Case No: CO/3141/2002

Neutral Citation No: [2003] EWHC 1578 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 8th July 2003

Before :

THE HONOURABLE MR JUSTICE SULLIVAN

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Between :

	R. **On the Application of** **Laing Homes Limited**	**Claimant**
	- and -	
	Buckinghamshire County Council	**Defendant**
	The Secretary of State for the Environment Food and Rural Affairs	**Interested Party**

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- -

Charles George QC, Paul Hardy Esq. and Jeremy Pike Esq. (instructed by **Laytons**) for the Claimant
Stephen Morgan Esq. (instructed by **Buckinghamshire County Council Legal Services**) for the Defendant
James Maurici Esq. (instructed by **The Treasury Solicitor**) for the Interested Party

Hearing dates : 25th March - 2nd April 2003

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Mr Justice Sullivan :

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 (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 12th June 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 25th August 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 5th June 2001, he held a public inquiry at Widmer End on six days between the 5th and 13th November and made an accompanied site visit on the 14th November 2001. In his report dated the 22nd March 2002 the Inspector's overall conclusion was:

> "(i) that there has been for at least 20 years before 25th August 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.)

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 section 4 of the Human Rights Act 1998 that sections 13(3) and 22 of the Act are incompatible with Article 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 30th July 1970), section 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, subsection 1(3) provides that:

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

15. Registration Authorities, defined by section 2, are required by section 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;"

18. The High Court is given power by section 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 sections 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 2nd January 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 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 paragraph 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&CR 487, between pages 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 section 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 p.492), Lord Denning M.R. hoped that the second stage legislation "will not be long delayed" (p. 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 section 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

(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 30th January 2001. The revised definition in the new subsection (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 ER 931 at p.937. However, the Inspector concluded that section 22 as originally enacted applied to GAG's application, which was made on the 25th August 2000, notwithstanding the fact that the amended section 22 had come into force well before the inquiry commenced in November 2001 (paras.12.1-12.7).

32. Mr George QC on behalf of Laings submitted that the Inspector's approach was correct, and referred to an *obiter dictum* of HH 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 76 Admin, 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 section 12 in cases where a town or village green or recreation ground has a known or defined boundary, as follows:

> "**29 Town and Village Greens**
>
> … 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 (Chapter 1), describes the application site (Chapter 2), sets out the legal basis of the proceedings (Chapter 3), identifies the principal issues (Chapter 4), analyses the information to be obtained from twenty-two aerial photographs with dates between 1962 and late 1999 (Chapter 5), introduces the evidence (Chapter 6), sets out in great detail the evidence of each witness called by GAG (Chapter 7) and by Laings (Chapter 8), records the submissions made on behalf of GAG (Chapter 9) and Laings (Chapter 10), and then sets out his own conclusions on the Human Rights Act challenge (Chapter 11), CROW (Chapter 12), "Locality" (Chapter 13), and the Principal Issues (Chapter14).

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 Chapter 3 (see below) Laings do not seek to challenge Chapters 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 Chapters 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 Chapters 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 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 section 12 of the 1857 Act and section 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 section 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." (p.391H-392G)

42. Browne L.J. agreed at p.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 p.395H)

44. A contrary view was expressed (*obiter*) by Pill L.J. in R. v. Suffolk County Council ex p. Steed (1996) 75 P&CR 102 at pp.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 section 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."

45. Schiemann and Butler-Sloss L.J.J. agreed (p.116). Steed was overruled by the House of Lords in R. v. Oxfordshire County Council ex p. Sunningwell Parish Council (2000) 1 AC 335, but issue (i) (above) was left open by Lord Hoffmann at p.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 p.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 section 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 p.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 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 Hazlemere, because an ecclesiastical parish cannot be a "locality" for the purposes of section 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, 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 paragraph 14.40 the Inspector said:

> "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 paragraph 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 paragraph 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 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 section 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 section 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 (EEC) 1765/92: Wren v. DEFRA, Times Law Reports, 4th December 2002. 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 (p.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". (p.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 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 section 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 ER 87, per Simon Brown LJ at paragraph [9].

65. Moreover, section 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 section 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 section 12 were a recognition that pre-existing commoners' rights of grazing could continue, and were not an acknowledgement of the landowner's right to graze cattle on a village green. I agree with the Inspector (14.45) that section 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 sections 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 paragraph 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 section 29, nor will it be a criminal offence under section 12. When enacting the definition of "town or village green" in section 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 section 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 sections 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 paragraph 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 level of 'agricultural' type activity coexisting on the land for a significant part of the prescription period."

71. He dealt with that question in paragraphs 14.29-14.47. The principal conclusions are set out above. In paragraph 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 section 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 ER 931, Harman J. at p.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 section 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 *Reg. 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 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" (p. 357D).

76. Although there are references in Lord Hoffmann's speech to "the quality of enjoyment" (p.351F) and "the quality of user" (p.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 section 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 (p.348H-349C). The House of Lords decided that registration should not have been refused on this ground (p.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 (p.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" (p.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 (1885) 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.' "

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 p.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, sections 12 and 29, from continuing to 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 section 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 section 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, 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 paragraph 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 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, p.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 paragraph 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 (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 paragraphs 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 p.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).

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 paragraph 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 section 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 casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at p.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 paragraph 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 paragraph 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 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 paragraph 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 Chapter 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)", paragraph 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 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, p.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" (p. 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" (p.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. W.H. Smith (Eziot) Ltd [1987] 1 WLR 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."

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 paragraph 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 paragraph 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.

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 section 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 p.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 (p.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 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 section 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 p.937 of the Ministry of Defence case.

134. In Steed, Carnwath J. said that "locality" in section 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." (p.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.

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 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 paragraph 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 paragraph 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 section 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 paragraph 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."

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 13th November. 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 paragraphs 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 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 section 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 Article 1 of Protocol 1 to the Convention ("Article 1"). Laings' submissions under the Human Rights Act 1998 ("the 1998 Act") are set out in paragraphs 10.86-10.92 of the Report. In paragraph 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*, 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 paragraphs 11.2-11.5 of the Report. Before me Mr George submitted that section 22(1) of the Act was incompatible with Article 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:

(a) The village green registration procedures in the Act did not engage Article 1 at all, being closely analogous to the acquisition of rights by prescription or adverse possession.

(b) If Article 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.

(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 25th March and 2nd April. 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 Laings' peaceful enjoyment of its possessions, and it is unnecessary to resolve the issues relating to Article 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 Article 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 Article 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 Article 1, since the defect under domestic law could have been remedied by remitting the matter for rehearing by the same, or another Inspector. But Laings' 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 section 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.

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 8th April 2002 must be quashed, on grounds (1), (2) and (3) of the domestic law challenge.