
>
> (2) The Inspector erred in concluding that the use of the fields for an annual hay cut for well over half of the 20-year period was not incompatible with the establishment of village green rights.
>
> (3) The local inhabitants' use of the fields for recreational purposes was not "as of right" because they had expressly acknowledged, when responding to consultations relating to planning applications/Local Plan proposals that there were no rights to engage in lawful sports and pastimes on the fields, by contending that they should "revert to full agricultural use".
>
> (4) The Registration Authority was not entitled to register a village green for the benefit of the inhabitants of the ecclesiastical parish of Haslemere, because an ecclesiastical parish cannot be a "locality" for the purposes of s.22(1) of the Act, because there was unfairness in the late identification of the ecclesiastical parish as the relevant locality, and because there was no evidence of any nexus between the use of the fields for lawful sports and pastimes and the ecclesiastical parish.

Analysis and Conclusions

Ground (2): Agricultural Use

51 I begin with ground (2) because the Inspector recognised that it was of critical importance:

> "14.46 Thus in the end the resolution of the present application stands or falls, in my judgment, on this point. The view which I have formed is that the annual cutting of grass and its collection as hay on each of the three application fields for well over half of the key 20 year period is *not* incompatible with recognising the establishment of village green rights, ****585*** which is otherwise clearly warranted here. The same goes for the very low level of use by grazing animals (minimal in Fields 1 and 3, slightly more in Field 2) which I have concluded might have been encountered, at some times, during parts of the first two or three years of the 20 year period.
>
> 14.47 If I am wrong on this point, and these things *are* incompatible with the establishment of a village green under the 1965 Act, then I make it plain that my overall conclusion and recommendation would have to be changed completely. However in my judgment the "low level" agricultural activities which Mr Pennington undertook on the subject fields from August 1980 onwards *were* compatible with the establishment of village green rights."

52 The Inspector's conclusions as to the nature and extent of Mr Pennington's "low level agricultural activities" are not in dispute. Having concluded that 1979 was the last year when

cattle were kept on the farm, including Fields 1 and 3, to any significant extent, and that "any presence of cattle in Fields 1 and 3 from and including 1980 onwards would have been minimal"(14.36) the Inspector said in paragraphs 14.37 and 14.38:

> "14.37 An annual hay crop would generally be taken from those of the fields which had not had cattle on them in the grass-growing season, until the early 1990s. Thus from summer 1980 (and possibly previously, from Mr Pennington's own evidence) a summer hay crop would usually be taken from Fields 1 and 3, and it can reasonably be assumed that for most of those years, until Mr Pennington gave up, a hay crop would be taken from Field 2 as well.
>
> 14.38 The methods used to gather a crop of hay from a grass field were explained in some detail by Mr Pennington, as were the preparatory steps of harrowing/rolling/ fertilising which are carried out in the spring. These matters were not in any real dispute."

53 Mr Pennington's explanation of the various steps is summarised in paragraphs 8.60–8.68 of the Inspector's Report. Harrowing the three fields could be done in a day. After harrowing, rolling the fields with a three-ton roller would take about two days. Fertiliser would be applied using a "spinner", a job that was easily done in a day. This preparatory work would be done sequentially over a period of four days usually (in the cattle years) before the cattle arrived, but occasionally after they had come. When the grass was ready, it would be cut and crimped by a flail mower/conditioner. This job would take two days if all three fields were mowed. Children could not play safely in a field whilst a flail mower was being used, and people were sometimes asked to leave the fields because of the danger. The hay would then be spread out to dry by a "hay bob", this process being repeated over two or more days depending on the weather. The bobbed hay would be placed into "wind rows" and then baled. In the early days, before balers improved, baling Field 3 (the largest field) would take two days. The bales would be collected into blocks, Field 3 would take one day, Fields 1 and 2 slightly less; they would then be loaded onto lorries and removed. Loading from Field 3 would take two days and from Fields 1 and 2 a little less. A very approximate figure of 2,400–2,500 bales (seven or eight lorry loads) might be taken from the fields altogether.

54 In para.14.40 the Inspector said: ***586**

> "14.40 I have registered the point that none of the Applicant's witnesses claimed to have the right to stop the haymakers from carrying out their activities. They would "steer clear" of Mr Pennington's equipment while it was in use, to whatever extent was appropriate to the apparent danger; they would not deliberately interfere with the cut hay laid out to dry before collection. Likewise, though this was less discussed in the evidence, they would "steer clear" of any cattle they happened to see in the fields (the evidence however suggested that encounters with cattle were minimal)."

55 In para.14.41 he posed the key question:

> "14.41 Are haymaking, and possible occasional encounters with a small number of grazing animals (particularly in Field 2) in the early years, incompatible with village green status, and in particular with establishing village green rights?"

56 At the outset of his "Conclusions on the Principal Issues—Fact and Law" the Inspector said that the case was "far from straightforward". In para.14.2 he identified one area of particular concern:

> "14.2 One area of particular concern to me, but on which I received comparatively little assistance from the case and authorities cited to me by the parties, is the extent to which the exercise, and "generation by prescription" of village green rights for sports and pastimes can be compatible with the continued carrying out of *some* level of 'agricultural' activity on the land concerned, in the shape of hay cutting and/or grazing.

All parties were agreed, and it seems obvious, that village green rights are incompatible with arable use of land. Common sense suggests that they are unlikely to be generated on enclosed land which is intensively used for pasturing animals. However Widner Farm is not one of those easy cases."

57 Having said that he was "not assisted by the 1965 Act at all" the Inspector set out his reasons for answering the key question in the negative:

"14.41 ... Common sense suggests that *someone* has to keep the grass down on any village green which consists of the normal grassy area which one typically expects. It would be a rare village green where the grass could be kept short enough on a permanent basis simply by the actions of human feet. No doubt with many established village greens it will be the local inhabitants themselves, perhaps through their Parish Council, who keep the grass cut. However, when a village green is being established through usage it seems to me almost inevitable that it will be the landowner, or his tenant or licensee, who does such cutting of the grass as does take place, whether by mechanical means or by some level of grazing which is compatible with the village green uses.

14.42 The fact that people on the fields in practice have to get out of the way of the equipment being used to cut the grass and collect the hay does not seem to me to argue strongly in any particularly direction; people routinely have to get out of the way of the sort of mowing equipment which is used to keep the grass down on playing fields and other recreation areas, including established ***587*** town or village greens. The same principle would seem to apply to the fact that most people would tend to avoid close contact with any grazing beasts they happened to see on a "village green" area.

14.43 Nevertheless I do not find this an easy question. I am assisted however by the fact that in a number of the leading cases on village greens it seems to have been assumed without question that there in no inherent incompatibility between grazing at least, and village green rights. Most notably, in the *Sunningwell case itself, in the House of Lords: [2000] AC 335* , at p.358, Lord Hoffmann expressly quotes from the report of the Inspector, Mr Vivian Chapman, who had held the inquiry in that case:

'Third, the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use and has been tolerated by the tenant or grazier.'

It seems to me inconceivable that Lord Hoffmann or the House of Lords (or indeed Mr Chapman) should be taken as having missed some obvious point that village green use is automatically incompatible with the land being grazed by the animals of the tenant or grazier. It was also noted by the *Court of Appeal in New Windsor v. Mellor [1975] Ch. 380* , at p.390 that the area concerned there ('Bachelors' Acre') had at one point in its history been let as a pasture, while still being subject to rights for 'recreations and amusement'.

14.44 My attention was also drawn to *Gadsen* on the law of Commons, where at section 13.07 under the sub-heading 'Greens and rights of common' there is some discussion of how village green rights can be compatible with rights of common (which presumably would include grazing), and with the taking of hay. I do not find it easy to relate the passage clearly to the present case, but it certainly does not displace the view I have formed that there is nothing inherently incompatible between village green use and either a moderate level of grazing or the cutting of the grass for hay.

14.45 I was also asked to consider Section 12 of the Inclosure Act 1857 , which among other things prohibits the leading or driving of any cattle or animal on a town or village green 'without lawful authority'. It seems to me that the answer to this must be that the *owner* of the land concerned, or his tenant or licensee, *does have* the lawful authority to place his cattle on the green, at least in any manner which is not incompatible with village green rights. The converse would be that village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing, or

indeed hay-cutting, on the land."

58 I do not find the first and second of these reasons persuasive. Mowing an established village green to facilitate its use for lawful sports and pastimes would not be in breach of s.12 of the 1857 Act, and being "with a view to the better enjoyment of such town or village green" would not be deemed to be a public nuisance by s.29 of the 1876 Act. It is not to be equated with the agricultural use of a field for the purpose of taking a hay crop. Land which is used to grow grass which is then cut and used for silage and hay falls within the definition of land "cultivated ... with a view to a harvest" in Council Regulation 1765/92 : *Wren v DEFRA, [2003] EWHC 2667* ****588*** . It might be one of the least intensive forms of cultivation, but it is still the growing of a crop with a view to harvesting it.

59 Preparatory steps, harrowing, rolling, fertilising, are taken with a view to encouraging the crop to grow, notwithstanding the fact that long grass may discourage many lawful sports and pastimes until it is cut (see, *e.g.* para.7.71). Gathering a hay crop, with the activities of mowing, bobbing, wind rowing, baling, stacking, loading and removal, will interrupt the use or enjoyment of a field "as a place for exercise and recreation". Not merely do people have to keep out of the way of the machinery when it is in use, they may not disturb the mown hay whilst it is drying, when it has been aligned in wind rows, and when it has been baled. Getting out of the way of machinery which is being operated so as to facilitate the use of land for lawful sports and pastimes (mowing/rolling a playing field) is wholly consistent with the assertion of a right to use the land as a village green. Getting out of the way of machinery which is being operated for an agricultural purpose, to facilitate the taking of a hay crop from the land which will inhibit its use for lawful sports and pastimes, whilst the grass is growing, whilst it is dried and aligned for baling after cutting, when it has been baled, and whilst the bales are collected is not consistent with the assertion of such a right.

60 I agree with the Inspector that it is inconceivable that the House of Lords would have missed an obvious point: that village green use is "automatically incompatible with the land being grazed by the animals of a tenant or grazier". In the *Sunningwell* case there was little discussion of the extent of the grazing; the Inspector merely recorded his conclusion that the "rough grazing", which he had described as being by "a handful of horses", had not conflicted with the use of the glebe for informal public recreation. That is not surprising, since neither the extent of the grazing use, nor its effect on the recreational use of the glebe were raised as issues by the objector before the Inspector, or in the House of Lords. The use of Bachelors' Acre as pasture, referred to by Lord Denning in the *New Windsor* case (at 388) appears to have preceded the 1857 Act (which prohibited without lawful authority leading or driving cattle on village greens), and in any event was, after 1817, always expressly subject to the Bachelors' right to use the land "for all lawful recreations and amusements"(at 390).

61 The passage in *Gadsen* referred to by the Inspector effectively acknowledges that there may be a conflict between recreational use and rights of common and seeks to reconcile the conflicting interests as follows:

> "On principle it must be that the recreational use in such circumstances is subservient to the rights of the owner of the land and the commoners ... In the event of conflicting priorities, the original property rights of owners and commoners should prevail. Thus, for example, if the land is traditionally cut for hay, the existence of the recreational use will not allow inhabitants to enter and spoil the hay. On the other hand it also seems, as a matter of principle, that the owners of the land, or rights over the land, may not exercise their rights in such a way as to wilfully inhibit or prevent the rights of recreation."

62 The only authority cited in support of this eminently sensible approach is *Fitch v Fitch (1797) 2 Esp. 543* . In that case the inhabitants of a parish had a customary right to play lawful games and pastimes at all times of the year in the plaintiff's ****589*** close. The close was used for growing grass. After the grass was mown the defendants had "trampled down the grass, thrown the hay about, and mixed gravel through it, so as to render it of no value". In response to the defendants' contention that they were justified in removing any obstruction to the free exercise of their right, Heath J. said:

> "The custom appears to be established. The inhabitants have a right to take their amusement in a lawful way. It is supposed, that because they have such a right, the plaintiff should not allow the grass to grow. There is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers."

63 This supports the proposition that the use of land for growing a hay crop was not incompatible with the existence of a customary right to indulge in lawful sports and pastimes on the land: see also *Fitch v Rawling (1795) 2 H. Bl. 394* . Prior to the enactment of the nineteenth-century legislation the two rights could coexist; each right was conditional upon it not being exercised in such a way as to deliberately obstruct the exercise of the other.

64 Since the enactment of s.12 of the 1857 Act it has not been possible to establish such conditional rights. Rights of common can no longer be created by prescription over a village green: if the grazing is with the owner's permission it will not be "as of right", and if it is "without lawful authority" it will be a criminal offence and thus will not give rise to a prescriptive right: see *Massey v Boulden [2003] 2 All E.R. 87* , *per* Simon Brown L.J. at para.[9].

65 Moreover, s.12 makes any act "to the interruption of the use or enjoyment [of a village green] as a place for exercise and recreation ..." a criminal offence. Whatever may be the position in relation to those customary rights which had been established by 1857, where haymaking and recreational use were able to coexist, no such rights can have been established after the enactment of s.12 . If a village green is established, any other use involving acts which would interrupt its use for enjoyment and recreation are effectively prohibited. It is difficult to see how the various steps that are necessary to gather a hay crop (as opposed to mowing grass to keep it short and useable for recreational purposes) could be said not to amount to such an interruption.

66 Section 29 of the 1876 Act, to which the Inspector did not refer, makes any effective agricultural use of a village green even more difficult. The erection of fencing ("inclosure"), or a shelter or water trough ("any erection") to facilitate the use of the land for grazing would be prohibited, as would ploughing and re-seeding ("disturbance or interference ... with the soil"). The occupation of the soil for the purpose of taking a grass crop, involving the steps described by Mr Pennington (above), would not be "with a view to the better enjoyment of [the] village green", and would thus be deemed to be a public nuisance.

67 Mr George submitted that the words "without lawful authority" in s.12 were a recognition that pre-existing commoners' rights of grazing could continue, and ***590** were not an acknowledgement of the landowner's right to graze cattle on a village green. I agree with the Inspector (14.45) that s.12 permits the landowner (or his tenant or licensee) "to place his cattle on the green at least in any manner which is not incompatible with the village green rights". I further agree that "the converse would be that [even after 1857] village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing ...". Given the restrictions imposed by ss.12 and 29 (above) such grazing would have to be very low key indeed (as was the case in the *Sunningwell*) in order to be lawful and compatible with the establishment of village green rights.

68 For the reasons set out above I do not agree with the Inspector's conclusion that village green rights can be established where land is being used for the growing, and cutting, drying, baling etc. of a hay crop. The Inspector refers at the end of para.14.45 to "hay cutting". The occupation of land for the purpose of "hay cutting" is not to be equated with grass cutting. The former is no different in principle to the harvesting of any other crop. Insofar as the latter is carried out "with a view to the better enjoyment of [the] village green" as such, it will not be a public nuisance under s.29 , nor will it be a criminal offence under s.12 . When enacting the definition of "town or village green" in s.22(1) of the Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of s.22(1) , since upon registration as a

village green (if not after 20 years use) some, if not all, of those lawful agricultural activities would become unlawful by virtue of ss.12 and 29 . Moreover, the prospect of improving the land agriculturally, by fencing, or by ploughing or re-seeding, would be lost.

69 On behalf of the Council Mr Morgan submitted that the question of whether a particular use by a landowner is incompatible with the establishment of a village green right is a matter of fact and degree. The issue is whether the use was such as to interfere sufficiently with the use for lawful sports and pastimes to indicate that the use was not enjoyed as of right. This appears to have been the Inspector's approach in Chapter 14 of his Report. At the beginning of that chapter he concluded that Mr Pennington visited Widmer Farm very much less frequently than three times a week (the figure claimed by Mr Pennington), and after cattle ceased to be on the fields he visited them " *very* infrequently ... except when specific activities such as harrowing/rolling/fertilising or hay-making, were being undertaken" (14.4–14.15).

70 He then analysed the extent of the use of the fields for lawful sports and pastimes and concluded that there was "abundant evidence of continuous use by local people of the whole surface of these fields for at least the 20-year period required ... The overall picture is one of substantial levels of use for recreational activities" (14.25). In para.14.23 he left:

> "until later the question foreshadowed earlier, of what the legal consequences are when the evidence suggests *both* a village green user *and* some modest ***591** level of 'agricultural' type activity coexisting on the land for a significant part of the prescription period."

71 He dealt with that question in paras 14.29–14.47. The principal conclusions are set out above. In para.14.39 he identified:

> "The real question, and the key question for me in terms of advising the County Council, is what effect this level of 'agricultural' activity in the fields has on the proposition that the village green type uses, which I have already found were being carried on extensively and openly from at least 1979 and probably earlier, truly were 'as of right' and sufficiently continuous."

72 Thus the Inspector was considering the effect of the "agricultural" activity upon the "village green type uses". Mr Morgan submitted that on the facts found by the Inspector,

> "the evidence was that the agricultural activities would have had very little effect on the lawful sports and pastimes being carried out on the application site".

73 I readily accept that the question is one of fact and degree in each case. Such questions are to be determined by the Council as Registration Authority, and the Court will not substitute its own judgment if the Council has, in adopting the approach set out in the Inspector's Report, correctly directed itself in law. In deciding whether the use for lawful sports and pastimes was being enjoyed "as of right" for the purposes of s.22(1) , I do not consider that it was appropriate to look at the question from the standpoint: "did the agricultural use interfere sufficiently with the use of the land for lawful sports and pastimes?" The extent to which the use of the land for recreational purposes has been interrupted during the 20-year period is certainly a relevant factor. In the only village green case in which the extent of the recreational use was in issue, *Ministry of Defence v Wiltshire County Council [1995] 4 All E.R. 931* , Harman J. at 935d, referred to a decision of Buckley J. in a commons case, *White v Taylor (No.2) (1969) 1 Ch. 160* at 192:

> "To make good a prescriptive claim in this case it is not necessary for the claimant to establish that he and his predecessors have exercised the right claimed continuously. This is a profit of a kind that, of its nature, would only be used intermittently. Flocks would not, for instance, be on the down at lambing time ... But the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed."

74 Harman J. therefore concluded that for the purposes of s.22(1)

> "one has to have here a user of the land of such a character and degree of frequency as to indicate an assertion of a right by a claimant".

75 In *Sunningwell* , Lord Hoffmann said:

> "I agree with Carwath J. in *R. v Suffolk County Council Ex parte Steed (1995) 70 P. & C.R. 487* , 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be ***592** the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right" (at 357D).

76 Although there are references in Lord Hoffmann's speech to "the quality of enjoyment" (at 351F) and "the quality of user" (at 352F), their Lordships were not concerned with the extent of the recreational use of the glebe in that case, but with the meaning of the words "as of right" in s.22(1) , and specifically with the question whether those words meant that the right had to have been exercised in the belief that it was a right enjoyed by the inhabitants of Sunningwell. The witnesses for the parish council had not said that they thought that the right was confined to the inhabitants of the village. This was held to be fatal to the application (at 348H–349C). The House of Lords decided that registration should not have been refused on this ground (at 356E).

77 At the beginning of his review of the historical background, Lord Hoffmann contrasted the approach to prescription under Roman Law, which was not concerned with the acts or state of mind of the former owner; and that under English Law, which approached the question from the other end, by treating lapse of time as barring the former owner's remedy, or giving rise to a presumption that he had done some act which conferred a lawful title (at 349D–H).

78 Under English Law the focus is not upon how matters would have appeared to the person seeking to acquire the right by long usage, but upon "how the matter would have appeared to the owner of the land" (at 352H–353A).

79 Referring to the requirement that long user had to be *nec vi* , *nec clam* and *nec precario* , Lord Hoffmann explained that:

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known the user and in the third, because he had consented to the user, but for a limited period."

80 He cited *Mann v Brodie (1884–85) L.R. 10 App.Cas. 378* , and *Bright v Walker (1834) 1 C.M. & R. 211* :

> "In *Mann v. Brodie* Lord Blackburn put the rationale as follows, at p.386: 'where there has been evidence of a user by the public so long and in such manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.'"

and

> "the user by the public must have been, as Parke B. said in relation to the private rights of way in *Bright v. Walker 1 C.M.& R. 211* , 219, 'openly and in the manner that a person rightfully entitled would have used it.'"

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81 In *Steed* the Court of Appeal had followed dicta in three earlier cases, including *Hue v Whiteley (1929) 1 Ch. 440* , a decision of Tomlin J. Lord Hoffmann (at 354F) doubted whether

> "Tomlin J. meant to say more than Lord Blackburn had said in *Mann v. Brodie, 10 App.Cas. 378* , 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is irrelevant."

82 Thus, the proper approach is not to examine the extent to which those using the land for recreational purposes were interrupted by the landowner's agricultural activities, but to ask whether those using the fields for recreational purposes were interrupting Mr Pennington's agricultural use of the land in such a manner, or to such an extent, that Laings should have been aware that the recreational users believed that they were exercising a public right. If the starting point is, "how would the matter have appeared to Laings?" it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's use of them, for taking an annual hay crop.

83 The Inspector noted that "none of the applicant's witnesses claimed to have the right to stop the haymakers from carrying out their activities. They would "steer clear of Mr Pennington's equipment while it was in use ... they would not deliberately interfere with the cut hay laid out to dry before collection" (14.40, see also the evidence of GAG's witnesses recorded at 7.5, 7.8, 7.17, 7.20, 7.32, 7.38, 7.56, 7.60 "the farmer carrying out activities such as mowing or harrowing in the fields would plainly have had priority over anyone involved in recreational activities", and 7.74).

84 I appreciate that Mr Pennington was not physically present on the fields for very many days in the year. That is not uncommon now that agriculture has become more mechanised. A landowner may choose to use his land for only a few days a year for a variety of non-agricultural purposes: e.g. as an overflow car park, a reserve playing field, or an occasional camping or caravan site. If the local inhabitants also use such land for lawful sports and pastimes, there may be very little interruption of their recreational use if the issue is looked at from their point of view. From the landowner's point of view, so long as the local inhabitants' recreational activities do not interfere with the way in which he has chosen to use his land---provided they always make way for his car park, campers or caravans, or teams playing on the reserve field, there will be no suggestion to him that they are exercising or asserting a public right to use his land for lawful sports and pastimes.

85 If it was possible for the local inhabitants to establish the existence of a village green after 20-years use in such circumstances (because there had been virtually no interruption of their recreational activities), the landowner would then be prohibited by the nineteenth-century legislation, ss.12 and 29 , from continuing to ***594*** use his land, on an occasional basis, for any purpose which would interrupt or interfere with the local inhabitants' recreational use. I do not believe that Parliament could have intended that such a user for sports and pastimes would be "as of right" for the purposes of s.22 . It would not be "as of right", not because of interruption or discontinuity, which might be very slight in terms of numbers of days per year, but because the local inhabitants would have appeared to the landowner to be deferring to his right to use his land (even if he chose to do so for only a few days in the year) for his own purposes.

86 Like the Inspector, I have not found this an easy question. Section 12 acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of the land for recreational purposes: see *Sunningwell* . If the statutory framework within which s.22(1) was enacted had made provision for low-level agricultural activities to coexist with village green type uses, rather than effectively preventing them once such a use has become established, it would have been easier to adopt the Inspector's approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with Mr Pennington's taking of an annual hay crop for over half of the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right,

which it would have been reasonable to expect Laings to resist.

87 I have dealt with ground (2) at some length, because if I am correct in concluding that this ground succeeds, that is sufficient to dispose of this application in the claimant's favour, as the Inspector said: "the present application stands or falls ... on this point". In my view, for the reasons set out above, the Inspector and the Council should have concluded that GAG's application fell on this ground.

Ground (1): Use for lawful sports and pastimes

88 Having reviewed the evidence, the Inspector's conclusions as to the nature and extent of the local inhabitants' use of the land were as follows:

> "14.23 I thus conclude that that which the local inhabitants were doing on the application land, from the late 1970s through until the application in August 2000, they were doing without force, openly, without permission express or implied, and not in defiance of any express prohibition. Thus *prima facie* they were doing these things "as of right", in the terms of the statute. However I recognise that in dealing with this aspect of the matter I have run ahead of the question whether *what* they were doing on the land was of the nature of "indulging in lawful sports and pastimes", and sufficiently extensive and continuous to meet the requirements of the 1965 Act . This is what I now turn to ...
>
> 14.24 I entirely take the point that some of the evidence was from people whose own regular habits involved walking round the paths that developed around the field boundaries, and that because of the nature of the vegetation on site some of the activities mentioned, such as blackberrying, must have taken place on or near to those boundaries and footpaths. Likewise the evidence, and common sense suggested, that certain activities such as cycling by children would tend to be confined to the field margins at certain times, ***595** when the grass in the middle of the fields was somewhat longer and awkward to cycle in.
>
> 14.25 However, it seems to me, from the evidence which was given at the Inquiry, from the additional written material, and from the numerous returned questionnaires (accepting that those latter two categories have less weight than evidence tested by cross-examination) that there is abundant evidence of continuous use by local people of the whole surface of these fields for at least the 20-year period required. I am conscious of what was said in the *House of Lords in Sunningwell* as to the nature of "lawful sports and pastimes" in modern times. Here, in addition to the dog walking and playing with children there referred to, there was evidence about general walking (i.e. without dogs), children playing by themselves, kite flying, bird watching, family games, football and other ball games, cycling, regular games by the local Scouts and Guides (particularly in Fields 2 and 3), picnicking, and many other activities besides. I entirely accept that not all of these things would be going on on all the fields at all times, and that some of the activities probably waxed and waned according to fashion, and the predominant age groups of the local people using the fields during any particular period. However the overall period is one of substantial levels of use for recreational activities.
>
> 14.26 ...
>
> 14.27 Clearly the point, mentioned in *Sunningwell* , that the user must not be so trivial and sporadic as not to give the appearance of user as of right, needs careful consideration in a case where a large area is claimed. It seems to me however, as indicated above, that there is abundant evidence of regular, continuous user of these fields by local people for a variety of lawful recreations and pastimes for the purpose of the Act. I do not consider that the fact that these fields do not look like the conventional "picture postcard" village green is relevant to whether they meet the requirements for that status."

89 His conclusion as to the extent to which Laings were aware of these activities is contained in para.14.21:

> "I have considered the argument advanced by Laings in this regard. I have some

> difficulty with the proposition that an absentee landlord with an almost absentee grazing licensee can rely on that absentee status to claim that they ought not or could not be taken to have notice of activities carried out quite extensively and openly on their land. In my view that is not the correct approach in village green cases under the 1965 Act . However, as already indicated, I find that Laings and Mr Pennington did during the relevant period have ample actual notice that local people were coming onto the land, and at least constructive notice that they were using it in ways which could potentially give rise to a village green claim (e.g. not just sticking to fixed footpaths but using it more informally and generally)."

90 In the light of these conclusions Mr George accepted that, at first sight, the claimant had an uphill task in establishing a relevant error of law for the purposes of ground (1) (above). In these conclusions the Inspector was resolving disputed ***596** questions of fact, having heard the witnesses give evidence. The claimant did not contend that GAG had to prove use of the fields each day, or even each week throughout the 20-year period, nor was it necessary to prove the use of every square yard of the 38 acres. However, Mr George submitted that in an application for registration of a village green under s.22(1) it had to be shown:

> (a) that the use was sufficiently frequent throughout the day, as opposed to frequent at certain times and infrequent at others,
>
> (b) that throughout the day the frequent use extended to the great majority of each of the three fields,
>
> (c) that in analysing continuity, frequency and extent, use by walkers with or without dogs should be excluded if it merely took place around the edges of the fields (along the public footpaths confirmed in the Footpath Order in June 2000) or diagonally across them.

91 In respect of (a) the Inspector had failed to specifically address the question whether during the majority of daylight hours there was normally recreational activity on the Fields. In respect of (b) he had failed to undertake a field-by-field analysis of the various uses and did not explain how he had reached the conclusion that recreational activities had extended across all three fields for 20 years: *e.g.* there was no evidence of Cub Scouts' use after 1987 (7.67), and prior to 1987 the Cub Scout use was mostly on part only of Field 3 (7.68), and was confined to 6.00–7.15pm (7.74).

92 In respect of (c) the Inspector had correctly recorded Laings' submissions. Relying upon *White v Taylor* (10.7) Laings had contended that "... in the present case it would be necessary to show a continuous village green use of all three fields and not just their perimeters, and not just such walking or dog walking as would give rise to a right of way as opposed to a new village green" (10.8). In closing submissions Laings presented an analysis which sought to distinguish between the use of the footpaths around the edges of the fields and other uses off the footpaths (10.16–10.22). The Inspector did not explain why he disagreed with that analysis, and in his conclusions (above) he appeared to have included all the walking and dog walking on the footpaths as evidence of the use of the fields for lawful sports and pastimes. If one asked how the matter would have appeared to Laings (*Sunningwell* , 352H), the use of the footpaths as such would not have suggested to a reasonable owner that the users believed that they were exercising a right to engage in lawful sports and pastimes across the whole of the 38 acres.

93 Although the claimant's skeleton argument contained a detailed analysis of what activities on the fields were, or were not, seen by Mr Pennington and Mr Pantling (the claimant's planning consultant from 1982), Mr George did not dissent from the proposition that the Inspector's approach in the second and third sentences in para.14.21 (above) was correct. Laings could not take advantage of the fact that it was "an absentee landlord with an almost absentee grazing licensee". The test is an objective one: how would the local inhabitants' use of the fields have appeared to a reasonable landowner?

94 I do not accept the claimant's proposition (a)(above). It is not suggested that it is supported by any authority, and it would appear to be an attempt to impose a more onerous test than that set

out in the Ministry of Defence and *Sunningwell* cases ***597** (above). The Inspector realised that the level of use would vary, at different times of the day and on different days:

> "I have already acknowledged that some of the regular users had a tendency to go on the land in the early mornings, the evenings or at weekends, but this is by no means true of all users" (14.20).

95 I accept Mr Morgan's submission that since village green uses are, by their very nature, leisure related, it would be most surprising if there was a requirement that lawful sports and pastimes should be carried on sufficiently frequently throughout daylight hours at all times of the year. Most recreational activities will, by their very nature, be enjoyed by the local inhabitants outside normal working hours, at the weekend and during the school holidays. Outdoor recreation is likely to be more frequent in the summer than in the winter. A similar pattern of use would have been expected on customary village greens. When the custom was first established working hours would have been much longer, and the time available for recreation on the village green correspondingly shorter.

96 With regard to proposition (b), the Inspector did consider whether there was sufficient evidence of use of the whole, as opposed to merely part of the fields, and concluded:

> "that there is abundant evidence of continuous use by local people of *the whole* surface of these fields for at least the 20-year period required"(14.25, my emphasis).

97 In reaching that conclusion, he accepted that not all of the activities listed in paragraph 14.25 "would be going on on all the fields at all times". Subject to point (c) (below) the Inspector was entitled to reach that conclusion. Many of the witnesses who gave evidence made it clear that their own use of the application site was not confined to one field, but extended to all three fields: see e.g. the evidence of Miss Edgson (7.2), 7.4); Mrs Lancaster (7.6); Mr Pattenden (7.13, 7.16); Mr Cassell (7.33); Mr McCarthy (7.49); and Mr Wainman (7.81). Other witnesses referred in general terms to their use of "the fields", and to seeing others using the fields. There were numerous access points around all three fields, and those who confined their use to one field did so as a matter of convenience of access and preference, and not in response to a perception that the other fields were closed to them. Having carefully recorded all the evidence, the Inspector was not obliged to go through a "field-by-field analysis" before reaching the conclusions in paras 14.23–14.27 (above).

98 In response to the claimant's proposition (c) (above) Mr Morgan submitted that it was artificial to "subtract" the use of the footpaths from the other recreational uses. Dog walking may be one of the main functions of a village green (*Sunningwell* 357D). The Inspector was aware of the footpath evidence. He specifically referred to Laings' argument at the Footpath Inquiry when the period 1979–1999 was being considered that:

> "the fields would appear to have been used on an informal basis with no definitive line taken" (14.20).

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99 Mr Morgan submitted that the Inspector did distinguish between the use of the paths that developed around the field boundaries (14.24) and the use of the three fields as a whole (14.25).

100 The evidence at the Footpath Inquiry was potentially significant, because the supporters of the Order were, in effect, contending that they had used the defined paths for 20 years or more prior to 1998, and had not simply roamed at will over the fields:

> "The claimed footpaths provided useful shortcuts between Hazelmere and facilities of Widmer End in or near Grange Road, and to North Road. They were also used for recreation and, especially, for exercising dogs" (para.22, Footpath Inspector's decision letter).

101 The Footpath Inspector rejected Laings' objection to the Order in para.39 of his decision letter:

> "Laings assert that there is informal use by the public of the fields, but no specific footpath routes. I accept from signs of use on the ground and from my observations of members of the public in the fields in the course of my site visits, that public use of the fields is not restricted to the footpaths claimed in the Order. Nevertheless, the routes of the claimed footpaths are discernible on the ground, and there is unchallenged evidence of considerable weight that their routes have been in such use as to satisfy Section 31 of the 1980 Act. Use of other parts of the fields would not, in my view, affect the accrual of public rights over the claimed footpaths."

102 As noted above, the Footpath Order confirmed the existence of footpaths all around the perimeters of each of the three fields (the paths cut across the south western corners of Fields 1 and 3). For obvious reasons, the presence of footpaths or bridleways is often highly relevant in applications under s.22(1) of the Act: land is more likely to be used for recreational purposes by local inhabitants if there is easy access to it. But it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way—to walk, with or without dogs, around the perimeter of his fields—and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.

103 Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?

104 The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who ***599*** casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see *per* Lord Hoffmann at 358E of *Sunningwell* . I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.

105 While the Inspector was not obliged to carry out a field-by-field analysis, he was obliged to grapple with the principal point made in the Claimant's analysis: that looking at the 20-year period, walking, including dog walking, was the principal activity, and that it was largely confined to the footpaths around the perimeter of the fields. If that use was discounted, the other activities over the remainder of the fields were not of such a character and frequency as to indicate an assertion of a right over the entirety of the 38 acres for 20 years, not least because the other paths (across the fields) only began to evolve after 1993 and so were not claimed as footpaths (10.17). In para.14.24 the Inspector appears to have accepted the claimant's analysis, up to a point: noting that in addition to walking on the paths that developed around the field boundaries, some of the other activities such as blackberrying would have taken place on or near the boundaries, rather than across the fields as a whole.

106 But when the Inspector concluded in para.14.25 that there was abundant evidence of continuous use by local people of *the whole* surface of the fields he relied "in addition to the dog walking and playing with children" referred to in *Sunningwell* , also upon "general walking (*i.e.* without dogs)" as being among the many activities that took place on the fields.

107 Thus the Inspector considered whether the whole, and not merely the perimeter of the fields was being used, but he did not deal with the issue raised in the claimant's analysis: how extensive was the use of the fields if the use of the footpaths around their boundaries for walking and dog walking (making allowance for the fact that dogs off the lead may stray, see 10.18) was discounted, such use being referable to the exercise of public rights of way, and not a right to indulge in informal recreation across the whole of the fields.

108 I accept that the two rights are not necessarily mutually exclusive. A right of way along a defined path around a field may be exercised in order to gain access to a suitable location for informal recreation within the field. But from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.

109 I do not suggest that it will be necessary in every case where a footpath crosses or skirts an application site under the Act to distinguish between the exercise of a right of way and the use of a site for informal recreation. The footpath may be lightly used as such and the evidence of non-footpath use may be substantial. But the present case is most unusual in that there were recently confirmed footpaths around the perimeters of all three Fields. These footpaths were not lightly used. The Footpath Inspector had concluded that there was "unchallenged evidence of considerable weight that their routes have been in such use as would satisfy section 31 of the [Highways Act] 1980 ". The Claimants drew the Inspector's attention to ***600*** evidence from one of GAG's witnesses "that the majority of people in the fields stuck to the boundary footpaths" (10.16).

110 It is no accident that the Inspector's list of activities in para.14.25 commenced with dog walking and general walking (*i.e.* without dogs). On any view of GAG's evidence set out by the Inspector in Ch.7 of his Report these were the principal activities throughout the 20-year period. A number of the other activities were very occasional, such as kite flying, or of limited duration, *e.g.* use by the Cub Scouts appears to have ceased in 1987 (7.67). I do not underestimate the difficulties confronting the Inspector but he does appear to have relied upon the extensive use of the perimeter footpaths as such, for general and dog walking, in reaching his conclusion that there was abundant evidence of the use of the whole of the fields for lawful sports and pastimes for the 20-year period (14.25). To Laings, as a reasonably vigilant, and not an absentee, landowner those walkers would have appeared to be exercising public rights of way, not indulging in lawful sports and pastimes as of right. For these reasons the claim also succeeds on ground (1).

111 I have dealt with grounds (1) and (2) separately, but there is an overlap to this extent. Walkers, whether with or without dogs around the perimeter of the fields would have been less likely to have interfered with Mr Pennington's use of the fields for growing a hay crop. From the landowner's or agricultural tenant or licensee's point of view there would be less reason to resist walkers who kept to the perimeter of the fields. They would be safely out of the way even whilst machinery was being operated. It would not be reasonable to expect the landowner or tenant to realise that such persons were, in fact, asserting a right to walk all over the fields, through the grass whilst it was growing, or the hay whilst it was being cut, was drying and/or being baled.

Ground 3: Residents' Representations

112 A number of the local residents who gave evidence before the Inspector, including Mr Wainman who had made the application on behalf of GAG, knew that the fields were owned by Laings and were being held for future residential development (7.36, 7.58, 7.73 and 7.93).

113 Part 8 of the GAG's application for registration referred to a supporting document "The Case for Registration of Three Fields at Widmer Farm, Widmer End As Village Green", a paper compiled by members of GAG. Under the heading "Name of Claimed Land (Q5)", para.4.1.4 of the paper says:

> "Figure 4.1.4 shows the variation in name given by the respondents. It shows that most respondents referred to the area simply as "The fields"—often with some locational prefix e.g. "The school fields". The term H7 refers to proposals in a draft Wycombe Local Plan in the 1960s where Grange Farm, Terriers Farm, Rockalls Farm together with these fields of Widmer Farm were proposed for housing development. These proposals were rejected and the term H7 long since removed from official documentation, but it lives on in the memories of the local population who strongly opposed the development proposals."

114 In 1988 Mr Hiscock, one of GAG's witnesses, had written a letter protesting about a planning

application on the fields. His letter did not make any reference to ***601*** the use of the fields for recreation (7.73). During consultations on the emerging Local Plan in 1997 the Hazlemere Residents' Association submitted a document opposing residential development, and arguing that Widmer Farm should "revert to full agricultural use" (7.93). Mr Wainman accepted responsibility for this document. A similar document was submitted by the Widmer End Residents' Association in 1999. It contended that the agricultural land in the area (including Widmer Farm) should continue to be used for agriculture, and not be "fossilised as a country park" (7.94). Both of these Associations were participating organisations in GAG (1.5).

115 Thus, those closely involved with GAG, including Mr Wainman, had known throughout the 20-year period that they had no rights over the fields. They knew that their use of the fields was precarious, and would be brought to an end by Laings as soon as it could obtain planning permission for residential development. It was not submitted on behalf of the claimant that mere knowledge by the users of the fields that their recreational activities were not as of right would be sufficient to prevent the user being as of right:

> "... an inquiry into the subjective state of mind of the users of the [fields] would be contrary to the whole English theory of prescription, which ... depends upon evidence of acquiescence by the landowner ..." (*Sunningwell* , at 354G).

116 It was accepted that the Court is concerned with "outward appearance" to the landowner, and not with "the individual states of mind" of users, or with their "inward belief" (at 356B). *Steed* 's case had been wrongly decided because the Court of Appeal had required applicants to "depose to their belief that the right to games and pastimes attached to them as inhabitants of the village" (at 356E). However, it was submitted that *Sunningwell* does not deal with the position where users publicly express their inward belief that their use is not by right. If a user claiming a prescriptive right has, during the 20-year period, conceded that he has no entitlement to the claimed right, his use cannot be "as of right": see *Patel v. WH Smith (Eziot) Ltd [1987] 1 W.L.R. 853* in which a prescriptive right to park vehicles had been claimed.

117 In *Mills v. Silver (1991) Ch. 271* , where there was a claim to a prescriptive right of way, Dillon L.J. said at p.284F:

> "There is then *W.H. Smith (Eziot) Ltd [1987] 1 WLR 853* where the defendants claimed a prescriptive right to park vehicles on the plaintiffs' property and the plaintiffs sought an interlocutory injunction. It appears from the judgment of Balcombe L.J., at p.861A-B, that the plaintiffs had been persistently asserting in correspondence that the defendants had no right to park cars there and the defendants had been in the correspondence in practice conceding that and negotiating for a licence to park. Therefore it was held that the user by parking could not have been user as of right. That seems to me, with all respect to be correct; it was difficult for the defendants to assert their user by parking had been as of right, when their solicitors had written in 1978, "Our clients appreciate that they do not have a right to park on the yard in question."

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118 In the present case there was no such express concession to Laings by any of the participating organisations in GAG, but Laings argued that the representations made by Mr Hiscock and the two Residents' Associations in 1988, 1997 and 1999 (above) were nevertheless relevant because they were part of the picture, the "outward appearance", being presented to the landowner. Local inhabitants were using the fields, but at the same time they were making representations in public consultations opposing residential development, not on the basis that they were entitled to use the fields for lawful sports and pastimes, but on the basis that the fields should be more effectively used for agriculture. To set the representations in 1997 and 1999 in context it will be remembered that Mr Pennington had ceased to take a hay crop from the fields in the early 1990s.

119 The Inspector recorded the Laings' submission in para.10.32:

> "It was suggested that throughout the relevant period Laings knew that most of the

> users of the fields were aware of and opposed to its plans to develop the fields in a way wholly incompatible with the creation of a village green. Nothing in the *Sunningwell* decision suggests that such actual knowledge by the owner is irrelevant to the question of the objective appearance to the owner. That point simply was not argued in the *Sunningwell* case."

120 He responded to this submission in para.14.22:

> "I am not persuaded that the fact that *some* local people were aware that from time to time Laings would put in planning applications, or local plan submissions, aimed at securing eventual residential development of the Widmer fields, should be taken as some kind of general notice from Laings to all the local inhabitants that they (Laings) did not intend to acquiesce in the establishment of village green rights. That seems to me to be at odds with the approach of the *House of Lords in Sunningwell* , and wrong in principle. I do not believe it is right that some sort of inquest has to be carried out as to whether local people would, if they had thought about it during the relevant period, have surmised that the landowner would or would not have viewed their activities with favour, because of his long-term ambitions for the land in question. What matters is what the local people actually did on the land, whether they did it openly, and sufficiently extensively, without breaking in, and so forth, not an analysis of their mental state, or that of those of them who happen to follow local planning debates. It also appears to be true, as the Applicants observed, that quite a lot of successful village green applications occur in circumstances where the landowner harbours or has revealed development ambitions for the land concerned."

121 I agree with the Inspector that it would be at odds with *Sunningwell* and wrong in principle to treat the fact that some of the users of the fields were aware of Laings' planning applications as some kind of general notice from Laings to the local inhabitants that Laings did not intend to acquiesce in the establishment of village green rights. I further agree that what matters is what local people actually did on the land and not an analysis of the mental state of those who happened to follow planning debates.

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122 But this misses the point that was being made on behalf of Laings: what message was being conveyed *to* Laings as landowner by the words, as well as the deeds of the users of the fields? There was no express concession as in *Patel* . Unlike a private claim to a prescriptive right, where the Claimant may make such a concession, an application under s.22(1) is a claim that a public right exists and it is difficult to see who could make a concession which would effectively bind all the local inhabitants. However, in deciding whether a user has been indulging in lawful sports and pastimes on land "openly and in a manner that a person rightfully entitled would have used it" (*Sunningwell* 353A), I see no reason why public statements made by that user as to the existence, or otherwise of the right should not be admissible for the purpose of deciding "how the matter would have appeared to the owner of the land".

123 Unlike inward beliefs, public statements may contribute, together with deeds, to the presentation of an "outward appearance".

124 Mr Morgan submitted that an objection to development proposals made under one statutory regime—Town and Country Planning—could not sensibly be regarded as a concession made in the context of another statutory regime—the Act—which operates independently of the planning regime. Opposition to planning applications has been the spur for a number of applications under the Act, including the application in *Sunningwell* (at 347B).

125 I accept that the context in which a public statement is made will be relevant. The existence or non-existence of a right may be irrelevant in a particular statutory context. If so, failure to mention the right will be of no significance. But it does not follow that a statement must be discounted merely because it was made in the context of a different statutory regime. If a statement is equivocal it will be disregarded for that reason. Mr Hiscock's letter falls into that category: the fact that he did not mention the use of the fields for recreation when objecting to a planning application in 1988 does not assist Laings: the failure might well have been due to an

oversight on his part.

126 What of the Residents' Associations' responses to public consultation in 1997 and 1999? An objection to residential development is not inconsistent with an assertion of a right to use the fields for recreational purposes. But the representations went further: in addition to objecting to residential development, the Associations were contending that the fields should be more effectively used for agriculture. Viewed in isolation, this might not appear to be particularly significant, but the representations were capable of contributing to the overall picture that was being presented to Laings as landowners. The extent to which they did so would have been a matter for the Inspector to determine, had he approached the issue in this way.

127 Mr Pennington had taken an annual hay crop off the fields until the mid-1990s. The Associations' public response to the cessation of this agricultural use was not to argue that the fields were being used, and should be retained for recreational purposes, but that they should revert to "full agricultural use". Thus the representations were consistent with the apparent acceptance by the local inhabitants of Laings' right to use the fields for agricultural purposes.

128 The Inspector's failure to consider this aspect of Laings' case would not, on its own, have been a justification for allowing this application, but it does tend to ***604*** reinforce Laings' ground (2) (above). Why should it have appeared to Laings that the users of the fields believed that they were exercising a public right if, following their non-interference with Mr Pennington's taking of a hay crop, they (or Associations representing significant numbers of them) contended that agricultural use should be resumed following Mr Pennington's departure?

Ground (4): Locality

129 I can deal with this ground quite shortly because I am in complete agreement with the Inspector's conclusions on this issue.

130 The entries in part 3 of GAG's application on Form 30 were as follows:

> "Name by which [the claimed village green is] usually known: The Fields of Widmer Farm
>
> Locality: Widmer End, Buckinghamshire
>
> Colour on plan herewith: Green."

131 Paragraph 4.1.3 of the Case for Registration listed as a supporting document in Part 8 of Form 30 provided more details of "Locality":

> "There are some minor differences of opinion as to what constitutes the locality but most agree it includes the Widmer End ward of Hughendon Parish and the Park and Brackley ward of Hazlemere Parish. It should be noted that the fields are bounded on two sides by the dwellings of those wards of the Parish Councils areas and on the other two sides by agricultural land. They are thus not generally visible to casual passers by using roads in the area. Village Green designation is claimed on the evidence therefore of the residents of the two Parish wards noted above and not by the general public."

132 Before the Inspector, Laings argued that since a village green can be registered only if there has been 20 years use for lawful sports and pastimes by the inhabitants of a qualifying locality, identification of the locality was a pre-requisite to registration.

133 There is no dispute that the locality for the purposes of s.22(1) has to be an area recognised by the law:

> "Such units have in the past been occasionally boroughs, frequently parishes, both ecclesiastical and civil, and occasionally manors, all of which are entities known to the law, and where there is a defined body of persons capable of exercising the rights or granting the rights" *per* Harman J. at 937 of the *Ministry of Defence* case.

134 In *Steed* , Carnwath J. said that "locality" in s.22(1) :

> "should connote something more than a place or geographical area—rather a distinct and identifiable community such as might reasonably lay claim to a town or village green as of right." (at 501)

135 Laings argued that against this background the reference to "Locality" in Part 3 of Form 30 required an applicant to identify the locality whence the inhabitants claiming to have indulged in lawful sports and pastimes on the application land came.

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136 The Inspector described this argument as:

> "wholly without merit and wrong. It is obvious that the particulars sought in Part 3 are only in relation to identifying the correct location and extent of the claimed land and have nothing to do with the section 22 issue at all"(3.8).

137 I agree, Part 3 is headed "Particulars of the land to be registered, i.e. the land claimed to have become a town or village green." Given the importance of the locality in the statutory scheme it might have been desirable to require an applicant to provide information about the locality served by the village green in the prescribed form, but Form 30 does not require the provision of such information.

138 The Case For Registration explained that village green designation was being claimed by the residents of Widmer End Ward of Hughenden Parish and the Park and Brackley Ward of Hazlemere Parish. Had that remained the position, Laings would have had a good prospect of persuading the Inspector that there was no qualifying locality; either because electoral wards are not localities, or if they are, because the wards constituted two localities, and the inhabitants of one would not be inhabitants of the other. These arguments were advanced in Laings' written objection to the application.

139 In response to these arguments GAG's opening statement on the first day of the Inquiry contended that the Wards of Widmer End in Hughenden and Park and Brackley were certain:

> "So too is the Ecclesiastical Parish of Hazlemere. Similarly the Civil Parishes of Hughendon are certain."

140 It was further submitted that the users lived in the houses which were in "a tightly connected group around the village green". Four possible descriptions of the locality were set out. They included:

> "That the users are in the locality of the Ecclesiastical Parish of Hazlemere ..."

141 A plan showing the boundary of the ecclesiastical parish was difficult to obtain, and one was not produced until the final day of the Inquiry, shortly before closing submissions. Despite the belated arrival of the plan Laings was able to respond in its final submission:

> "10.78 The Applicants at the Inquiry had made reference for the first time to the Ecclesiastic Parish of Hazlemere as being a possible locality. While Laings accept than an Eccelsiastical Parish could be a locality in former times, there is no basis in modern secular times for regarding a religious division as a locality for the purpose of village green rights. Harman J. in *MOD v Wiltshire* does not purport to say that there can *now* be prescription in favour of an Ecclesiastical Parish; all he was doing was stating that in the past it could be in favour of an Ecclesiastical Parish.
>
> 10.79 It should be regarded as very curious that priority should now be put on the Ecclesiastical Parish when it was not even mentioned in the application ***606** or

supporting material; only in the Applicants' closing submissions had the Ecclesiastical Parish been put as a priority.

10.80 In any event it was suggested that on the evidence there was a minimal relationship between use of the application site and the Hazlemere Ecclesiastical Parish, whose boundary extends way beyond the principal user of the application site. None of the Applicants' witnesses had actually suggested that all of the inhabitants of the Ecclesiastical Parish are now entitled to rights over the new village green. Such a claim would be not only contrary to the Applicants' original application form and the way their case was first presented; it would also be considerably more burdensome to Laings than the present usage or that of a smaller locality."

142 Mr George submitted to me, as he had submitted to the Inspector, that it was not permissible for GAG to amend the description of the qualifying locality from that contained in para.4.1.3 of the case for Registration. The Inspector rejected that submission saying:

"3.9 It is clear from the scheme of the Act and the Regulations that the question of what is the relevant 'locality' (or if appropriate "neighbourhood within a locality") in the Section 22 sense is a matter of *fact* for the Registration Authority to determine (albeit in accord with correct legal principles) in the light of all the evidence, which may indeed contain a number of conflicting views on the topic. There is no requirement in the Form or Regulations for an applicant to commit himself to a legally correct (or any) definition of the "Section 22 locality" (or 'neighbourhood')."

143 He reiterated this conclusion in para.13.1 of the Report when dealing with "Locality". I agree with the Inspector. The purpose of giving notification of an application to the owner and occupier and to the public (see Regulation 5 of the Regulations, above) is to elicit further evidence and information, in addition to that contained in the application. Form 30 is not to be treated as though it is a pleading in private litigation. A right under s.22(1) is being claimed on behalf of a section of the public. The Registration Authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence.

144 Mr George submitted that Laings were prejudiced by the late identification of the Ecclesiastical Parish as the qualifying locality because it was not possible to prepare to meet GAG's case on locality on the basis on which it was ultimately decided by the Inspector. He accepted that Laings did not ask the Inspector for an adjournment. Laings did complain about the late introduction of Hazlemere Ecclesiastical Parish as a possible qualifying locality, because the Inspector reported in para.3.10:

"Laings have not been in the slightest degree prejudiced or misled. They knew from the outset what the applicants' position was, and indeed fully took up the opportunity presented by the Inquiry to address the question of what the relevant locality might or might not be for the purposes of Section 22 of the 1965, a matter which I consider later in this report."

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145 I agree that there was no prejudice. Laings were represented at the Inquiry by leading and junior counsel. The Inquiry commenced on 5th November and did not conclude until November 13. There was ample time for Laings to decide how it wished to respond to GAG's case in relation to the Hazlemere Eccelesiastical Parish. Laings did respond in some detail: see paras 10.78–10.80 of the report (above). If it had been felt that there was inadequate time to make a proper response, then an adjournment could have been sought.

146 The Inspector considered:

"whether any apparent "locality" which emerges from the evidence is legally capable of amounting to a section 22 locality"(13.2)

with great care and in considerable detail in paragraphs 13.3–13.25 of his report.

147 GAG had submitted that:

> "the safest way of interpreting the correct locality in this case is the Ecclesiastical Parish of Hazlemere. It is clear that the predominant amount of users come from that area."(9.25)

148 In paragraph 13.21 the Inspector accepted that point:

> "I accept the point made by GAG that it is obvious whether one takes as the putative "locality" the combined *civil* wards of Park and Brackley (Hazlemere) and Widmer End (Hughenden), or the ecclesiastical parish of Hazlemere, in either case the evidence shows that the overwhelmingly predominant element of village green types use of the fields has been by inhabitants of the area concerned."

149 Those conclusions are challenged by Laings on two grounds. First, it is submitted that in the secular world of the late twentieth century Parliament in 1965 could not have envisaged that an ecclesiastical parish would constitute a qualifying locality for the purposes of registering a new class [c] village green. Harman J.'s reference to ecclesiastical parishes in the *Ministry of Defence* case (above) as having "in the past" supported a class [b] village green is not an authority for the proposition that an ecclesiastical parish is capable of being a qualifying locality for a new class [c] green.

150 The Inspector rejected that argument, saying in paragraphs 13.23 and 13.24:

> "... in my judgment "locality" as long as it is certain enough is not something which must be regarded in modern times as a concept restricted to current local government boundaries (which is rather what Laings' were suggesting in argument). Such a view is not consistent with quite modern authority in the shape of *MOD v Wilts* case (whatever may be status of that decision more generally after *Sunningwell*). It seems to me, as a matter of judgment, that in many rural and semi-rural/edge of urban areas of the ecclesiastical parish continues to be of just as much significance to the lives of its inhabitants as the civil parish and the doings of civil parish councils. I agree with GAG that this is not just a matter which affects active regular churchgoers, but is potentially ***608*** relevant to such matters as qualification for church schools, or to get married, or christened, etc., in the Parish Church.
>
> The ecclesiastical parish in this case clearly is quite a coherent area, and is precisely the area from the built up core of which the "users" of the fields do predominantly come. The ecclesiastical parish is clearly certain. In my judgment, as a matter of fact, the Ecclesiastical Parish of Hazlemere is the best and most appropriate way of identifying the relevant "locality" here in the sense meant by Section 22 of the 1965 Act ; I attach to the back of this report a map showing the information I was given as to the boundaries of that ecclesiastical parish."

151 Again, I agree. In 1965 Parliament was trying to make it less, not more difficult to establish the existence of village green rights. Ecclesiastical parishes are entities known to the law, they have defined boundaries, and since they have frequently been used in the past as qualifying localities for customary village greens it is difficult to see on what basis Parliament could have intended that they should not be so used for the purpose of establishing the existence of new class [c] village greens.

152 Second, it is submitted that even if the Inspector was entitled to conclude that an ecclesiastical parish could be a qualifying locality, there was no nexus between the Hazlemere Ecclesiastical Parish and the claimed rights, save for residence within the parish. There was no evidence that any of the users, if challenged, would have attributed their recreational use of the fields to residence within the ecclesiastical parish.

153 In my view this is a thinly veiled attempt to revive the argument that was rejected by the

House of Lords in Sunningwell . In effect, the claimant is complaining that "the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of [the Ecclesiastical Parish of Hazlemere]".

154 Since the Inspector was not concerned with the individual states of mind of the users, he did not have to consider whether they would have attributed their recreational use of the fields to residence within any particular area. It was sufficient for the purposes of s.22 that, as the Inspector concluded, the "overwhelmingly predominant element of village green types of use of the fields has been by inhabitants of the area concerned".

155 Accordingly, I would reject ground (4) of the challenge to the Council's decision, but allow the application on grounds (1), (2) and (3), for the reasons set out above.

The Human Rights Challenge

156 Before the Inspector Laings argued that registration of the fields as a village green would amount to a de facto deprivation of property without compensation, contrary to Art.1 of Protocol 1 to the Convention ("Art.1"). Laings' submissions under the Human Rights Act 1998 ("the 1998 Act") are set out in paras 10.86–10.92 of the Report. In para.11.1 the Inspector said that he was:

> "not persuaded that there is any force in Laings' argument that there is any inherent or fundamental conflict between the village green registration provisions of the Commons Registration Act 1965 and the Human Rights Act 1998 ***609** , including the "convention rights" which the latter brought directly into English law for the first time. I agree with the Applicants that even if it can be said that registration of land as a village green potentially interferes with the peaceful enjoyment by a landowner of his possessions, i.e. the land concerned, and so raises the issue of Article 1 of the First Protocol of the Human Rights Convention (included in Part II of Schedule 1 to the 1998 Act) the proviso set out within that Article is obviously applicable to a case like this.

157 He amplified his reasoning in paras 11.2–11.5 of the Report. Before me Mr George submitted that s.22(1) of the Act was incompatible with Art.1 :

> (a) Registration interfered with Laings' peaceful enjoyment of its possessions.
>
> (b) The degree of interference was such as to amount to a de facto deprivation of possessions without compensation: Laings was effectively deprived of all meaningful use of its land.
>
> (c) Alternatively, registration was a most severe interference with property rights going well beyond a mere "control of use".
>
> (d) While the deprivation/interference/control was authorised under domestic law by the Act, it was not lawful for the purposes of Article 1 because "the quality of the law", as contained in the Act, was not "compatible with the rule of law", in that the Act did not provide "protection in the form of procedural safeguards from arbitrariness".
>
> (e) Since the aim of the registration procedure in the Act was not clear, it could not be said that the interference was in pursuit of a legitimate aim, or what public, as opposed to local, interest was being served by the interference.
>
> (f) In view of the absence of compensation, and the draconian effects of registration, effectively sterilising Laings' land bank for all time, the Act did not strike a fair balance between the general interest and the protection of Laings' rights as landowner, and imposed an "excessive burden" upon Laings.

158 The Secretary of State for the Environment, Food and Rural Affairs was joined as an Interested Party in relation to the claim for a declaration of incompatibility. On behalf of the Secretary of State, Mr Maurici submitted that: ***610**

> (a) The village green registration procedures in the Act did not engage Art.1 at all, being

closely analogous to the acquisition of rights by prescription or adverse possession.

(b) If Art.1 was engaged, registration did not amount to a deprivation of property, but to a control of use, albeit "a very strong control".

(c) The Act was not incompatible with the rule of law. It was legitimate for States to frame legal rules to promote legal certainty, the law relating to prescription (and, by analogy, registration) promoted that end. There were ample procedural safeguards: an informal inquiry coupled with the availability of judicial review. ***610**

(d) Registration pursued a legitimate aim in the public interest: to resolve uncertainties as to the existence of rights over land which has been used for recreation purposes for many years, and to secure the use of such land for recreation and exercise by persons living in the locality. A measure may be in the public interest even though it benefits only a section of the public.

(e) The Act struck a fair balance between the interests of the landowner and the general interest. Compensation was not essential where there was merely a control of use or other form of interference falling short of deprivation. However draconian, the effects of registration were less serious than the consequences of a successful claim of adverse possession.

159 On behalf of the Council, Mr Morgan adopted Mr Maurici's submissions.

160 These wide ranging submissions fortified by the citation of numerous authorities, took up much of the five-day hearing between March 25 and April 2. At the conclusion of the hearing the parties asked for judgment to be deferred pending the decision of the *House of Lords in Wilson v First County Trust (No.2) [2001] 3 W.L.R. 42 (CA)* . I agreed, since at that time it was hoped that their Lordships' decision would be available by the end of May. When it became clear that this would not be the position, the parties agreed that I should proceed to give judgment. Since I have concluded that the domestic law challenge succeeds there will be no interference with Lairgs' peaceful enjoyment of its possessions, and it is unnecessary to resolve the issues relating to Art.1 . Having expended so much time and energy on their submissions under the human rights challenge, the parties understandably expressed a wish during the hearing that I should resolve those issues whatever might be my conclusions under the domestic law challenge.

161 The arguments relating to Art.1 were very wide ranging and raised important issues of principle. I realise that the parties will be disappointed, but I do not consider that it would be appropriate for me, at first instance, to seek to resolve the many disputed issues relating to Art.1 on a purely hypothetical basis. Success for the Claimant on certain of its criticisms of the Inspector's Report under the domestic law challenge—for example, failure to distinguish between the use of footpaths as such and the use of the fields for lawful sports and pastimes—might have left open the substantive issues under Art.1 , since the defect under domestic law could have been remedied by remitting the matter for rehearing by the same, or another Inspector. But Lairgs' success on ground (2) is fatal to the case for registration as a village green. It would not be right to exercise the discretionary jurisdiction conferred by s.4(2) of the 1998 Act in circumstances where there has been, and can be, no breach of the Claimant's rights under the Convention.

162 Setting aside all the other issues of principle (above), the answer to the question whether a particular interference with property rights places a disproportionate burden upon a landowner will be largely, if not wholly, fact-dependant. Preventing a landowner who has been using his land for agricultural purposes for all or part of the last 20 years from continuing to use it for such purposes, is one thing; preventing a landowner who has made no effective use of his land for the last 20 years from recommencing any use, save for rough grazing, is another.

***611**

Conclusion

163 For these reasons I decline to make a declaration under the 1998 Act. The issues in the human rights challenge do not arise, because the claim succeeds, and the Regulatory Committee's resolution dated the April 8, 2002 must be quashed, on grounds (1), (2) and (3) of the domestic law challenge.

Reporter—Edward Peters, Falcon Chambers.

Consideration of the form of relief and other consequential matters adjourned.

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1. Paragraph numbers in this judgment are as assigned by the court.

Status: ⊠ Positive or Neutral Judicial Treatment

ICLR

*889 Regina (Beresford) v Sunderland City Council

House of Lords

13 November 2003

[2003] UKHL 60

[2004] 1 A.C. 889

Lord Bingham of Cornhill , Lord Hutton , Lord Scott of Foscote , Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe

2003 May 19, 20; Oct 3; Nov 13

Commons—Town or village green—Registration—Land used by local inhabitants for sport and recreation for more than 20 years—Whether claim to use "as of right" defeated by implied licence—Commons Registration Act 1965 (c 64), ss. 13, 22(1)

In 1973 a new town development corporation created a town plan which identified an area of land as "parkland/ open space/ playing field". The land was grassed over and seating installed around part of the perimeter and it was used thereafter by local inhabitants for ball games and other lawful pastimes. The land was transferred in 1989 to the Commission for New Towns and in 1996 to the local authority, which continued its predecessors' practice of mowing the grass and allowing public access. At no time was the land fenced off and neither the council nor its predecessors displayed any sign setting out the basis of the inhabitants' use of the land. In 1998 the applicant applied for registration of the land as a town or village green under section 13(b) of the Commons Registration Act 1965 [1] on the ground that it had been used "as of right", for the purposes of section 22(1) of that Act, for more than 20 years. The local authority, as the registration authority for the purposes of registering and maintaining a register of town and village greens within its boundaries pursuant to section 3 of the Act, refused the application on the ground that the land had not been used as of right but by the implied licence of the local authority and its predecessors as landowners. On an application for judicial review of the local authority's decision the judge held that an implied licence could be inferred from the acts of the local authority and its predecessors in mowing the grass and providing seating, and that that was sufficient to defeat a claim to use land "as of right". The Court of Appeal, dismissing the applicant's appeal, upheld the judge's decision.

On the applicant's appeal—

Held, allowing the appeal, that although a landowner might by overt conduct show that, notwithstanding the absence of any express statement, notice or record, use of its land was pursuant to its permission so as to amount to the implied grant of a revocable licence precluding a claim of use "as of right" under section 22(1) of the 1965 Act, the landowner having encouraged an activity on its land did not in itself indicate that it took place by virtue of a revocable permission; that user could be as of right even though it was not adverse to the landowner's interests; and that, accordingly, since neither the cutting of the grass nor the provision of seating were indicative of the grant of a revocable licence and no other evidence had been adduced of overt acts by the local authority or its predecessors from which a licence to use the land could be inferred, the use had been "as of right" in terms of section 22(1) and the ***890** decision refusing the application for the land to be registered as a town green would be quashed (post, paras 5-8, 10, 11, 43, 48-50, 59-61, 67-69, 75, 83, 90, 92).

Decision of the Court of Appeal [2001] EWCA Civ 1218; [2002] QB 874; [2002] 2 WLR 693; [2001] 4 All ER 565 reversed .

The following cases are referred to in their Lordships' opinions:

Attorney General v Poole Corpn [1938] Ch 23; [1937] 3 All ER 608, CA

Bridges v Moos [1957] Ch 475; [1957] 3 WLR 215; [1957] 2 All ER 577

Burrows v Lang [1901] 2 Ch 502

Bute, Marquis of v M'Kirdy & M'Millan Ltd 1937 SC 93

Cumberland and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SC 357; 1992 SLT 1035 ; *1993 SC(HL) 44, HL(Sc)*

Dalton v Henry Angus & Co (1881) 6 App Cas 740, HL(E)

Davies v Du Pavor [1953] 1 QB 184; [1952] 2 All ER 991, CA

Folkestone Corpn v Brockman [1914] AC 338, HL(E)

Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229, HL(E)

Hall v Beckenham Corpn [1949] 1 KB 716; [1949] 1 All ER 423

Herrington v British Railways Board [1972] AC 877; [1972] 2 WLR 537; [1972] 1 All ER 749, HL(E)

Ives (E R) Investment Ltd v High [1967] 2 QB 379; [1967] 2 WLR 789; [1967] 1 All ER 504, CA

Jones v Bates [1938] 2 All ER 237, CA

Mann v Brodie (1885) 10 App Cas 378, HL(Sc)

Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA

Napier's Trustees v Morrison (1851) 13 D 1404

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)

R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102, CA

Scottish Property Investment Co Building Society v Horne (1881) 8 R 737

Sturges v Bridgman (1879) 11 Ch D 852, Jessel MR and CA

The following additional cases were cited in argument:

Bright v Walker (1834) 1 CM & R 211

De la Warr (Earl) v Miles (1881) 17 Ch D 535, CA

Hyman v Van den Berg h [1907] 2 Ch 516

Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77; [1936] 2 All ER 422

Mills v Colchester Corpn (1867) LR 2 CP 476

Monmouthshire Canal Co v Harford (1834) 1 CM & R 614

R v Hereford and Worcester County Council, Ex p Ind Coope (Oxford and West) Ltd (unreported), 26 October 1994, Brooke J

R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587

R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)

Tickle v Brown (1836) 4 Ad & E 369

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hutton and Lord Scott of Foscote), the applicant, Pamela Beresford, appealed from the decision of the Court of Appeal (Latham and Dyson LJJ and Wilson J) upholding the decision of Smith J to dismiss her application for an order of certiorari to quash the decision of Sunderland City Council on 27 April 2000 that the sports arena adjacent to the Princess Anne Park in Washington ***891*** should not be registered as a town or village green pursuant to sections 13 and 22(1) of the Commons Registration Act 1965.

The facts are stated in the opinions of Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe.

George Laurence QC and *Douglas Edwards* for the applicant. Section 22(1)(c) of the Commons Registration Act 1965 defines a town or village green as land on which the local inhabitants have indulged in lawful sports and pastimes "as of right" for not less than 20 years. The user has to be nec vi, nec clam, nec precario, in other words, not by force, nor stealth, nor the licence of the owner. There is no requirement for a subjective belief of the users in their entitlement to carry on the activity in question, but the activity must be open and in the manner to be expected of a person rightfully entitled to carry on such activity: see Cumbernauld and Kil *syth District Council v Dollar Land (Cumbernauld) Ltd 1993 SC(HL) 44* ; *1992 SC 357* . The phrase "as of right"in the 1965 Act is to be given the same meaning as is accorded to it in the Prescription Act 1832 and the Rights of Way Act 1932 (now the Highways Act 1980): see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 350-351, 353-354; *Bright v Walker (1834) 1 CM & R 211* , 219; *Mills v Colchester Corpn (1867) LR 2 CP 476* , 486 and *Jones v Bates [1938] 2 All ER 237* , 245.

Only an express permission is capable of rendering a use precario; an implied permission is not: see *Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229* and *Folkestone Corpn v Brockman [1914] AC 338* . Use where a landowner encourages use of his land is not inconsistent with use "as of right", see *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1993 SC(HL)*

44 ; 1992 SC 357 . [Reference was also made to *Monmouthshire Canal Co v Harford (1834) 1 CM & R 614* ; *Tickle v Brown (1836) 4 Ad & E 369* ; *Earl De la Warr v Miles (1881) 17 Ch D 535* ; *Dalton v Henry Angus & Co (1881) 6 App Cas 740* ; Hyman v Van den Bergh [1907] 2 Ch 516 and Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77 .] Once it appears to the landowner that the public are asserting a right to the land, it is for him to show his opposition to the alleged right, either by stopping the relevant user or expressly making it clear that the user is by his permission. The positive acts relied on by the local authority—the erection of seats and the cutting of the grass—were, in any event, equivocal and not capable of supporting the implication of permission.

Philip Petchey for the local authority. Use of land will be precario if there has been permission, whether written, parol or implied. Such use is to be contrasted with use that is tolerated or acquiesced in and as such is adverse to the landowner and therefore as of right: cf *R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC (Admin) 1578* . The fact that use may be tolerated or acquiesced in does not make it less of a trespass: see Mills v Silver [1991] Ch 271 .

The situation is different from that of highways, where if there is an intention to dedicate and use is not precario, use would not be adverse to the landowner. Although it might be difficult in a particular case, in the context of an intention to dedicate, to distinguish a situation where use is precario from one where it is of right, that cannot arise in the present case since land cannot be dedicated for use by the inhabitants of a locality.

***892**

Implied licence was not argued in Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1993 SC(HL) 44 ; 1992 SC 357 ,which, however, deals with Scots law and does not reflect the law of England in its interpretation of nec vi, nec clam, nec precario.

[After taking time for consideration their Lordships invited counsel to make submissions on the question whether the statutory regimes applicable to land held by new town development corporations and the Commission for New Towns, or to land held by a local authority for the purposes of public recreation, conferred a right to use such land inconsistent with a claim under section 22(1) of the 1965 Act.]

Petchey . The starting point is to ask why every park and recreation ground in England and Wales is not a town or village green. The answer is that use of the land by members of the public is by way of licence, although the licence may not have been communicated to them: see R v Secretary of State for the Environment, Ex p Billson [1999] QB 374 and R v Hereford and Worcester County Council, Ex p Ind Coope (Oxford and West) Ltd (unreported), 26 October 1994 .

The question prefigures a second answer as to why such land cannot become a town or village green, namely, that, whatever statutory regime the land is held under by the local authority is inconsistent with such land becoming a town or village green. The use by way of licence answer is to be preferred as it is difficult to draw a line between situations where land has been made available for recreational use and where it has not, in terms of statutory powers, and the result of the second answer would be that section 22 does not apply to land held by local authorities in any circumstances. Parliament is not likely to have envisaged that.

Laurence QC . Land acquired and held by a local authority under the Open Spaces Act 1906 will not become a town or village green. Such land could be disposed of by the local authority after compliance with section 123(2A) without loss of its status as a green.

Section 21 of the New Towns Act 1981 permits a development corporation which has acquired open space, i e, any land laid out as a public garden or used for the purposes of public recreation or being a disused burial ground, to do anything with it for which planning permission has been obtained. However, the section only bites when the relevant land is a common or open space at the date of acquisition and has no relevance where, as here, the land begins to be so used only after the date of acquisition.

In any event, to read section 22 of the 1965 Act as applying to all land which has been used as of right by local inhabitants for lawful sports and pastimes for 20 years or more will not derogate from any provision in any earlier Act empowering a statutory body to use land in its ownership for a particular purpose inconsistent with its being a green. It is in the statutory landowning body's own hands to prevent its land becoming a town or village green. It may prevent use altogether or render it precario by granting an express licence.

There is nothing in the statutory background which assists in defeating the claim, or adds anything to the implied licence argument.

Petchey, in reply, referred to *Hall v Beckenham Corpn [1949] 1 KB 716* .

***893**

Their Lordships took time for consideration.

13 November. LORD BINGHAM OF CORNHILL

1 My Lords, the issue in this appeal is whether the Sunderland City Council erred in law in refusing to register as a "town or village green" under the Commons Registration Act 1965 an area of land known as the sports arena ("the land") close to the town centre of Washington, Tyne and Wear. I am indebted to my noble and learned friends Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe for their summaries of the relevant facts and the history of these proceedings, which I gratefully adopt and need not repeat.

2 As defined in section 22 of the 1965 Act , before its amendment by section 98 of the Countryside and Rights of Way Act 2000 , the expression "town or village green" means (for present purposes): "land ... on which the inhabitants of any locality have ... indulged in [lawful] sports and pastimes as of right for not less than 20 years." As Pill LJ rightly pointed out in *R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102* , 111: "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ..." It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met. These ingredients of the definition can give rise to contentious and difficult questions. But they do not do so in this case. The only difference between the parties, on which the appeal turns, is whether the admitted use of the land by the inhabitants of the locality for indulgence in lawful sports and pastimes for not less than 20 years was "as of right".

3 In this context it is plain that "as of right" does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period. It is also plain that "as of right" does not require that the inhabitants should believe themselves to have a legal right: the House so held in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council (2000) 1 AC 335* , 354, 356. It is clear law, as summarised in the last-mentioned decision, that for prescription purposes under the Prescription Act 1832 (2 & 3 Will 4, c 71), the Rights of Way Act 1932 and the 1965 Act "as of right" means nec vi, nec clam, nec precario, that is, "not by force, nor stealth, nor the licence of the owner": see pp 350, 351, 353-354. In this case there was no question of force or stealth. So the only question is whether the inhabitants' user was by the licence of the owner.

4 It was not suggested that the council had expressly licensed the inhabitants' use of the land, either in writing or orally. The argument was accordingly directed to whether it was ever possible to imply a licence by a landowner to use land in the manner prescribed by the statute and, if so, whether the facts here could properly be held to give rise to such an implication.

5 I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, ***894** I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.

6 Authority, however, establishes that a licence to use land cannot be implied from mere inaction of a landowner with knowledge of the use to which his land is being put. In *Davies v Du Paver [1953] 1 QB 184* , which concerned a private right, Morris LJ said, at p 210:

> "Before Mr Davies could establish a claim based on prescription the evidence would have to show that the owner of the servient tenement had knowledge of what was

> happening, or as an ordinary owner must be taken to have had reasonable opportunity of knowledge, and that, having power to prevent it, he did not intervene."

In *Mills v Silver [1991] Ch 271* , which also concerned a private right, Dillon LJ acknowledged, at pp 279-280:

> "it would be easy to say ... that there is an established principle of law that no prescriptive right can be acquired if the user by the dominant owner of the servient tenement in the particular manner for the appropriate number of years has been tolerated without objection by the servient owner. But there cannot be any such principle of law because it is, with rights of way, fundamentally inconsistent with the whole notion of acquisition of rights by prescription. It is difficult to see how, if there is such a principle, there could ever be a prescriptive right of way."

Dillon LJ added, at p 281:

> "It is to be noted that a prescriptive right arises where there has been user as of right in which the servient owner has, with the requisite degree of knowledge ... acquiesced. Therefore mere acquiescence in or tolerance of the user by the servient owner cannot prevent the user being as of right for purposes of prescription."

Parker LJ, at p 290, was of the same opinion:

> "The true approach is to determine the character of the acts of user or enjoyment relied on. If they are sufficient to amount to an assertion of a continuous right, continue for the requisite period, are actually or presumptively known to the owner of the servient tenement and such owner does nothing that is sufficient ... I add only this, that any statement that the enjoyment must be against the will of the servient owner cannot mean more than 'without objection by the servient owner'. If it did, a claimant would have to prove that the right was contested and thereby defeat his own claim."

In *R v Oxfordshire County Council, Ex p Sunningwell District Council [2001] 1 AC 335* it was held by the House that the landowner's toleration of the local inhabitants' user of the land in question was not inconsistent with ***895*** such user having been as of right, and so did not prevent registration of the land in question as a town or village green. As my noble and learned friends Lord Rodger and Lord Walker point out, some caution is required of English lawyers reading the Scottish authorities, since the applicable legislation is not the same and "tolerance" is used to mean not acquiescence but permission. It does however appear that the Scots approach to prescription, as applied to public rights of way, is close to the English. As the Lord President (Hope) put it in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035* , 1041, in a passage expressly approved by the House of Lords *1993 SC (HL) 44* , 47:

> "where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

7 Recognising that the authorities preclude reliance on mere inaction as giving rise to an implied licence to use the land, the council has placed reliance on its conduct in mowing the grass on the land and providing benches for the accommodation of spectators and other users of it. This, it was said, showed that the council was encouraging the public to use the land, from which its licence to do so could be implied. Both the mowing of the grass and the provision of benches are open to more than one explanation. But the argument is in my opinion open to a more fundamental objection. As already pointed out, the 1965 Act drew heavily on principles established under the Acts of 1832 and 1932, relating to private and public rights of way respectively, and in neither of these instances could acts of encouragement by the servient owner be relied on to contend that the user by the dominant owner had not been as of right. Such conduct would indeed strengthen the hand of the dominant owner.

Here the conduct is in any event equivocal: if the land were registered as a town or village green, so enabling the public to resort to it in exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities for those so resorting, thus encouraging public use of this valuable local amenity. It is hard to see how the self-same conduct can be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence.

8 In the decision under challenge, the council considered that there was evidence, which it accepted, of an implied licence, thus enabling the inference to be drawn that the use by local inhabitants for statutory purposes had not been as of right. In her clear and helpful judgment *[2001] 1 WLR 1327* , 1340-1341, Janet Smith J accepted that conclusion. For reasons given by Dyson LJ, with which Latham LJ and Wilson J agreed *[2002] QB 874* , 884-886 the Court of Appeal was of the same opinion. It is at this point that I respectfully differ from both the lower courts. Qualifying user having been found, there was nothing in the material before the council to support the conclusion that such user had been otherwise than as of right within the meaning of section 22 of the 1965 Act .

***896**

9 The foregoing paragraphs of this opinion are directed to the issue which was contested before the lower courts and debated between the parties on the hearing of this appeal. After the House had reserved judgment at the conclusion of oral argument, however, the House became concerned to explore the possibility that, on the special facts of this case, the inhabitants of the locality might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not "as of right" but pursuant to a statutory right to do so. Such use would be inconsistent with use as of right. Counsel were invited to make written submissions on the point, which had not been raised or investigated below, and the House heard further oral argument on it. The House is grateful to counsel for responding so fully to its invitation, and consideration has been given to every statutory provision which appeared to be potentially relevant. In the event, I do not find it necessary to review these provisions in detail since it is to my mind clear that none of them, on the facts found or agreed, can be relied on to confer on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes. Indeed Mr Petchey for the council, who had not himself sought to raise this contention earlier, found it hard to argue otherwise.

10 For these reasons and those given by my noble and learned friends, Lord Scott, Lord Rodger and Lord Walker, I would allow this appeal.

LORD HUTTON

11 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Walker of Gestingthorpe, and for the reasons which he gives, and also for the reasons given by my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry, I too would allow this appeal.

LORD SCOTT OF FOSCOTE

Introduction

12 My Lords, the issue in this case is whether the use by the local inhabitants of a piece of land, commonly known as the sports arena, at Washington, Tyne and Wear, has turned that land into a "town or village green", as defined by section 22(1) of the Commons Registration Act 1965. Section 22(1) defines "town or village green" as including "land ... on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years".

13 Three years ago your Lordships had to consider the same issue. The case was *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* . It was the first time your Lordships had had to consider the section 22(1) definition. The present case is the second time.

14 The main issue in the *Sunningwell* case was whether the inhabitants, whose use of the land for sports and pastimes was relied on as constituting the requisite use "as of right", had to use the land in the belief that they had the right to do so. The House held that they did not have to have a personal belief in their right to use the land. It was sufficient that their use of the land, objectively evaluated, appeared to be a use as of right. The issue that arises in the present case is different. The issue is whether a use that is tolerated, and indeed encouraged, by the landowner, can none the less be a

use "as of right" for the purposes of section 22(1). The issue is complicated in the *897 present case by the circumstance that the successive owners of the sports arena during the period over which the use relied on has taken place have been public authorities, holding the land for public purposes and whose tenure of the land has been subject to various statutory provisions whose relevance and effect I must later consider. Nonetheless, the core issue is whether the use relied on has been use "as of right".

15 The leading opinion in the *Sunningwell* case was given by my noble and learned friend, Lord Hoffmann. Each of the other members of the Appellate Committee agreed with his opinion. It contains a valuable and scholarly exposition of the historical provenance of the expression "as of right" in the 1965 Act that is as pertinent to this case as to *Sunningwell* . I cannot improve upon and need not repeat what Lord Hoffmann has said: see pp 349-355.

16 It is accepted that:

> "the words 'as of right' import the absence of any of the three characteristics of compulsion, secrecy or licence—'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements ..." (per Scott LJ in *Jones v Bates [1938] 2 All ER 237* , 245 cited by Lord Hoffmann *[2000] 1 AC 335* , 355).

The issue in the present case is whether the use by the inhabitants was "nec precario". Was there an implied permission given by the landlord? If so, is use pursuant to an implied permission fatal to the contention that the inhabitants' use was "as of right"? How, if at all, does the fact that the sports arena was, throughout the period of use, public land held by public authorities for public purposes bear upon the answer to the question whether the use was "as of right". These questions raise some difficult issues. But let me start with the facts.

The facts

17 The sports arena is a grass arena of 10 acres or thereabouts. It was acquired by Washington Development Corporation (the "WDC") in the course of its development of Washington New Town pursuant to the New Towns Act 1965. The WDC's Washington New Town Plan 1973 identified the land as "parkland/open space/playing field". In 1974 the WDC, using excavated soil from the development of a shopping centre, laid out and grassed over the area. It would thereby have become recognisable as what is now the sports arena. It has never been fenced and it seems likely that public use of it for the purpose of recreation began shortly after the grassing over. In this litigation, however, the public recreational use contended for, and established by the evidence, is a use from 1977.

18 In 1977 the WDC installed a double row of wooden benches, sufficient to accommodate 1,100 people, around the north, west and south perimeters of the sports arena. This was done in order to provide seating for the public on the occasion of a Royal visit. A non-turf cricket wicket was laid down in 1979. And over the years the sports arena has been used for various recreational activities, ranging from team games to the walking of dogs.

19 Title to the sports arena was, in 1989, transferred by the WDC to the Commission for the New Towns ("the CNT") and, in 1996, was transferred by the CNT to the Sunderland Council. Throughout the period since the *898 sports arena was grassed over in 1974, the owners for the time being, first the WDC, then the CNT and, since 1996, the council, have mowed the grass in the summer.

The litigation

20 On 24 December 1998 the council granted planning permission for the erection of a college of further education on land which includes the sports arena. It is common ground that the council wants to dispose of the land for use for that purpose. This proposal has been opposed by a number of local residents who have been accustomed to use the sports arena for recreational activities and who want to go on doing so. Their opposition to the grant of planning permission having failed, they made an application on 18 November 1999 for the sports arena to be registered under the 1965 Act as a town or village green. The 1965 Act requires every "registration authority" to maintain a register of town or village greens (section 3(1)(b)). The registration authority for the area where the sports arena is situate is the council (section 2(1)(a)).Section 13 of the 1965 Act enables the register to be amended where any land becomes a town or village green. The applicants' contention is that the sports arena

has become a town or village green as a result of the requisite use of it by local inhabitants for at least 20 years. The council refused the application. They did so on the ground that the local inhabitants' use of the sports arena for recreational purposes had not been "as of right" but pursuant to an implied permission given by the landowners. Therefore, it was said, the use was not "nec precario".

21 An application was made by the appellant for judicial review of the council's refusal of the registration application. Smith J *[2001] 1 WLR 1327* refused the application. She held that the use had been pursuant to an implied permission and that that was sufficient, on the facts of the case, to disqualify the use from being "as of right". She took into account that the land was publicly owned, at p 1340:

> "In my judgment, the fact that the land is in public ownership is plainly a relevant matter when one is considering what conclusion a reasonable person would draw from the circumstances of user. It is well known that local authorities do, as part of their normal functions, provide facilities for the use of the public and maintain them also at public expense. It is not part of the normal function of a private landowner to provide facilities for the public on the land. Public ownership of the land is plainly a relevant consideration."

I respectfully agree with these comments.

22 The Court of Appeal *[2002] QB 874* dismissed the appeal. Dyson LJ, with whose judgment the other two members of the court agreed, held, first, that as a matter of principle a claim that land had been used "as of right" could be defeated by showing that the use had been pursuant to an implied permission and, second, that the council's conclusion that there had been an implied permission was a conclusion the council, on the facts of the case, had been entitled to reach. On the point regarding the public ownership of the sports arena, Dyson LJ, while agreeing with Smith J that the public ownership was relevant, expressed the view, at p 885, para 30, that "on its own, it was a factor of little weight".

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23 On the further appeal to your Lordships' House, Mr Laurence, who had not appeared below, concentrated on attacking the proposition that use pursuant to an implied licence or permission could ever suffice to defeat a claim that the use was "as of right". An express licence or permission was, he said, essential. Mr Petchey, counsel for the respondent council, contended in answer, that an implied licence would suffice to defeat an "as of right" claim and that the public use of the sports arena had been "precario". Neither counsel dealt with the implications of the public ownership of the sports arena. This point emerged later and the appeal was, therefore, restored for further written and oral submissions on the point.

The statutory provisions relating to public authority land used for the propose of public recreation

24 The New Towns Act 1981 (a consolidating Act) sets out the functions and powers of development corporations such as the WDC and the CNT. Section 21(1) applies to: "Any land being, or forming part of, a common, open space or fuel or field garden allotment, which has been acquired for the purposes of this Act by a development corporation ..." "Open space", as defined by section 80(1) of the 1981 Act , includes "any land ... used for purposes of public recreation." Under sub-paragraph (a) of section 21(1), land to which section 21(1) applies may be used by the development corporation "or by any other person, in any manner in accordance with planning permission". This provision demonstrates the breadth of the freedom that development corporations were intended to have in using or dealing with land they had acquired for their statutory purposes. Not only were they themselves free to use the land "in any manner in accordance with planning permission" but so too were any persons to whom they might transfer the land, nb "or by any other person".

25 Part II of the 1981 Act provides for the eventual dissolution of a development corporation and the vesting of its property in the CNT (section 41). The function of the CNT is to "hold, manage and turn to account" the property of development corporations transferred to them under the Act (section 36(1)). The CNT must have regard, inter alia, to the "convenience and welfare of persons residing, working and carrying on business" in the new town (section 36(3)).

26 These provisions seem to me to give rise to a number of issues on the facts of the present case. Does section 21 apply to land which was not, when acquired by the development corporation, being used for public recreation but where use for that purpose commenced after its acquisition? Mr Petchey expressly disclaimed, in answer to a question from me, any reliance on section 21(1). In view of that disclaimer your Lordships cannot decide the point on this appeal. But, with respect to counsel, I do not think the answer to the point is plain. The sports arena was, at the date when the WDC transferred it to the CNT and at the date when the CNT transferred it to the council, land "used for purposes of public recreation" i e an "open space" as defined. The land had been acquired by the WDC for the purposes of the Act (or its statutory predecessor). So why does section 21(1)(a) not apply and entitle the council to use the land "in any manner in accordance with planning permission?" This question your Lordships must leave unanswered.

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27 Sections 122 and 123 of the Local Government Act 1972 relate to land which has been acquired by a "principal council". The respondent council is a principal council (see section 270(1)).Section 122(2A) (added by amendment under the Local Government, Planning and Land Act 1980) deals with the power of a principal council to appropriate land of various descriptions including "open space" land to other uses. Section 123(2A) (also added by amendment under the 1980 Act) deals with the power of a principal council to dispose of "open space" land. "Open space" is given the same definition as appears in the 1981 Act, and includes land "used for the purposes of public recreation" (see section 270(1) of the 1972 Act and section 336(1) of the Town and Country Planning Act 1990). The two sections, 122 and 123, prescribe, however, special procedures that a council must follow if the "open space" land is to be appropriated to some other purpose or disposed of (as the case may be). The procedures include advertising the council's intention, allowing time for objections from members of the public and the giving of due consideration to any objections.

28 It was, as I understood it, suggested by Mr Laurence that if the "open space" land had achieved the status of a 1965 Act town or village green, then, notwithstanding the disposal of the "open space" land by a principal council, the section 123(2A) procedures having been duly complied with, the land would retain its status as a town or village green under the 1965 Act. Mr Petchey did not contend that this was wrong. Your Lordships do not need to decide the issue on this appeal but, speaking for myself, I regard the proposition as highly dubious. An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an "open space" that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect.

29 Finally I should refer to section 10 of the Open Spaces Act 1906 . Section 10 provides:

> "A local authority who have acquired any estate or interest in or control over any open space ... under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—(a) hold and administer the open space ... in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and (b) maintain and keep the open space ... in a good and decent state ..."

"Open space", as defined in section 20, includes "land ... which ... is used for purposes of recreation ..." Section 123(2B)(b) of the Local Government Act 1972 enables open space land held under a 1906 Act trust to be disposed of freed from that trust.

30 It is, I think, accepted that if the respondent council acquired the sports arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965 . But Mr Petchey accepted that Mr Laurence was correct in contending that the sports arena ***901** had not been acquired "under the [1906] Act" and that section 10 did not, therefore, apply. Here, too, although your Lordships cannot, in view of this concession, conclude that Mr Laurence's contention is wrong, I do not, for myself regard the point as clear. Is it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? *Attorney General v Poole Corpn [1938] Ch 23* is interesting on this point. The open space land in question had been conveyed to Poole

Corporation "in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use". There was no express reference in the conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (cf counsel's argument in the *Poole Corpn* case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case.

31 The various statutory provisions to which I have referred are, in my opinion, whatever other relevance they may have, relevant as background against which the implications of the recreational use of the sports arena made by the local inhabitants from 1977 to, say, 1999 ought to be assessed. The sports arena, throughout that period, was, and remains, land in public ownership, held for public purposes, maintained at public expense and used by the public for recreation.

Was the use "as of right" for section 22(1) purposes?

32 It is accepted that the sports arena has been used for "lawful sports and pastimes", that the level of use has been sufficiently regular to satisfy section 22(1), that the use has been made predominantly by inhabitants of the locality and that this use has continued for more than 20 years. What is in issue is whether the use has been "as of right". To that I must now turn. Before I do so, however, I would like to pay tribute to the council's director of administration who prepared an admirably clear report dated 19 April 2000 for the benefit of the special meeting of the council convened to deal with the registration application. I have drawn heavily on the report in describing the history of the sports arena and reciting the other facts relevant to this appeal.

33 As Lord Hoffmann noted in the *Sunningwell case [2000] 1 AC 335* the concept of use as of right—nec vi, nec clam, nec precario—is derived from the law relating to the acquisition by prescription of private easements. Section 2 of the Prescription Act 1832 refers to rights of way or other easements "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years ..." The concept was imported into the law relating to the dedication of land as a public highway. ***902** Section 1(1) of the Rights of Way Act 1932 provided that "where a way ... upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ..." (see now section 31(1) of the Highways Act 1980 , which is in the same terms).

34 It is a natural inclination to assume that these expressions, "claiming right thereto" (the 1832 Act), "as of right" (the 1932 Act and the 1980 Act) and "as of right" in the 1965 Act, all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.

35 If a private right of way is to be acquired by prescription, by 20 years enjoyment by someone "claiming right thereto", use pursuant to a licence or permission from the owner of the land will usually—not invariably, but usually—be use that does not satisfy the nec precario condition.

36 The acquisition of a private easement is the acquisition of a right in rem over land. If such a right is to be granted by a landowner it must be granted by deed and the grant will usually be express. An easement can only be acquired by implied grant if the implication can be derived from the contents of a deed. A conveyance of land, for example, may carry with it the implied grant of easements necessary for the enjoyment of the land. But the conveyance will have been by deed and, accordingly, capable of effecting the grant of an easement. A mere agreement for the grant of an easement cannot by itself grant the easement.

37 Where private easements are concerned there are, however, two exceptions to the requirement that the right must be granted by a deed. First, if permission to enjoy a right, capable of constituting an easement, is given by the landowner in terms likely to lead, and that do lead, the beneficiary of the permission to believe he is entitled on a permanent basis to enjoy the right and in that belief he sufficiently alters his position to his detriment, by expenditure of money or otherwise, he may become entitled in equity to the easement by proprietary estoppel (see *E R Ives Investment Ltd v High [1967] 2 QB 379*). The landowner would not be able to withdraw the permission he had given. Twenty years' enjoyment of the equitable right would surely enable the beneficiary of the permission to claim a legal easement under the 1832 Act. In such a case it is easy to regard the enjoyment of the right pursuant to the original permission as enjoyment by a person "claiming right thereto". In such a case the original permission would be the foundation of the claim of right but the enjoyment would not have been precario.

38 Second, if an agreement to grant an easement were entered into for good consideration and the consideration were fully paid, the purchaser of the easement would at once become absolutely entitled in equity to the easement and would become entitled at law after 20 years' use. His enjoyment of the easement, although deriving from permission, would not ***903*** have been precario and, in my opinion, would have been enjoyment by a person "claiming right thereto" (cf *Bridges v Mees [1957] Ch 475* , 484-485). It follows that the proposition that use pursuant to permission given by the landowner is always precario and cannot ever be as of right for prescription purposes is not correct.

39 The same is true of use of a public way, or a would-be public way, following upon permission given by the landowner. A public right of way is not created by grant. It is created by dedication. The dedication does not have to be by deed and need not even be in writing. It can be evidenced by conduct. An implied permission for the public to use a particular path or track may be no more than a temporary, terminable permission but equally it may indicate an intention to dedicate. An implied permission that sufficiently evidences an intention to dedicate creates the public right of way immediately. Twenty years' use by the public is not necessary. But 20 years' use "as of right" following a permission by a landowner that is indicative of an intention to dedicate will produce a deemed intention to dedicate unless the landowner can produce sufficient evidence that he had no such intention (see section 1(1) of the 1932 Act and section 31(1) of the 1980 Act).

40 There are differences, too, between public rights of way on the one hand and town or village greens on the other. Public rights of way are created by dedication, express or implied or deemed. Town or village greens on the other hand must owe their existence to one or other of the three origins specified in section 22(1) of the 1965 Act. One of these is the 20 years' use as of right to which I have already referred. Alternatively, a town or village green may be "land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality", or "land ... on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes ..." In short, the origin of a town or village green must be either statute or custom or 20 years' use. Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green.

41 The present case is concerned with implied permission. The installation and maintenance of the double rows of wooden benches round three sides of the sports arena and the regular cutting of the grass by the owners of the sports arena evidenced a clear enough willingness that the public should resort to the sports arena for recreational purposes. Indeed, it can reasonably be said that these acts encouraged the public to do so. Mr Petchey has submitted that since the public resorted to the sports arena pursuant to an implied permission from the landowners, their use of it during the 20 year period failed the nec precario requirement and was not "as of right".

42 Mr Laurence submitted that although use pursuant to an express permission would negate use "as of right", use pursuant to a permission that was merely to be implied would not do so. Implied permission, he submitted, was to be equated with mere acquiescence or toleration on the part of the landowner. None of these, he submitted, would disqualify the use from being use "as of right". Only an express permission would render the use precario.

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43 My Lords, I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing

nothing about it, i e toleration or acquiescence, is consistent with the use being "as of right". That that is so is accepted by Mr Petchey. But I am unable to accept either that an implied permission is necessarily in the same state as mere acquiescence or toleration or that an implied permission is necessarily inconsistent with the use being as of right. Indeed, I do not, for the reasons I have given, accept that even an express permission is necessarily inconsistent with use as of right.

44 Lord Hoffmann in the *Sunningwell case [2000] 1 AC 335* made clear that the section 22(1) requirement of 20 years' use as of right did not require the users of the land to give evidence of their personal belief in their right of use. He said, at p 356:

> "A person who believes he has a right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not."

It is sufficient, therefore, if the use is "apparently as of right". But, of course, if the users do have a personal belief in their right to use the land, so much the better.

45 Permission for the public to use land for recreational purposes, or to pass along a path or track, may, depending on the terms of the permission, if it is express, and on the surrounding circumstances, whether or not it is express, indicate to the public that the permission is temporary only, may be withdrawn, and is therefore precatory, or may indicate to the public that their right of use is intended to be permanent. In the case of a path or track, a sufficient indication, express or implied that the right of the public to use the path or track was intended to be permanent would usually constitute a dedication and create a public right of way. The members of the public using the way would be unlikely, not having perused the *Halsbury* volume dealing with public highways, to know anything about dedication or the manner in which public rights of way can come into existence. They would simply use the way, following the indications that they could do so or following the example of others who were using the way. Their use would at least be "apparently as of right". Their actual state of mind would not matter. The dedicatory nature of the permission that the public could use the path or track would positively support the contention that their user was as of right rather than contradict it.

46 Where a town or village green is concerned, however, a sufficient indication, express or implied, that the right of the public to use the land for recreational purposes was intended to be permanent could not itself endow the land with that status. But the quality of the use of the land by the public, following the dedicatory indications in question, would surely be "as of right". It seems to me to be quite unreal to draw a distinction between the quality of use of a path or track by members of the public following an express or implied dedication and the quality of the recreational use by members of the public of a piece of land following permission given by a ***905** landowner that, if dedication of land as a town or village green had been possible, would have constituted a dedication. In each case the quality of the use, entirely consistent with the nature of the permission that had been given, would have been "apparently as of right". The only difference would have been that in the case of the public right of way the landowner could not, once the dedication had been accepted by public use, terminate the use, but in the case of the land used for recreational purposes the landowner could, provided the 20 years had not expired, terminate the use. But this difference does not seem to me to bear upon the quality of the use of the land by the public in the meantime.

47 Let me try to illustrate the point I am making by examples. If a landowner puts up a notice which says "The public may use this path as a public highway", use by the public thereafter would surely be use as of right. If a landowner puts up a notice which says "The public may use this land for recreational purposes as a village green", use by the public thereafter, until the landowner cancelled the notice and/or excluded the public, would similarly be use as of right. Whether express or implied, permission to use a path over land or to use land for recreational purposes may be of a sufficiently dedicatory character to justify the same conclusion, namely that use by the public thereafter is use "as of right".

48 I agree with Mr Petchey that, in the present case, the attitude of the successive owners of the sports arena to the public use of the land for recreation was more than mere acquiescence or toleration. There was, I agree, positive encouragement. The provision of the rows of benches was to make more comfortable the watching of the activities of others. The cutting of the grass was in order to enhance the enjoyment of the sports arena by those using it. I am receptive to the submission that

the successive owners had impliedly consented to the recreational use of the land by the public. The users were, in my opinion, certainly not trespassers. But this does not, in my opinion, answer the question whether the use was "as of right" or "nec precario".

49 Was there any sign that the permission was intended to be temporary or revocable? There was none. The fact that the land was publicly owned seems to me highly material. Neither the WDC nor the CNT nor the council were, or are, private landowners. Their respective functions were and are functions to be discharged for the benefit of the public. The provision of benches for the public and the mowing of the grass were, in my opinion, not indicative of a precatory permission but of a public authority, mindful of its public responsibilities and function, desirous of providing recreational facilities to the inhabitants of the locality. In these circumstances there seems to me to have been every reason for the inhabitants of the locality who used the sports arena to believe that they had the right to do so on a permanent basis.

50 Accordingly, the nature of the implied permission from the landowners that the evidence shows to have been present was not, in my opinion, such as to prevent the use of the sports arena by the public from being use "as of right". The positive encouragement to the public to enjoy the recreational facilities of the sports arena, constituted, in particular, by the provision of the benches, seems to me not to undermine but rather to reinforce the impression of members of the public that their use was as of right.

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51 Smith J and the Court of Appeal were, in my respectful opinion, led astray by according the concept of permission and, thus, of implied permission, a rigidity of character and effect that is not justified. They concluded that because use pursuant to permission will sometimes, or often, or usually, be inconsistent with use as of right, it will always be inconsistent with use as of right. The conclusion, my Lords, must in my opinion depend upon the nature of the permission, objectively assessed or construed. To conclude that use pursuant to implied permission is inconsistent with use as of right may in most cases be correct. But the conclusion is an evidentiary one; it is not a rule of law. And in the present case it is not, in my opinion, a correct evidentiary conclusion.

52 For these reasons I would, on the basis on which the case has been argued before your Lordships, allow the appeal. I am, however, for reasons which will have appeared, uneasy about this conclusion. Where "open space" land comes into the ownership of a "principal council", I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed to your Lordships. I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion.

LORD RODGER OF EARLSFERRY

53 My Lords, the town of Washington lies within the jurisdiction of the Sunderland City Metropolitan Borough Council ("the council"). From at least 1977 members of the public have used an area near the town centre—referred to as "the sports arena"—for recreation. In truth it is just an open, flat area of grass of some 13 acres which the Washington Development Corporation laid out in about 1974. In the Washington New Town Plan 1973 the land was identified as "parkland/open space/playing field". In 1977, around the time of the Queen's Silver Jubilee visit to the ground, the development corporation constructed wooden seats along much of the perimeter. A hard-surface cricket pitch was laid out in 1979. For the rest, the public bodies who have owned the land—most recently, the council—have done little except keep the grass cut. Local people have used the ground in their different ways. Toddlers have played there, children of all ages have kicked a ball around or played cricket and other games, a Sunday league football team have used it for their matches. Many have simply treated it as a place to picnic, socialise, take their ease in the sunshine or walk the dog.

54 In 1999 the appellant, Mrs Beresford, sought to register the area as a town or village green under the Commons Registration Act 1965. In terms of the relevant part of the definition in section 22(1) , as it then stood, a town or village green means land on which the inhabitants of any locality have indulged in lawful sports and pastimes "as of right" for not less than 20 years. Having considered a well-reasoned and objective submission by their director of administration, the council, acting as the registration authority, refused Mrs Beresford's application—but only on the ground that, although the

land had indeed been used for lawful sports and pastimes for over *907 20 years, the use had not been "as of right" but by virtue of an implied licence from the owners.

55 In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* Lord Hoffmann explained in illuminating detail why the words "as of right" are to be interpreted in the same way in section 22(1) of the 1965 Act as in section 5 of the Prescription Act 1832 (as amended) and section 1(1) of the Rights of Way Act 1932 . Long before, in *Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229* , 238, 239 both Lord Davey, impliedly, and Lord Lindley, expressly, had held that these words in the 1832 Act were intended to have the same meaning as the older expression "nec vi, nec clam, nec precario". Lord Hoffmann adopted that interpretation and translated the phrase as "not by force, nor stealth, nor the licence of the owner": *[2000] 1 AC 335* , 350h. So, if the inhabitants of any locality have engaged in lawful sports and pastimes nec vi nec clam nec precario for at least 20 years, they have engaged in them "as of right" and the land can be registered as a town or village green in terms of the 1965 Act.

56 It is not suggested that members of the public used the sports arena vi, by force: the owners did not try to stop them and so there was no question of them overcoming any resistance on the owners' part. Equally, the public were not enjoying themselves clam, by stealth: on the contrary, they used the land openly and the owners know what was going on. The council concluded, however, that the local residents and others enjoying the land had been doing so precario, by virtue of the licence of the owners of the land. Admittedly, there was nothing to show that the owners had given any express permission or licence to the public. But the facts as a whole, and cutting the grass and constructing the seating in particular, showed that the owners had actively encouraged the use of the area for recreation and so had impliedly granted a licence, or given permission, for it to be used in that way. Use of the land by virtue of this licence or permission could not constitute use "as of right" for purposes of section 22(1) of the 1965 Act. Smith J *[2001] 1 WLR 1327* dismissed Mrs Beresford's application for certiorari to quash the council's decision, and the Court of Appeal *[2002] QB 874* dismissed her appeal.

57 In Roman law "precarium" is the name given to a gratuitous grant of enjoyment of land or goods which is revocable at will. The arrangement is informal and is based on the grantor's goodwill, whether more or less enthusiastic. But, however informal, the arrangement does involve a positive act of granting the use of the property, as opposed to mere acquiescence in its use. The name suggests, and the Digest texts indicate, that in Roman law the paradigm case is of a grant in response to a request. The arrangement lasts for only so long as the grantor allows, tamdiu quamdiu is qui concessit patitur: D.43.26.1 pr, Ulpian 1 institutionum. The concept of precarium crops up in different areas of Roman law, but importantly in connexion with interdicts. The praetor protects someone from interference if he has taken possession of land, or begun carrying out work, nec vi nec clam nec precario.

58 In De legibus et consuetudinibus Angliae Bracton took over the noun precarium and its congeners from the vocabulary of Roman law and used them in a number of contexts, but always with reference to a gratuitous grant which is revocable at any time at the grantor's pleasure. See, for instance, lib 2 ff 52 and 52b. In lib 4 f 221 Bracton discusses the acquisition *908 of easements by use for some time nec vi nec clam nec precario--the last being, the author says, the same as de gratia, of grace. Under reference to the second of these passages, in speaking of the use of a watercourse in *Burrows v Lang [1901] 2 Ch 502* , 510, Farwell J asked "What is precarious?" and answered his own question: "That which depends, not on right, but on the will of another person." Some years before, in *Sturges v Bridgman (1879) 11 Ch D 852* , 863, Thesiger LJ had indicated that, if a man "temporarily licenses" his neighbour's enjoyment, that enjoyment is precario in terms of the civil law phrase "nec vi nec clam nec precario". It is important to notice that, in this regard, English law distinguishes between an owner who grants such a temporary licence or permission for an activity and an owner who merely acquiesces in it: Gale on Easements, 17th ed (2002) , para 4-83. Someone who acts with the mere acquiescence of the owner does so nec precario.

59 The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green only if those who used the sports arena did so by the revocable will of the owners of the land, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land. Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. But I see no reason in principle why, in an appropriate case, the implied grant of

such a revocable licence or permission could not be established by inference from the relevant circumstances.

60 In the present case the owners did not expressly license the use of the land by the public. The council rely on two circumstances, however, as justifying the inference that those who used the sports arena did so precario, merely by licence from the owners of the land. The first is that the owners cut the grass. But that is at least equally explicable on the basis that the owners were concerned, as many owners would be, for the appearance of such a large and prominent area of open land in the heart of the town. Like charity, care of amenities begins at home. The second matter relied on is the, now rather dilapidated, wooden seating along the perimeter. Whatever may have been its original purpose, the continued existence of the seating is consistent with the owners of the land having acquiesced, perhaps quite happily, in people using the area for football or other games which their friends or relatives would wish, or feel obliged, to watch. To an extent the owners may thus have encouraged these activities. The mere fact that a landowner encourages an activity on his land does not indicate, however, that it takes place only by virtue of his revocable permission. In brief, neither cutting the grass nor constructing and leaving the seating in place justifies an inference that the owners of the sports arena positively granted a licence to local residents and others, who were then to be regarded as using the land by virtue of that licence, which the owners could withdraw at any time.

61 In these circumstances I would conclude that local people used the land nec precario.

62 After the first hearing of the appeal, however, your Lordships invited further written and oral submissions from counsel on whether any of the ***909*** statutes that may apply to local authority land had conferred on the local residents and others a right to use the sports arena—with the result that their use would be "of right", as opposed to being "as of right" in terms of section 22(1) of the 1965 Act. Having considered those submissions, for the reasons given by my noble and learned friend, Lord Walker of Gestingthorpe, I am satisfied that, on the agreed facts, neither the designation of the land as "open space" in the New Town Plan nor any of the statutes conferred any such right in this case.

63 It follows that the local residents and others indulged in their sports and pastimes on the sports arena "as of right" in terms of section 22(1). Mrs Beresford is accordingly entitled to have the land registered under the 1965 Act as a town or village green.

64 In a memorable passage in *Napier's Trustees v Morrison (1851) 13 D 1404* , 1409, dealing with a public right of way, Lord Cockburn deprecated the citation in the Court of Session of authorities from England. He really wished, he said—taking a swipe at a future Lord President among others—that Scottish counsel and judges:

> "could imitate the example set us by the counsel and the judges of that kingdom, who decide their causes by their own rules and customs, without exposing themselves by referring to foreign systems, the very language of which they do not comprehend."

Times change: in the course of the hearing of this appeal well-informed counsel on both sides referred your Lordships to a number of Scottish authorities on the acquisition of servitudes and public rights of way. In *Mann v Brodie (1885) 10 App Cas 378* , 385-387, Lord Blackburn analysed some of the differences between the English and Scots law on the topic. Lord Hoffmann referred to that discussion in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 352. While exercising all due caution, and at the risk of disturbing the shade of Lord Cockburn, I believe that the Scottish authorities can provide some assistance in this case, at least by way of confirming the conclusion that I have already reached.

65 The phrase "nec vi nec clam nec precario", taken over from Roman law, has resounded just as powerfully among Scots lawyers and judges as among their brethren south of the Border. But in reading the Scottish cases a linguistic point must be noted. English judges have tended to use "tolerance" as a synonym for acquiescence. See, for instance, *Mills v Silver [1991] Ch 271* . Scottish judges, on the other hand, have tended to use "tolerance" as a synonym for permission and as a translation of precarium. This is perfectly understandable since an owner who, perhaps somewhat reluctantly, decides to permit the public to walk across his land until further notice may be said to "tolerate" them doing so. That is what Lord Cockburn has in mind when he says in *Napier's Trustees v Morrison 13 D 1404* , 1408 that the defenders have possessed the road "by no trespass or tolerance, but as a public road". Similarly, in a different context, in *Scottish Property Investment Co*

Building Society v Horne (1881) 8 R 737 , 740 Lord President Inglis says that to warrant the remedy of summary ejection, the defender's possession of premises has to be vicious, i e obtained by fraud or force, or precarious possession. He adds: "A precarious possession is a possession by tolerance merely." It is in this sense that Lord Kinnear, a recognised authority on ***910** Scottish land law, uses the phrase "tolerance or permission" in *Folkestone Corpn v Brockman (1914) AC 338* , 356.

66 In *Marquis of Bute v M'Kirdy & M'Millan Ltd 1937 SC 93* , for some 70 years the public on the Isle of Bute had used a track to pass from a public road to part of the foreshore for purposes of bathing and recreation. The Marquis of Bute, who owned the relevant land, contended that the use of the track by the public should be attributed to the tolerance of himself and his predecessors in title. He therefore sought interdict against a bus company who had been bringing large numbers of trippers to the point on the public road from which they could use the track to get to the beach. Rejecting the pursuer's contention, Lord President Normand held, at pp 119-120, that the proper question was whether:

> "having regard to the sparseness or density of the population, the user over the prescriptive period was in degree and quality such as might have been expected if the road had been an undisputed right of way. If the public user is of that degree and quality, the proprietor, who fails for the prescriptive period to assert or to put on record his right to exclude the public, must be taken to have remained inactive, not from tolerance, but because the public right could not have been successfully disputed or because he acquiesced in it."

The First Division of the Court of Session, having concluded that the bus company had proved the existence of a public right of way for pedestrians, pronounced decree of absolvitor in their favour.

67 In *Cumbernauld and Kilsyth Council v Dollar Land (Cumbernauld) Ltd 1992 SC 357* the council raised an action of declarator that a public right of way existed over a raised walkway crossing the centre of Cumbernauld. The walkway, which the defenders had bought along with other properties from the Cumbernauld Development Corporation, was extensively used by the public to get from one part of the town to another. Holding that a public right of way had been established, Lord President Hope observed, at p 368:

> "the occasional or irregular use of a path by hill walkers or by others who resort to the countryside can readily be distinguished from the continuous use of it by members of the public as a route from one public place to another. It seems to me to be clear, on an examination of all the later authorities, that a proprietor who allows a way over his land to be used by the public in the way the public would be expected to use it if there was a public right of way cannot claim that that use must be ascribed to tolerance, if he did nothing to limit or regulate that use at any time during the prescriptive period."

In dismissing the appeal to this House from the decision of the First Division, *1993 SC (HL) 44* , 47a-d, Lord Jauncey of Tullichettle adopted and approved both this passage from the opinion of Lord President Hope and the passage that I have quoted from the opinion of Lord President Normand in *Marquis of Bute v M'Kirdy & M'Millan Ltd* . Lord Jauncey went on to note, at pp 47h-48a, that there is no principle of law which requires that there be conflict between the interest of the users of the right of way and those of a proprietor. If acquiescence could lead to a public right of way being ***911** established, "encouragement can even more readily be said to have the same consequences".

68 Similarly, in the present case, for at least 20 years before Mrs Beresford made her application the inhabitants of Washington had played and passed the time on the sports arena in the way they could have been expected to do as of right on a town or village green. Therefore, in the absence of any act on the owners' part to regulate the activities on the land or otherwise to show that the inhabitants were disporting themselves only by the owners' revocable leave or licence, it is proper to infer that the owners had acquiesced in the inhabitants' use of the land as of right. The same result follows if the owners are thought to have encouraged the activities.

69 For these reasons, as well as those given by my noble and learned friends, Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, I would allow the appeal.

LORD WALKER OF GESTINGTHORPE

70 My Lords, the crucial issue in this appeal turns on the words "as of right" in the definition of "town

or village green" in section 22(1) of the Commons Registration Act 1965. I set out the definition with the insertion of paragraph numbers which are not in the Act but are often used as a convenient means of denoting its three limbs:

> "[a] Land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

71 It might be supposed that there is, after the magisterial speech of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , little more to be said on the subject. Certainly any consideration of the subject must start with Lord Hoffmann's speech, in which the rest of your Lordships' House concurred. But on the undisputed facts of this case (as to which I gratefully adopt the summary in the speech of my noble and learned friend, Lord Scott of Foscote) a new issue has been raised, that of implied licence (or permission, or consent). That was the ground on which the Sunderland City Council succeeded before the judge *[2001] 1 WLR 1327* and in the Court of Appeal *[2002] QB 874* .

72 It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035* , 1043, approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."

73 In *Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229* , 231 the Earl of Halsbury LC referred to the phrase "as of right" used in **912* section 5 (and reflected in section 2) of the Prescription Act 1832, and observed:

> "I cannot help thinking there has been a certain play upon words in commenting upon them. In a certain sense a man has a right to enjoy what he has paid for, and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have had a right to complain that what I will call her contract had been broken, and that during the year she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parol licence, it might be withdrawn, and her action would be for damages, but she would have no *right* to the way. And in no sense could the right be the right contemplated by the Act. That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean an user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought."

74 In that case the party claiming a right of way through the yard of a neighbouring inn, and her predecessors in title, had for well over 40 years used the inn yard (the only means of access with carts and horses to her premises) and had paid the annual sum of 15 shillings to the innkeeper. The most likely explanation of this payment was as an acknowledgement of the innkeeper's title, amounting (as it was put by Lord Lindley, at p 239) to: "a succession of yearly licences not, perhaps, expressed every year, but implied and assumed and paid for." So to make a charge for entry to land is one way of making clear that entry is not as of right. The paying entrant would be there by licence, even though he would (as Lord Halsbury pointed out) have the right to complain if the landowner broke the terms of his contract.

75 An entry charge of this sort can aptly be described as carrying with it an implied licence. The entrant who pays and the man on the gate who takes his money both know what the position is without the latter having to speak any words of permission (although he may qualify the permission by saying that no dogs, or bicycles, or radios are allowed). Similarly (especially in a small village

community where people know their neighbours' habits) permission to enter land may be given by a nod or a wave, or by leaving open a gate or even a front door. All these acts could be described as amounting to implied consent, though I would prefer (at the risk of pedantry) to describe them as the expression of consent by non-verbal means. In each instance there is a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass.

76 The authorities contain many references (which can be identified and understood more readily since *Sunningwell*) to the importance of looking at the overt conduct of those involved, including what the landowner said and did from time to time during the period which the court has to examine. If the landowner found that his land was being used as a footpath by his neighbour (in a private right of way case) or by the whole village (in a public right of way case) and he suffered in silence, he would be treated as having acquiesced in what was going on. As Fry J (one of the judges who advised the House of Lords in *Dalton v Henry Angus & Co (1881) 6 App Cas 740*) said in that case, at p 773: ***913**

> "the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."

(Lord Blackburn took a different view about acquiescence—see pp 817-818—but the view expressed by Fry J seems to have prevailed.)

77 A landowner who wishes to stop the acquisition of prescriptive rights over his land must not acquiesce and suffer in silence. The Lord President, Lord Hope, put the point clearly in the Inner House in *Cumbernauld 1992 SLT 1035* , 1041 (that case was concerned with section 3 of the Prescription and Limitation (Scotland) Act 1973 , which does not use the phrase "as of right"; but it is common ground that there is still such a requirement under the law of Scotland):

> "where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

Lord Jauncey of Tullichettle quoted that passage with approval when the case came before your Lordships' House on a further appeal *1993 SC (HL) 44* , 47; the rest of the House concurred in the speech of Lord Jauncey.

78 Later in his judgment in the Inner House Lord Hope said, at p 1042:

> "a proprietor who allows a way over his land to be used by the public in the way the public would be expected to use it if there was a public right of way cannot claim that that use must be ascribed to tolerance, if he did nothing to limit or regulate that use at any time during the prescriptive period."

Mr Laurence (for the appellants) emphasised Lord Hope's repeated references (in the two passages set out above, and again at p 1042I) to the need for the landowner to *do* something.

79 Acquiescence, by contrast, denotes passive inactivity. The law sometimes treats acquiescence as equivalent in its effect to actual consent. In particular, acquiescence may lead to a person losing his right to complain of something just as if he had agreed to it beforehand. In this area of the law it would be quite wrong, in my opinion, to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons. To do so would be to reward inactivity; despite his failing to act, and indeed simply by his failure to act, the landowner would change the quality of the use being made of his land from use as of right to use which is (in the sense of the Latin maxim)

precarious.

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80 This point was put very clearly, and to my mind very compellingly, by Dillon LJ in *Mills v Silver [1991] Ch 271* , 279-280. After referring to what the judge at first instance had said about tolerance Dillon LJ observed:

> "The topic of tolerance has bulked fairly large in recent decisions of this court dealing with claims to prescriptive rights, since the decision in *Alfred F Beckett Ltd v Lyons [1967] Ch 449* . If passages in successive judgments are taken on their own out of context and added together, it would be easy to say, as, with all respect, it seems to me that the judge did in the present case, that there is an established principle of law that no prescriptive right can be acquired if the user by the dominant owner of the servient tenement in the particular manner for the appropriate number of years has been tolerated without objection by the servient owner. But there cannot be any such principle of law because it is, with rights of way, fundamentally inconsistent with the whole notion of acquisition of rights by prescription. It is difficult to see how, if there is such a principle, there could ever be a prescriptive right of way. It follows that the various passages in the judgments in question cannot be taken on their own out of context. If each case is looked at on its own and regarded as a whole, none lays down any such far-reaching principle."

81 Parker and Stocker LJJ both agreed with Dillon LJ, although each added some further reasons. Parker LJ referred to what Lord Halsbury had said in *Gardner [1903] AC 229* , 231 (in the passage which I have already quoted) and said *[1991] Ch 271* , 289, that by "against the will of the person" Lord Halsbury meant no more than "without the licence of the owner". Stocker LJ stated, at p 293:

> "It seems clear from the passage in the judgment cited by Dillon LJ that the judge in the instant case failed to recognise the very limited circumstances in which the word 'toleration' has been used in the cases cited which might be summarised as relating to the exercise of a purported right which was casual or trivial or in respect of which some form of consent for the user was established so that acquiescence did not arise."

I respectfully agree with both these observations. Stocker LJ was making the same point as Dillon LJ, that in this context consent is not a synonym for acquiescence, but almost its antithesis: the former negatives user as of right, whereas the latter is an essential ingredient of prescription by user as of right.

82 Smith J referred to *Mills v Silver* although it had not been cited to her. It was cited in the Court of Appeal but was not referred to by Dyson LJ. It was referred to with approval by Lord Hoffmann in *Sunningwell* . For my part I have found it, after *Sunningwell,* the most helpful guide to the relevant principles.

83 In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the ***915*** land, when they do have access, depends on the landowner's permission. But I cannot agree that there was any evidence of overt acts (on the part of the city council or its predecessors) justifying the conclusion of an implied licence in this case.

84 The grounds of the licencing committee's decision, based on the report by the director of administration, were:

> "(a) Members were satisfied that evidence showed the use of the sports arena for 'lawful sports and pastimes' by the inhabitants of Washington for a period of at least 20 years prior to the making of the application, the level of use being more than trivial or sporadic. The real issue for consideration was whether there had been permission or a licence to use the site in this way. (b) Having taken legal advice, members were satisfied that an

> implied licence would be sufficient to defeat the application, provided that there was sufficient evidence to support the existence of a licence. (c) Members considered that there was evidence of an implied licence since the site is publicly owned land, specifically laid out as an arena with seating, which is adjacent to the Princess Anne Park and which has been maintained by the council and the Washington Development Corporation before it. Members agreed with the comment in the report that 'it is difficult to conceive that anyone could have imagined that this was other than a recreational area, provided for use by the public for recreation'. The other information contained in section 2 of the report, whilst not in itself conclusive, supported the view that the sports arena was intended for public use."

85 In my opinion this reasoning, and the fuller reasoning in the director's report which it was based on, must be regarded as erroneous. The fact that the city council and its predecessors were willing for the land to be used as an area for informal sports and games, and provided some minimal facilities (now decaying) in the form of benches and a single hard cricket pitch, cannot be regarded as overt acts communicating permission to enter. Nor could the regular cutting of the grass, which was a natural action for any responsible landowner. To treat these acts as amounting to an implied licence, permission or consent would involve a fiction, like the fiction under which the placing or maintaining on land of an "allurement" was regarded as an implied licence which might lead to a straying child being treated as an "invitee" rather than a trespasser for the purposes of occupiers' liability: see generally *Herrington v British Railways Board [1972] AC 877* , especially the speech of Lord Diplock, at pp 932-936. For the reasons given by Dillon LJ in *Mills v Silver [1991] Ch 271* , to add the fiction of implied licence to the unavoidable fiction of presumed grant would reduce this part of the law to a state of incoherence.

86 I would however add that I feel some sympathy for the view taken by the courts below. The city council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the city council, and was held by its predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner ***916*** was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in *Hall v Beckenham Corpn [1949] 1 KB 716* , 728, which was concerned with a claim in nuisance against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions.

87 After that approach had been suggested there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906 , sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976 . Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation.

88 Those situations would raise difficult issues but in my opinion they do not have to be decided by your Lordships on this appeal, and would be better left for another occasion. The undisputed evidence does not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land as recreational open space. Counsel for Sunderland rightly did not argue for some general implied exclusion of local authorities from the scope of section 22 of the Commons Registration Act 1965 .

89 It is worth summarising the salient points of the evidence.

(a) The land was first acquired by the Washington Development Corporation ("WDC") as part of what seems to have been an extensive acquisition under the very wide powers in the New Towns Act 1965. The WDC did not acquire this particular area of land for any specific purpose, and was not under an obligation to appropriate it for any specific purpose (such as housing, public buildings, or open space). The plans for the new town provided for the area to be included in a sports complex

consisting of an indoor leisure centre and an indoor swimming pool (both of which were built) and a tartan running track (enclosing a football field) and a grandstand (which were not built). Had the track and the grandstand been built, public access to them would no doubt have been regulated in some way (probably including charging an entrance fee). The area would have been devoted to recreation but local inhabitants would not have used it as of right.

(b) The ambitious plans for the sports complex have never been fully realised, but they still seem to have been regarded as at least a possibility in 1982 (when a manuscript draft report referred to an unencouraging opinion from the Sports Turf Research Institute) and in 1983 when the city council, although not yet owners of the land, referred to "the accommodation of a running track" in a report entitled 'Open Space Recreation'. In the meantime recreational use of the area by local inhabitants was tolerated (but not, for reasons which I have already stated, enjoyed by any overt licence).

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(c) The land was transferred by the WDC to the Commission for the New Towns ("CNT") in 1989 as part of a general disposal of WDC's assets. It appears that the CNT retained the land in 1991 (when other assets were transferred to the city council) because it was regarded as having potential for commercial development (see para 2.4 of the report by the director of administration).

(d) When the land was eventually transferred by the CNT to the city council in 1996, its use was restricted by covenant to "the provision of magistrates' courts and/or community health facilities and/or community leisure/recreation and/or other similar community related uses and developments" (see para 2.7 of the same report).

90 In short there is no evidence of any formal appropriation of the land as recreational open space by the city council or its predecessors. Nor is there material from which to infer an appropriation. Such action by the WDC or the CNT would have been unnecessary, and at or after the city council's acquisition in 1991 an appropriation as open space would have been inconsistent with the site's perceived development potential. It is true that the public's interim use of the land for recreation was not inimical to the city council's interests. But user can be as of right even though it is not adverse to the landowner's interests.

91 That was established by the decision of this House in *Cumbernauld 1993 SC (HL) 44* , 47-48 where Lord Jauncey said:

> "senior counsel for the appellants argued that unless a public user of a way was adverse to the interests of the proprietor it must necessarily be ascribed to tolerance and that since the user of [a pedestrian walkway in the middle of a new town] had been positively encouraged by the development corporation, it could not amount to user as of right. For a user to be so considered there must, it was argued, be conflict between the interest of the users and that of the proprietor. For this somewhat stark proposition counsel could produce no authority. There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor. As Lord President Normand pointed out in *Marquis of Bute v M'Kirdy & M'Millan* acquiescence on the part of a proprietor in continued user throughout the prescriptive period without taking steps to assert or record his right of exclusion will result in the constitution of a public right of way against him. If acquiescence in these circumstances produces such a result encouragement can even more readily be said to have the same consequences."

92 For these reasons, and for the further reasons set out in the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry, I would allow this appeal and quash the decision which the city council took by its licensing committee. I reach this conclusion with mixed feelings. The campaigning group named Washington First may feel that they have won a famous victory, and saved an important public amenity from being built on. That seems to be the likely consequence of this case. But the campaigners have achieved that end by a route which has bypassed normal development controls, and in a way which may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended. Any change in the law is of course a matter for Parliament but I respectfully agree with Lord Bingham's ***918*** observations as to the need for care on the part of decision-makers, whose conclusions as to the existence of a town or village green may have very important practical consequences. I also respectfully agree with Lord Rodger's Sobservations as to the assistance to be

derived from the Scottish authorities, provided that note is taken of the different meanings in which "tolerance" has been used in England and Scotland respectively.

Appeal allowed. Decision of licensing committee refusing application for registration quashed. Direction that licensing committee give effect to application for registration in light of opinions expressed in House. Question of costs adjourned pending written submissions.

Representation

Solicitors: Southern Stewart & Walker, South Shields ; Legal and Democratic Services, Council of the City of Sunderland .

C T B

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1. Commons Registration Act 1965, s. 13: "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where ... (b) any land becomes common land or a town or village green ..."S 22(1): "In this Act ... 'town or village green' means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."