PLANNING AND REGULATORY COMMITTEE DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX D 2018 COURT OF APPEAL JUDGMENT

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Neutral Citation Number: [2018] EWCA Civ 721

Case Nos: C1/2016/2585 and C1/2016/3267

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE OUSELEY
[2016] EWHC 1238 (Admin)
MR JUSTICE GILBART
[2016] EWHC 1715 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2018

Before:

Lord Justice Rupert Jackson
Lord Justice Lindblom
and
Lady Justice Thirlwall

- -

Between:	**C1/2016/2585**
R. (on the application of Lancashire County Council)	**Appellant**
- and -	
Secretary of State for Environment, Food and Rural Affairs	**Respondent**
- and -	
Janine Bebbington	**Interested Party**

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- -

Mr Douglas Edwards Q.C. and Mr Jeremy Pike (instructed by **Sharpe Pritchard**) for the **Appellant**
Mr Tim Buley (instructed by **the Government Legal Department**) for the **Respondent**
Mr Ned Westaway (instructed by **Harrison Grant**) for the **Interested Party**

And between: **C1/2016/3267**

(1) R. (on the application of NHS Property Services Ltd.)
(2) Surrey County Council

Respondents

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- and -

Timothy Jones **Appellant**

- -
- -

Dr Ashley Bowes (instructed by **Richard Buxton Environmental and Public Law**)
for the **Appellant**
Mr Jonathan Clay and Mr Matthew Lewin (instructed by **Capstick Solicitors LLP**)
for the **First Respondent**
The Second Respondent did not appear and was not represented.

Hearing dates: 4 and 5 October 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

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Introduction

1. Did the concept of "statutory incompatibility" defeat an application for the registration of land as a town or village green under section 15 of the Commons Act 2006? That question arises in each of these two appeals.

2. In the first appeal the appellant is Lancashire County Council. The respondent is the Secretary of State for Environment, Food and Rural Affairs, whose inspector, Ms Alison Lea, a solicitor, granted an application under section 15 of the 2006 Act for the registration of land known as Moorside Fields, in Lancaster, as a town or village green. Some 13 hectares in extent, the land is adjacent to Moorside Primary School and is owned by the county council. On 9 February 2010 the interested party, Ms Janine Bebbington, applied to the county council as registration authority to register the land as a town or village green. The county council, as local education authority, objected. The inspector was appointed to determine the application in a "pilot" scheme under the Commons Registration (England) Regulations 2008. She held an inquiry on eight days in September 2014 and July 2015. In her decision letter, dated 22 September 2015, she concluded that four of the five areas shown on the application plan should be added to the register of town and village greens, but that the fifth should not – because its use for lawful sports and pastimes by a "significant number of inhabitants" during the relevant period had not been demonstrated. The county council challenged the registration by a claim for judicial review. That claim was dismissed by Ouseley J. in an order dated 27 May 2016. I granted permission to appeal on 8 May 2017.

3. The appellant in the second appeal is Mr Timothy Jones. The first respondent is NHS Property Services Ltd., a company wholly owned by the Secretary of State for Health, which, by a claim for judicial review, successfully challenged the registration by the second respondent, Surrey County Council, of some 2.9 hectares of land in its ownership at Leach Grove Wood in Leatherhead as a village green. The land adjoins Leatherhead Hospital, and is in the same freehold title. The application for registration was made by Ms Phillippa Cargill on 22 March 2013, with the support of Mr Jones and others. It was opposed by NHS Property Services. The inspector, Mr William Webster, a barrister, held an inquiry on five days in April and May 2015. In his report, dated 9 June 2015, he accepted that a significant number of the inhabitants of the claimed "locality" and a significant number of the inhabitants of the claimed "neighbourhood" had indulged as of right in lawful sports and pastimes on the land for at least 20 years. He rejected NHS Property Services' objection that the land was not registrable on the grounds of "statutory incompatibility". But he found that the claimed "locality" was not a "locality", and the claimed "neighbourhood" not a "neighbourhood", within the meanings of those concepts in section 15 of the 2006 Act. He therefore recommended that the application for registration be refused. At its meeting on 23 September 2015 the county council's Planning and Regulatory Committee rejected that recommendation. The registration was accordingly made, on 5 October 2015. By an order dated 28 July 2016 Gilbart J. upheld the claim for judicial review, concluding that the county council had failed properly to consider the question of "statutory incompatibility". Permission to appeal was granted by the judge. Although the county council took part in the proceedings in the court below, it has not done so before us – because of a "lack of resources", and not because it concedes that it made "any error of law" (its Principal Solicitor's letter to the court dated 28 September 2017).

4. A complete account of the relevant facts is given in the judgments in the court below. I gratefully adopt the narrative to be found there.

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The issues in the appeals

5. In the Lancaster appeal there are five issues for us to decide:

   (1) whether, as Ouseley J. concluded, the concept of "statutory incompatibility" did not apply (ground 4 in the appellant's notice);
   (2) whether the judge was right to endorse the inspector's finding that the county council had not demonstrated that it had held Moorside Fields for educational use (ground 3);
   (3) whether the inspector erred in finding there existed a "locality" for the purposes of section 15 of the 2006 Act (ground 1);
   (4) whether, as Lancashire County Council asserts, the "significant number of inhabitants" of a locality who use the land in question must be geographically "spread" across it (ground 2); and
   (5) whether the inspector erred in finding that the land was used "as of right" (ground 5).

6. In the Leatherhead appeal there are two issues:

   (1) whether Gilbart J. was wrong to conclude that the concept of "statutory incompatibility" applied (ground 1 in the appellant's notice and ground (a) in NHS Property Services' respondent's notice); and
   (2) whether Surrey County Council's reasons for departing from the inspector's finding that there did not exist a relevant "neighbourhood" were adequate (ground (b) in the respondent's notice).

   A further ground in the respondent's notice asserted that the county council's decision to register the land at Leach Grove Wood was "affected" by procedural unfairness. That ground was not pursued separately before us, but was said to be relevant to the argument on ground (b).

The statutory scheme for the registration of town and village greens

7. Section 15 of the 2006 Act, "Registration of greens", provides in subsection (1) that "[any] person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies". All three of those subsections apply where "(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality", have "indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years". Subsection (2) applies where "(b) they continue to do so at the time of the application". Subsection (3) applies where "(b) they ceased to do so before the time of the application but after the commencement of this section" and "(c) the application is made within the relevant period", which is defined in subsection (3A) as meaning "(a) … the period of one year beginning with the cessation mentioned in subsection (3)(b)". Subsection (4) is not relevant here.

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8. In most parts of England, an application to register land as a green is determined by a commons registration authority – usually a county council or unitary authority. But in the "pilot" areas, of which the administrative area of Lancashire County Council is one, applications for registration are determined by inspectors under the 2008 regulations, and no application may later be made to the High Court for rectification of the register of town or village greens under section 14 of the Commons Registration Act 1965.

9. As Lord Hoffmann said in *R. (on the application of Beresford) v Sunderland City Council* [2004] 1 A.C. 889 (in paragraph 2 of his speech), the registration of land as a town or village green can have serious consequences for a landowner. Once land has been registered, rights to continue to use it for lawful sports and pastimes accrue and are vested, as enforceable civil rights, in the inhabitants of the qualifying locality or neighbourhood (see Lord Hoffmann's speech in *Oxfordshire County Council v Oxford City Council* [2006] 2 A.C. 674, at paragraphs 47 to 51). The land will then enjoy the protection of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. The landowner will not be able to use it in such a way as to interfere with the local inhabitants' rights, or build on it, or exclude local inhabitants from it.

Issue (1) in the Lancaster appeal and issue (1) in the Leatherhead appeal – "statutory incompatibility"

10. As Lord Carnwath pointed out in *R. (on the application of Barkas v North Yorkshire County Council* [2015] A.C. 195 (in paragraph 66 of his judgment), it would be wrong to think that "land in public ownership can never be subject to acquisition of village green rights under the 2006 Act". That, he said, "is demonstrated by the "Trap Grounds" case [*Oxfordshire County Council*]", where "[although] the land was in public ownership, it had not been laid out or identified in any way for public recreational use …".

11. In *R. (on the application of Newhaven Port and Properties Ltd.) v East Sussex County Council* [2015] UKSC 7 the Supreme Court held that the general provisions of section 15 of the 2006 Act should yield to a specific provision in section 49 of the Newhaven Harbour and Ouse Lower Navigation Act 1847, which provided that "the trustees shall maintain and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith …", and to subsequent statutory provisions governing the operation of a harbour on West Beach at Newhaven, including section 33 of the Harbours, Docks and Piers Clauses Act 1847, which provided that "… the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods". West Beach had been registered as a village green.

12. In a judgment with which Lady Hale and Lord Sumption agreed, Lord Neuberger and Lord Hodge described the relevant issue as being "whether … section 15 of the 2006 Act cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function to which the land was to be put" (paragraph 24).

13. Having surveyed the English jurisprudence on dedication and prescription, including the House of Lords' decision in *British Transport Commission v Westmorland County Council* [1958] A.C. 126, and the Scots law of positive and negative prescription – in particular, the line of authority including *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623, they

observed (in paragraph 91) that it was "significant … that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes". The concept of "statutory incompatibility", they emphasized, does "not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act" (paragraph 92). They continued (in paragraph 93):

> "93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281:
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> > 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.'
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> While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act."

They saw "an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour …". The harbour company was "obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act)", and it had "powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order" (paragraph 94). They went on to say (in paragraph 96):

> "96. In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way

> which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

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There was, they said, "a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green" (paragraph 97).

14. They then referred (in paragraphs 98 to 100) to a number of cases in which the registration as a green of land held by public bodies had been approved by the court – including *New Windsor Corporation v Mellor* [1976] Ch. 380, *Oxfordshire County Council* and *R. (on the application of Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] UKSC 11. In *New Windsor Corporation v Mellor*, "[while] the land had long been in the ownership of the local council and its predecessors, it was not acquired and held for a specific statutory purpose" (paragraph 98). In *Oxfordshire County Council*, "while the city council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility" (paragraph 99). And in *Lewis*, "[it] was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green" (paragraph 100). Those cases, therefore, were readily distinguishable. Lord Neuberger and Lord Hodge went on to say this (in paragraph 101):

> "101. … The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."

15. As Lord Carnwath said in his judgment (at paragraph 138), Lord Neuberger and Lord Hodge had proceeded "on the basis that registration of the Beach as a town or village green would make it subject to the restrictions (subject to criminal sanctions) imposed by the 19th century village green statutes". In his view it was "easy to see why such restrictions are likely to be incompatible with future use for harbour purposes, even if that has not proved a problem hitherto". He added (in paragraph 139):

> "139. However, it is to be noted that the supposed incompatibility does not arise from anything in the 2006 Act itself, but rather from inferences drawn by the courts as to Parliament's intentions. In the relevant passage [of his speech in *Oxfordshire County Council*] (para 56), Lord Hoffmann expressed agreement with the courts below on this issue, including by implication my own rather fuller reasoning in the Court of Appeal [2006] Ch 43, paras 82-90. However, he did not see this issue as impinging directly on the question whether the land should be registered. … It was not necessary in that case to consider the issue which arises here: that is, the potential conflict between the general village green statutes and a more specific statutory regime, such as under the Harbours Acts. It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour."

16. In the Lancaster case, Lancashire County Council relied on the analysis of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* in contending that registration of the land at Moorside Fields as a village green was incompatible with the statutory purposes for which it held the land as education authority.

17. In her conclusions on "Statutory Incompatibility", the inspector acknowledged that the principle applied in *Newhaven Port and Properties* "could, in certain circumstances, be applied to land held by a local authority" (paragraph 111 of her decision letter). She said it was "necessary to examine the purposes for which LCC acquired and hold the Application Land, and, if held for a specific statutory purpose, then to consider whether registration of the land as a town or village green would be incompatible with the continuing use of the land for those purposes" (paragraph 112). Having considered the evidence before her, she said (in paragraphs 119 to 122):

> "119. Furthermore, even if the land is held for "educational purposes", I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The School is currently being extended on other land and will, according to Lynn MacDonald [a School Planning Manager for the county council], provide 210 places which will meet current needs. There is no evidence to suggest that the School wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.
>
> 120. Areas C and D are marked on LCC's plan as "Replacement School Site". However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her 5 year planning phase.
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> 121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.
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> 122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish to make that provision on the Application Land."

And she concluded (in paragraph 124):

> "124. It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships [in *Newhaven Port and Properties*]. Even if it is accepted that LCC hold the land for "educational purposes", there is no *"clear incompatibility"* between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility."

18. The statutory provisions on which the county council had sought to rely are in the Education Act 1944, the Education Act 1996 and the Education Act 2002. Section 8 of the 1944 Act imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education. Section 13(1) of the 1996 Act, under the heading "General responsibility for education", provides that "so far as their powers enable" a local education authority must secure that "efficient primary education and secondary education … are available to meet the needs of the population of their area". Section 14 requires it to "secure that sufficient schools" are available for providing primary and secondary education (sub-section (1)), and that they should be sufficient in "number, character and equipment to provide for all pupils the opportunity of appropriate education" (subsection (2)). Section 530(1) provides its power compulsorily to purchase any land required for "the purposes of any school …" or "otherwise … for the purposes of [its] functions under [the] Act"; section 531, its power to purchase land by agreement for such purposes. Regulations made under section 542, prescribing the standards to which school premises are to conform, include, in regulation 10 of the School Premises (England) Regulations 2012, the requirement that "[suitable] outdoor space must be provided" for "physical education to be provided for pupils" and for "pupils to play outside". Section 175 of the 2002 Act requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children".

19. Ouseley J. was not persuaded by the argument that those provisions engaged the concept of "statutory incompatibility". He said (in paragraph 76 of his judgment) that "[the] mere fact that the land is owned by a statutory body for an identified statutory function does not mean that use as of right for public recreation is necessarily incompatible with that function". He went on (in paragraph 79) to pose, and answer, three questions. The first question was this: "can [Lancashire County Council] carry out some educational functions on the land if the public has the right to use Areas A-D or any of them for lawful games and pastimes[?]". The answer to that question was: "yes; some educational use can be made of … Areas A-D; open air classes and some supervised or organised recreation are not prevented by public rights of access with reasonable give and take, though they may be inhibited or made less convenient than would be the case without registration as a town green". The second question was: "can [Lancashire County Council] put the land to whatever educational purpose it might want in the future[?]". The answer was: "no[; some] educational uses obviously are prevented, notably the construction of buildings or other uses such as a contractor's compound or for temporary classrooms while maintenance or expansion takes place". And the third question was this: "can [Lancashire County Council] carry out its educational functions if the public has the right to use Areas A-D for recreational purposes[?]". The judge's answer to that question was: "yes[; and] it would still be yes, even if it could make no educational use of

the land at all". In *Newhaven Port and Properties*, he said, "the answer to the latter two questions would have been no, and the answer to the first would have been: yes but only temporarily".

20. It was, in Ouseley J.'s view, the third question "which matters". As that question was "answered in the positive here", there was, he said, "no statutory incompatibility". In his view "[what] is envisaged for a specific Act to be in conflict with the [2006 Act], and to override it by necessary implication, is that the statutory ownership of the land should bring specific statutory duties or functions in relation to that specific land which are prevented or hindered by its use for public recreation after registration". It was "not enough that the duty could be performed on the land in question but could also be performed on other land, even if less conveniently" (paragraph 80), nor "that, after registration, [the county council] could only use the land for a limited range of educational purposes, nor that it might have to look elsewhere for land". Its "general statutory educational functions" could "still be undertaken even if no educational functions could be undertaken on this specific land compatibly with public recreational use". In *Newhaven Port and Properties*, "the importance of the beach to possible future needs of the harbour was obvious". This, said the judge, "highlights the difference between a specific statutory function which requires the use of specific identifiable land, and a general statutory function which can be performed, more or less conveniently without the land in question" (paragraph 81). The "specific purposes for which the Areas were acquired [had] been met elsewhere". The county council "does not need the land for new school buildings now and has no immediate plans to use them for that purpose" (paragraph 82).

21. In the Leatherhead case, the land at Leach Grove Wood had for many years been held by one or another of several public bodies for statutory purposes relating to healthcare, though never itself used for such purposes. In 1948, together with other land, it was transferred by the Trustees of Leatherhead Hospital to the Minister of Health, in 1968 vested in the Secretary of State for Social Services, and in 1969 transferred, with other land, to Surrey County Council. In 1971 it was appropriated to "Education, Health and Social Services", evidently with the intention that it might be developed as a health centre. Remaining undeveloped, however, it was eventually transferred, together with the site of Leatherhead Hospital, to the Surrey Primary Care Trust in 2006, and, in 2013, to NHS Property Services (see paragraphs 18 to 34 of Gilbart J.'s judgment).

22. NHS Property Services contended before Gilbart J., as it had before the inspector, that the concept of "statutory incompatibility" precluded registration of the land as a village green. Gilbart J. set out the relevant statutory provisions, their origins and their evolution.

23. At the time of the application for its registration, the land was owned by the Surrey Primary Care Trust. By section 83(1) of the National Health Service Act 2006, as enacted, primary care trusts were under a duty to provide, or to secure the provision of, primary medical services in their area. On the dissolution of Surrey Primary Care Trust in 2013, the freehold title of the land was transferred to NHS Property Services, which had been created by the Secretary of State for Health under his power in section 223(1) to "form … companies to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act". The NHS body for which NHS Property Services holds the land is the Surrey Downs Clinical Commissioning Group.

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24. Following the amendment of the National Health Service Act 2006 by the Health and Social Care Act 2012, functions previously exercised by the Secretary of State acting through a primary care trust fell to be exercised by a clinical commissioning group. The principal statutory duties of a clinical commissioning group are in section 3(1) of the National Health Service Act 2006, as amended:

> "(1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility –
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> (a) hospital accommodation,
>
> (b) other accommodation for the purpose of any service provided under this Act,
>
> (c) medical, dental, ophthalmic, nursing and ambulance services,
>
> (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the group considers are appropriate as part of the health service,
>
> (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the group considers are appropriate as part of the health service,
>
> (f) such other services or facilities as are required for the diagnosis and treatment of illness."

25. The inspector described the land (in paragraphs 65 to 71 of his report) as woodland that had had little management, which was crossed by tracks and attractive for walking with or without dogs, and for children's play. In January 2013 NHS Property Services had put up a notice on the land, on which it was stated that this was private land, that the public had permission to enter it on foot, but that that permission could be withdrawn at any time.

26. The issue of "statutory incompatibility", as the inspector saw it, was "whether land held for the statutory purposes of the NHS falls within the same category as land held by a statutory undertaker for the purposes of its operations such that, consistently with the decision in [*Newhaven Port and Properties*], the land in this instance would not be registerable as a matter of law" (paragraph 175(a)). He preferred the submissions made on behalf of Mr Jones (paragraph 175(b)). He accepted that the fact that the land formed part of the same freehold title as the hospital site "should not mean that it must be treated as part of the working hospital site when, as a matter of fact, it plainly is not and never has been" (paragraph 175(c)). Pointing to paragraph 101 of the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties*, he said that NHS Property Services' case "would in practice emasculate the provisions of the 2006 Act when it came to land held by public bodies for specific statutory functions". This, he thought, could not have been Parliament's intention (paragraph 175(d)). In *Newhaven Port and Properties* there had arisen "an obvious and irreconcilable clash as between the conflicting statutory regimes" (paragraph 175(e)). He went on to say (in paragraph 175(e) and (f)):

> "(e) … The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

> (f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has [sic]) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being. … [In] *Barkas* at [66] Lord Carnwath had explained that land in public ownership is not outside the 2006 Act and to suggest that any land held for purposes inimical to TVG rights would be outside the 2006 Act would be absurd, not least as it might give rise to unnecessary speculation and debate about what the landowner's future intentions were for the land in contrast to the wholly proper analysis which, in my view, arises from *Newhaven* which focuses on the specific duty or duties which are imposed on a landowner (in its capacity as a statutory undertaker) with regard to its holding and management of the land which would clash with registration of the land as a TVG. As indicated, no such conflict impacts on the holding of the land in this instance in the performance of the statutory health functions of the NHS and those bodies through whom they are discharged."

The inspector did not accept that the principle of "statutory incompatibility" applied only to public bodies with no power to hold land for public recreation "since [this] might mean in practice that all or most publicly held land is outside the 2006 Act". He said that "if registration was to have been avoided during the relevant qualifying period in this instance then the answer was permissive signage or making user contentious" (paragraph 175(g)). He concluded therefore that "the doctrine of statutory incompatibility has no application in this case" (paragraph 175(h)).

27. The officer's report for the meeting of Surrey County Council's Planning and Regulatory Committee on 23 September 2015, which recommended that the application for registration be rejected, did not address the question of "statutory incompatibility", nor, it seems, was there any discussion of the question at the meeting.

28. Gilbart J. framed the issue for the court in this way: "given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has [the county council] shown that there was no basis for concluding that there was statutory incompatibility?". In the light of the relevant conclusions expressed by Lord Neuberger and Lord Hodge in *Newhaven Port and Properties*, he said that "[what] matters is whether, as a matter of statutory construction, the relevant statutory purpose is incompatible with registration" (paragraph 128 of the judgment). He accepted that Ouseley J.'s judgment in the Lancaster case was consistent with the conclusions of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* (paragraph 129).

29. As to the statutory powers with which he was concerned, Gilbart J. said it was clear that there was "no general power in any of the relevant bodies to hold land". The defined statutory purposes did "not include recreation, or indeed anything outside the purview of … the purposes of providing health facilities". Asking himself the question "Could the land be used for the defined statutory purposes while also being used as a town or village green?", he said that "the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use" (paragraph 134). It was "very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village

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green". A "hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used". By contrast, said the judge, it was "easy to think of functions within the purview of education, whereby land is set aside for recreation". There was "a specific statutory duty [in section 507A of the 1996 Act] to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities" (paragraph 135). It was "not relevant … that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes" (paragraph 136). In the judge's view, given those conclusions, "there is a conflict between the statutory powers in this case and registration" (paragraph 137). The inspector had not concentrated, as he should have done, on the question of statutory construction, and the county council's decision to register the land was flawed by its committee's failure to consider NHS Property Services' objection on this ground (paragraphs 138 and 139).

30. For Lancashire County Council, Mr Douglas Edwards Q.C. contended that Ouseley J.'s understanding of the concept of "statutory incompatibility" was unjustifiably narrow. He submitted that, where a public authority holds land for the purpose of discharging a statutory function, the land may not be registered as a green if to do so would frustrate the discharge of that function on that land. This concept can apply to "general" statutes as well as to "special" or "local" Acts, such as the one with which the court was concerned in *Newhaven Port and Properties*. There were two requirements: first, that the land had been acquired for a specific statutory purpose or statutory purposes, and secondly, that registration must be incompatible with the performance of that statutory purpose or any of those statutory purposes – though not necessarily all of them – on the land itself. That principle, Mr Edwards submitted, was clearly engaged in the Lancaster case. Registration would make it impossible for the county council to prevent access to the land, or to build on any part of it. The fencing erected to protect children at Moorside Primary School would have to be removed. Any future expansion of the school on to the land would be precluded. The county council's ability to discharge those statutory obligations on the land would now be compromised. Mr Edwards submitted that the reference to "the continuing use of the land for [the] statutory purposes" in paragraph 93 of the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* means use for any of those statutory purposes – whether now or in the future. The fact that the land may in the future be required for those purposes is enough to prevent its registration as a green if registration would give rise to incompatibility with the relevant statutory purposes. That was clearly so here. To hold otherwise, as did Ouseley J., would create serious problems for public authority landowners.

31. Mr Edwards also submitted that the same considerations apply to land held for education purposes by a local education authority as to land owned by NHS bodies. Gilbart J.'s observations to the contrary in the Leatherhead case were incorrect. One could readily envisage NHS bodies, in the exercise of their statutory functions, providing open space for patients and visitors at a hospital. That would be no different, in principle, from land being laid out land for recreation at a school. Neither statutory regime was compatible with the registration of land as a town or village green.

32. The implications of this argument, Mr Edwards submitted, should not be exaggerated. It would not be likely, for example, to prevent registration of land acquired by a "principal council" under section 120(1) of the Local Government Act 1972 for the purposes of "(a)

any of their functions under this or any other enactment" or "(b) the benefit, improvement or development of their area".

33. For NHS Property Services, opposing the appeal in the Leatherhead case, Mr Jonathan Clay adopted Mr Edwards' submissions on the law. He submitted that the "key question" was whether the registration of the land at Leach Grove Wood as a town or village green would be incompatible with its use "by NHS bodies for NHS purposes ([especially] under section 3 [of the National Health Service Act 2006])". He pointed out that NHS Property Services' power to hold land is limited to putting that land at the service of the relevant NHS body – here the clinical commissioning group – to enable it to provide medical services to the public. It had no power to hold land for recreational purposes. Though the land was not being used to provide hospital accommodation, or any other accommodation, service or facility, within section 3(1) of the National Health Service Act 2006, that is irrelevant. It is the only undeveloped land within the site of Leatherhead Hospital that could be used to extend the hospital or to provide other accommodation. This was commended by Gilbart J. (in paragraph 138(vii) of his judgment) as a "prudent husbanding of resources". The judge was therefore right, submitted Mr Clay, to conclude that the statutory purposes for which the land was held and used would be incompatible with registration. This case was unlike those envisaged by Ouseley J. in his judgment in the Lancaster case (at paragraph 81) – "public bodies with general functions which do not specifically or in reality have to be performed on the land in question".

34. In the Lancaster appeal those submissions were countered by Mr Tim Buley for the Secretary of State and Mr Ned Westaway for Ms Bebbington, and, in the Leatherhead appeal, by Dr Ashley Bowes for Mr Jones. All three submitted that Ouseley J.'s conclusions on "statutory incompatibility" were correct; Dr Bowes that Gilbart J.'s was incorrect. Parliament had not created, in the self-contained code for the registration of town and village greens under the 2006 Act, a general exemption from registration for land held by public bodies that is not essential for the discharge of their statutory functions. Had the Supreme Court in *Newhaven Port and Properties* been concerned that registration might conflict with the future exercise of statutory powers, Lord Neuberger and Lord Hodge would not have said what they did in paragraph 101 of their judgment. This understanding of the Supreme Court's decision sits well with its own recent jurisprudence confirming that there is no general exemption from the scheme of the 2006 Act for public bodies owning land (see Lord Carnwath's judgment in *Barkas,* at paragraph 66). It is also consistent with the general tenor of the jurisprudence relevant to the concept of "statutory incompatibility" – including, for example, as Mr Westaway submitted, the decision of the Court of Appeal in *Bishop of Gloucester v Cunnington* [1943] 1 K.B. 101.

35. The legal principles at work here are to be found in the judgments given in the Supreme Court in *Newhaven Port and Properties*. They are entirely clear in Lord Neuberger and Lord Hodge's judgment (in paragraphs 92 to 101), and are amplified by Lord Carnwath's observations in his (in paragraph 139). They can be applied in each of these two appeals, without needing to be further refined or enlarged by this court. Our task, in each case, is to apply them to the relationship between the provisions of the 2006 Act concerning the registration of town and village greens and the statutory powers and duties relating to the land in question.

36. Three general points may be made about the relevant principles, none of them controversial in argument before us. First, it should be remembered that they are the means by which the

court resolves a conflict between two statutory regimes, where Parliament itself has not seen fit to do that – in either regime. They must therefore be exercised with care, and only when the need to do so truly arises. Secondly, they are potentially applicable in all cases where an issue of "statutory incompatibility" is said to arise. They are not confined to cases where powers and duties contained in a private Act of Parliament are said to trump the general provisions for the registration of town and village greens in section 15 of the 2006 Act. Nor – as is clear from the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* (at paragraph 101) – are they confined to the activities of statutory undertakers. They may also be applied in cases where there is said to be a conflict between those provisions of the 2006 Act and statutes providing for the functions of public bodies within a given sphere of responsibility. Thirdly, however, under the statutory scheme for registration there is no blanket exemption for land held by public bodies for the purposes of their performance of statutory powers and duties. Section 15 of the 2006 Act contains no limitation, or exception, for public body landowners. Parliament has had several opportunities to enact such a provision as the statutory scheme has evolved – for example, in the amendments brought about by the Growth and Infrastructure Act 2013.

37. As the Supreme Court stressed in *Newhaven Port and Properties*, when another statutory regime is said to displace the registration provisions of the 2006 Act, the issue will always be one of "statutory construction". Lord Neuberger and Lord Hodge laid emphasis on the land in question being held for "defined statutory purposes" and the 2006 Act not enabling rights to be acquired by the public that are "incompatible with the continuing use of the land for those statutory purposes" (paragraph 93). The inconsistency amounting to "statutory incompatibility" was the inevitable clash between the consequences of registration under the 2006 Act and the harbour company's ability to perform the statutory purposes entailed in operating the harbour, not between the consequences of registration and the possibility of a public body performing on the registered land general functions that might be performed on the land but could also be performed elsewhere. The "statutory incompatibility" was inherent in the potential frustration of the "statutory purposes" themselves. In subsequent passages of their judgment Lord Neuberger and Lord Hodge spoke of "a clear incompatibility between NPP's statutory functions in relation to the Harbour … and the registration of the Beach as a town or village green" (paragraph 97). In their observations about the three cases in which land held by public bodies had been registered as town or village greens, they underscored the point that in those cases the land in question had not been acquired and held for "a specific statutory purpose" likely to be impeded by its registration as a green (paragraphs 98 to 100). And they confirmed that the ownership of land by a public body with "statutory powers that it can apply in future to develop land" was "not of itself sufficient to create a statutory incompatibility" (paragraph 101).

38. In each of the two cases before us the circumstances were, plainly, very different from those in *Newhaven Port and Properties*. In both cases, the statutory powers and duties with which the provisions for registration of greens under the 2006 Act were said to be incompatible were quite different from the statutory regime governing the operation of the harbour on the land in question at Newhaven, which gave rise to what Lord Neuberger and Lord Hodge described (in paragraph 97 of their judgment) as "a clear incompatibility between [the harbour company's] statutory functions in relation to the Harbour … and the registration of the Beach as a town or village green".

39. I think Ouseley J.'s approach to this question in the Lancaster case was essentially consistent with the principles indicated by the Supreme Court in *Newhaven Port and Properties*, and

that his conclusion, in agreement with that of the inspector, was correct. Mr Edwards' submissions to the contrary seem to extend the relevant principles beyond their true scope and to give them an effect that the Supreme Court did not intend – and with potentially far-reaching consequences. Assuming for the moment, as the county council contend, that it had acquired and held the land at Moorside Fields for educational purposes – a contention the inspector could not accept – I do not think this was a case in which the concept of "statutory incompatibility" stood in the way of the land being registered as a green. It seems to me that the statutory powers and duties in the Education Acts on which the county council sought to depend as giving rise to some decisive incompatibility with the 2006 Act, in particular sections 13 and 14 of the Education Act 1996, were materially different from the statutory provisions considered in *Newhaven Port and Properties*.

40. Crucially, as a matter of "statutory construction" there was no inconsistency of the kind that arose in *Newhaven Port and Properties* between the provisions of one statute and the provisions of the other. The statutory purpose for which Parliament had authorized the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with *Newhaven Port and Properties*, there were no "specific" statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible. This was not analogous to the situation referred to by Lord Neuberger and Lord Hodge in *Newhaven Port and Properties* (at paragraph 93), "[where] Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes", and "the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes". It was not a case in which registration would, as Lord Neuberger and Lord Hodge put it (at paragraph 96), "clearly impede", or "prevent" or "restrict" the exercise of any statutory power, or the discharge of any statutory duty, relating specifically to that particular land. It was not akin to the circumstances of *Newhaven Port and Properties*, in which, again as they put it (at paragraph 101), "the statutory harbour authority throughout the period of public user of the Beach held the Harbour for the statutory harbour purposes and as part of a working harbour".

41. The statutory powers and duties relied upon here were general in their character and content, comprising a local education authority's functions in securing educational provision in its area. There was no statutory obligation to maintain or use the land in question in a particular way, or to carry out any particular activities upon it. The basis of the asserted incompatibility between section 15 of the 2006 Act and the provisions of the Education Acts on which the county council sought to rely could only be that the carrying out of its general obligations to provide schools in its area – its compliance with a "target duty" – might be or become more difficult or less convenient, not that it would be prevented from carrying out any particular statutory function relating specifically to the land whose registration as a town or village green had been applied for. There was no statutory duty to provide a school on the land, or to carry out any particular educational activity on it. There were no proposals to develop it for a new school. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a "statutory incompatibility" (see paragraph 101 of the judgment of Lord Neuberger and Lord Hodge in *Newhaven Port and Properties*). Nor was the fact of its having been acquired and held for such purposes – if, indeed, it was. The relevant statutory purposes were capable of fulfilment through the county council's ownership, development and management of its property assets as a local education authority

without recourse to the land in question – notwithstanding that, on its own contention, it had owned that land for "educational purposes" for many years. The registration of the land as a town or village green would not be at odds with those statutory purposes.

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42. As Ouseley J. accepted in supporting the inspector's conclusions on this issue, the county council, as local education authority, would still be able to carry out its statutory educational functions if the public had the right to use the land for recreational purposes, and this would also be so even if it could make no educational use of the land itself. Indeed, the judge was able to go further than that. As he said, it would still be possible for some, albeit limited, educational use to be made of the land after its registration as a green. But in any event there was no necessary inconsistency between the two statutory regimes. This was not a case of "statutory incompatibility".

43. In the Leatherhead case it seems clear that Gilbart J. did not consider his approach to the question of "statutory incompatibility" to be different from Ouseley J.'s in the Lancaster case, but congruent with it. However, I am not persuaded that his own conclusion on that question can be reconciled with Ouseley J.'s application of the principles in *Newhaven Port and Properties* (in paragraphs 76 to 82 of his judgment).

44. A similar analysis applies in my view, because the circumstances of the two cases are, in all material respects, parallel. It is not necessary to repeat the same basic points, but they apply equally here (see paragraphs 39 to 42 above). As in the Lancaster case, and for essentially the same reasons, I cannot see why, as a matter of "statutory construction", the court should be compelled to find an incompatibility between the statutory provisions under which the land at Leach Grove Wood was held and its registration as a village green under section 15 of the 2006 Act. There was no inherent inconsistency between the provisions in the statutory regime under which the land was held and the statutory provisions for registration. On a similar analysis, the critical considerations to which I have referred in the Lancaster case were also present here. The two cases are indistinguishable in that respect.

45. The statutory functions on which NHS Property Services relied, and the statutory purposes underlying them, were also general in character and content: the general functions of a clinical commissioning group to provide medical services to the public, and, under section 3(1) of the National Health Service Act 2006, the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities. The registration of the land as a green under section 15 of the 2006 Act would not, in itself, have any material effect on NHS Property Services' function under section 223(1) of the National Health Service Act 2006, to hold land for the NHS Surrey Downs Clinical Commissioning Group. Nor would it prevent the performance by the clinical commissioning group, or any other NHS body, of any of statutory function relating specifically to the land in question. Beyond their general application to land and property held by NHS Property Services, none of those statutory functions could be said to attach in some specific way to this particular land. Parliament had not conferred on NHS Property Services or on the clinical commissioning group, any specific power, or imposed any specific duty, in respect of the land whose registration was sought. There was, for example, no statutory duty to provide a hospital or any other healthcare service or facility on the land.

46. As in the Lancaster case, therefore, the circumstances did not correspond to those of *Newhaven Port and Properties*. The land was not being used for any "defined statutory purposes" with which registration would be incompatible. No statutory purpose relating

specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a "statutory incompatibility". The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land. And again, it is possible to go somewhat further than that. Although the registration of the land as a village green would preclude its being developed by the construction of a hospital or an extension to the existing hospital, or as a clinic or administrative building, or as a car park, and even though the relevant legislation did not include a power or duty to provide facilities for recreation, there would be nothing inconsistent – either in principle or in practice – between the land being registered as a green and its being kept open and undeveloped and maintained as part of the Leatherhead Hospital site, whether or not with access to it by staff, patients or visitors. This would not prevent or interfere with the performance of any of the relevant statutory functions. But in any event, as in the Lancaster case, the two statutory regimes were not inherently in conflict with each other. There was no "statutory incompatibility".

47. It follows that the county council's committee was right to accept and adopt the inspector's conclusion on "statutory incompatibility", which was, I believe, correct as a matter of law.

48. In my view, therefore, on a proper understanding of the concept in the light of the Supreme Court's decision in *Newhaven Port and Properties*, there was no "statutory incompatibility" in either of these cases. I accept the submissions of Mr Buley, Mr Westaway and Dr Bowes on this issue, and reject the arguments of Mr Edwards and Mr Clay.

49. I should add, finally, that this conclusion does not depend on the fact that in both of these cases the risk of registration could have been avoided by preventing or challenging the use of the land by members of the public, or by some clear act of permission. The absence of such action might indicate that a public body owning the land has seen nothing inconsistent between the performance of its statutory functions and the recreational use of the land by members of the public within section 15 of the 2006 Act. But this does not affect the exercise of "statutory construction" involved in determining whether a "statutory incompatibility" has truly arisen.

Issue (2) in the Lancaster appeal – the statutory purposes for which Moorside Fields was held

50. The inspector in the Lancaster case was not satisfied that the land had been held for educational use by Lancashire County Council. In the section of her decision letter headed "The statutory requirements", she said (in paragraph 9):

> "9. In *R v Suffolk County Council, ex parte Steed*, approved by Lord Bingham in *Beresford v Sunderland City Council* it was noted that it was *"no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green"* and that each of the relevant criteria must be *"properly and strictly proved"*. Nevertheless the standard of proof is the normal civil one of the balance of probabilities."

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In the section where she dealt with "Statutory Incompatibility" she considered the documentary evidence produced by the county council (in paragraphs 113 to 116):

> "113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944". The endorsement is dated 12 August 1948.
>
> 114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows "Education Lancaster Greaves County Secondary School".
>
> 115. In addition LCC provided an Instrument dated 23 February 1925 and a letter from LCC to the School dated 1991. The Instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of the land acquired by the Council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the BRP Fields. An acknowledgement and undertaking dated March 1949 refers to the transfer to the County Council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the BRP Fields. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.
>
> 116. At the inquiry LCC provided a print out of an electronic document headed "Lancashire County Council – Property Asset Management Information" which in relation to "Moorside Primary School" records the committee as "E". I accept that it is likely that this stands for "Education". An LCC plan showing land owned by "CYP education" shows Areas A, B and E as Moorside Primary School and Areas C and D as "Replacement School Site". In relation to Areas C and D the terrier was produced, and under "committee" is the word "education". The whole page has a line drawn through it, the reason for which is unexplained."

A footnote to the last sentence of paragraph 116 refers to the county council's suggestion that "it may be the case that pages were crossed out once they had been uploaded onto the electronic system", but adds that "no electronic version was available and there is therefore no evidence that the page has been uploaded". The inspector then stated her conclusions on that evidence (in paragraphs 117 and 118):

> "117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no Council resolution authorising the purchase of the land for

> educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the Council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald … confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.
>
> 118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC's statement that *"the Application Land was acquired and is held for educational purposes and was so held throughout the 20 year period relevant to the Application"* accurately reflects the legal position."

51. Mr Edwards accepted that the burden lay on the county council to demonstrate that the land was held for educational purposes. But he submitted that the inspector was plainly wrong to require the county council to prove so that she could be "sure" – in effect, "beyond reasonable doubt" – that it had held the land for educational purposes during relevant 20-year period. To apply a standard of proof higher than the civil standard – the "balance of probabilities" – was an error of law. The inspector only had to be satisfied it was "more likely than not" that the position was as the county council contended.

52. Mr Edwards submitted that the relevant evidence all pointed to the land having been held by the county council for educational purposes. As the inspector acknowledged, there was "no evidence to suggest [the land] is held for other than for educational purposes". In the absence of evidence showing that a local government process had not been correctly performed, the "presumption of regularity" applied (see, for example, the judgment of Dove J. in *R. (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2016] 1 P. & C.R. 8, at paragraphs 20 to 25, and other decisions at first instance such as *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) and *R. (on the application of Malpass) v Durham County Council* [2012] EWHC 1934 (Admin)). In this case there was no evidence to rebut the "presumption of regularity". If the inspector had applied that presumption, she could only have concluded on the evidence before her that the land was indeed held for educational purposes.

53. But, submitted Mr Edwards, even if the "presumption of regularity" was not engaged here, the inspector had made a basic mistake of fact in concluding as she did. This is even more apparent, he said, from the further evidence that came to light after the inspector's decision – in the form of the county council's contemporaneous minutes. On 5 February 1948, on the recommendation of its Education Committee, the county council resolved that "the Seal of the Council be affixed to … [a] Conveyance from Mr. J. Dilworth of 13.89 acres of land on the south side of Bowerham Road, Scotforth, Lancaster, as a site for a proposed Primary School". On 31 July 1947 the county council's Finance Committee, at the request of its Education Committee, had recommended that applications be made to raise loans of £2,050 for the "Purchase of site and incidental expenses" for "Lancaster Scotforth Moorside proposed Primary School". The 13.89 acres acquired by the conveyance dated 29 June 1948 comprised Areas A, B and E in the application land. Looked at as a whole, Mr Edwards submitted, the evidence left no room for doubt that those three parcels of land were acquired for educational purposes.

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54. Mr Edwards relied on principles confirmed by Carnwath L.J., as he then was, in his judgment in *E and R v Secretary of State for the Home Department* [2004] Q.B. 1044: that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law" (paragraph 66); that such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" – as explained by Lord Slynn in *R. v Criminal Injuries Compensation Board, ex p. A* [1999] 2 A.C. 330 and *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 (paragraph 54); and that the admission of new evidence on such an appeal is subject to the principles in *Ladd v Marshall* [1954] 1 W.L.R. 1489, which "may be departed from in exceptional circumstances where the interests of justice require" (paragraph 91). In this case, Mr Edwards submitted, the mistake of fact was plain and verifiable, and played a material part in the inspector's reasoning. The county council was not responsible for the mistake, having produced ample evidence to the inspector to show the land had been acquired and was held for educational purposes. It could not have foreseen the need to adduce further evidence on this question (see Phipson on Evidence (18th edn.), at paragraph 13-07). The additional evidence, corroborating that presented to the inspector, would have been decisive. Being in documentary form, it was accurate and credible. On the application of *Ladd v Marshall* principles, it ought to have been admitted. But even if those principles were not satisfied, Mr Edwards submitted, this case falls within the exceptional category envisaged by Carnwath L.J. in *E and R*. Admitting it would overcome an obvious injustice to the county council, and would cause no prejudice to the other parties. The county council was now unable to apply to the court for rectification of the register under section 14 of the 1965 Act. To admit the evidence would be consistent with the court's traditional benevolence towards landowners facing expropriation or a substantial diminution in the value of their landholdings, which extends to the registration of town and village greens (see, for example, the judgment of Lady Hale in *Adamson v Paddico (267) Ltd.* [2014] UKSC 7, at paragraphs 33 to 42, and 44, and Lord Bingham's speech in *Beresford v Sunderland City Council*, at paragraph 2).

55. Finally, Mr Edwards submitted that the inspector's finding, against the weight of the evidence, was in any event irrational. There was no reasonable basis, on the evidence before the inspector, for her finding that the land had not been acquired and held for educational purposes.

56. All those arguments were very fully developed before Ouseley J., and were thoroughly, and in my view correctly, considered by him.

57. Having noted that the inspector had referred specifically to the appropriate standard of proof (in paragraph 9 of her decision letter), the judge found it impossible to conclude that she had forgotten that standard of proof when she came to assess the evidence before her. Her use of the word "sure" (in paragraph 118) did not demonstrate that she had. It simply reflected her conclusion that the evidence was too weak to show that the county council had acquired the land for educational purposes (paragraph 43 of the judgment).

58. In the judge's view the "presumption of regularity" did not enable "the purpose of acquisition and continued holding to be inferred from limited use, if it cannot be inferred from the documents" (paragraph 55). He doubted that he would have reached the same conclusion as the inspector on the inferences one could draw from the conveyances and the endorsements on them. He could see "no real reason not to conclude, on that basis, that the

acquisition was for educational purposes". This conclusion was reinforced by the evidence showing "the property, after acquisition, … managed by or on behalf of the Education Committee" (paragraph 57). The inspector's reasoning permitted a different conclusion, but did "not impel it as clearly as is required for her conclusion to be held irrational" (paragraph 60). Her approach had been on the basis that no resolutions relating to acquisition had been produced "despite proper endeavours to find them …". She was therefore "not prepared to assume that resolutions in relation to acquisition had existed". This "was entirely a matter for her, and cannot come close to legal error" (paragraph 61). There were no resolutions to demonstrate the "appropriation" of the land for educational use, and "the history of the uses of the land for educational purposes could not assist the inference that they must have existed" (paragraph 62). The inspector had found that only areas A and B were currently performing any educational function. Land acquired in 1948 had not been put to the form of educational use specifically envisaged for it, Area E not at all in nearly 70 years, and land acquired in 1961 had still not been put to such use in the following 55 years (paragraph 63). The inspector had not erred in law in concluding as she did (paragraph 64).

59. The judge was also unable to accept Mr Edwards' submission that the additional evidence was admissible. It failed the first test in *Ladd v Marshall*. It could have been obtained with reasonable diligence, the county council having "judged that it had sufficient evidence on a point which it knew was in issue and for which it needed evidence, and so searched no further". As the inspector had considered the county council's case on "statutory incompatibility" on the basis that the land was held for educational purposes, the new evidence could have had "no important bearing on the ultimate outcome of her decision, unless [she] erred in law in her approach" to that issue (paragraph 53 of the judgment). The judge also considered the possibility of error of fact enabling a departure from the principles in *Ladd v Marshall* in exceptional circumstances, as this court envisaged in *E and R*. He accepted that the inspector's mistake, if it was a mistake, was "one of existing fact". He was sure that, "faced with the evidence", she "would have concluded that the land had been acquired for educational purposes". But "she might not have been persuaded that the land, or all of it, was still held for that purpose throughout the 20 years, in view of the use or rather absence of educational use made of it". The county council was "responsible for the mistake if mistake it be", and the mistake would only have been material if the inspector was wrong on the question of "statutory incompatibility" (paragraph 54).

60. In my view the judge was right to reject the argument that, in weighing the evidence before her as to the acquisition and holding of the land, the inspector failed to apply the correct standard of proof. Her self-direction as to the standard of proof, in paragraph 9 of her decision letter, was clear and impeccable: "the standard of proof is the normal civil one of the balance of probabilities". This was the only reference she made to the standard of proof.

61. The submission that she applied a more demanding standard when she came to consider the evidence hangs on a single word – "sure" – in the second sentence of paragraph 118. I think this is to attach a false significance to her use of that word, in its context. On a fair reading of what she said about the county council's evidence in paragraphs 113 to 117, she was clearly of the view that it was inadequate and unconvincing. The conveyances to which she referred in paragraphs 113 and 114 made "no mention of the purposes for which the land was acquired". As "none of [the] documentation" she mentioned in paragraph 115 "[related] directly to the [land]", she did "not find it of particular assistance". The terrier for Areas C and D to which she referred in paragraph 116 had an "unexplained" line drawn through the page. The county council's case, as she recorded it in paragraph 117, was that the documents

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it had produced were "clear evidence" of the land being held for educational purposes, and that "no further proof is necessary". It was this case she found herself unable to accept, for the reasons she gave: first, the lack of any resolution of the county council authorizing "the purchase of the land for educational purposes or appropriating [it] to educational purposes"; second, the fact that the conveyances did not show the purpose for which the land had been acquired; and third, the inability of the county council's School Planning Manager to express an opinion about "the detail of [its] ownership of the land". These deficiencies in the evidence led her to conclude, in paragraph 118, that the "information with regard to the purposes for which the [land] is held by [the county council]" was "unsatisfactory".

62. When she went on to say it was "not possible to be sure" that the county council's assertion as to the land having been acquired for educational purposes and held for those purposes throughout the 20-year period "accurately reflects the legal position", she was, I think, simply confirming her conclusion that the county council had not produced "clear evidence" to demonstrate that. She was not neglecting the standard of proof to which she had earlier, and accurately, referred, or now elevating it above the civil standard. She was saying, in effect, that the county council had failed to satisfy the relevant standard of proof – the civil standard. As Mr Buley submitted, she would have had in mind that any relevant documents related to the county council's own affairs and would have been in its own possession. Having had the opportunity to provide relevant material in committee reports, minutes, correspondence and other documents, and having apparently done its best to put everything of relevance before her, the county council had left her unconvinced of the assertions it made. The evidence did not show that the land had been held for educational purposes for the relevant period. That was all.

63. As the judge recognized, the answer to this difficulty for the county council does not lie in the "presumption of regularity". It would of course have been lawful for the county council to have acquired and held the land for educational purposes. That is not in doubt. But it is not the same thing as saying there was a legal requirement for the land to be acquired for such purposes. The "presumption of regularity" operates where the issue is whether the act of a public authority has been done regularly and properly. It is not a substitute for clear evidence that the act was done for a particular purpose. In the absence of evidence to demonstrate the purpose for which the county council had acquired and held the land, there was nothing to which the "presumption of regularity" could attach. The inspector was not obliged to find that the land had been held for educational purposes on the basis of the county council's assertion that it had.

64. The inspector's conclusions were not irrational. Different conclusions might have been reached on the county council's evidence. I accept that, as did the judge. But this is not enough to demonstrate perversity in the conclusions that were in fact reached. The inspector's misgivings in the light of the evidence before her were understandable, her assessment properly reasoned, and her conclusions well within the bounds of reasonable judgment.

65. The challenge to the judge's exercise of his discretion against admitting the further evidence is, in my view, unsustainable. I cannot fault the approach he took. He applied the principles in *Ladd v Marshall*, and found that in this case they were not satisfied. He was right to do so. The additional evidence could have been obtained with "reasonable diligence". The material was all in the county council's possession, and could have been produced in evidence before the inspector. And it would not have made a difference to the outcome of the application for

registration, because the inspector considered the question of "statutory incompatibility" on the basis that the land had indeed been acquired and held for educational purposes, concluding – rightly, in my view – that the county council's argument on that issue must also be rejected. I would also uphold the judge's application of the exceptional approach in cases of mistake of fact indicated in *E and R*. Responsibility for the alleged mistake lay with the county council – though it should be noted that neither Mr Edwards nor Mr Pike, who represented the county council both in this court and before Ouseley J., appeared at the public inquiry. In any event, the mistake itself could only have been material if the inspector's conclusion on the question of "statutory incompatibility" was wrong, which, in my view, it was not.

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Issue (3) in the Lancaster appeal – a "locality"?

66. Section 22 of the 1965 Act provided for registration where inhabitants of a "locality" could show a customary right to use land for lawful sports and pastimes. The words "or of any neighbourhood within a locality" were added by the Countryside and Rights of Way Act 2000, and retained in section 15 of the 2006 Act. In *Oxfordshire County Council*, Lord Hoffmann observed (in paragraph 27 of his speech) that the expression "[any] neighbourhood within a locality" was "obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries" (see also the judgment of Sullivan J., as he then was, in *R. (on the application of Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin), at paragraphs 81 to 85). In *Adamson v Paddico (267) Ltd.* [2012] 2 P. & C.R. 1 this court recognized that a "locality" was not as flexible a concept as a "neighbourhood" (see the judgment of Carnwath L.J., at paragraphs 51 to 55). In a passage of his judgment on which both sides sought to rely in argument here, Carnwath L.J. said this (in paragraph 62):

> "62. … I accept that, where one has a historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. However where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link."

67. In the Lancaster case Ms Bebbington relied on the Scotforth East Ward within the area of Lancaster City Council as the relevant "locality" for the purposes of section 15(3)(a), or, failing that, as a "neighbourhood" within that "locality". The county council accepted that an electoral ward is capable in principle of being a "locality" for the purposes of section 15 of the 2006 Act, but contended that the Scotforth East Ward could not be a "locality" because of a boundary change in 2001. Before then, the ward had extended further to the south and had incorporated the University of Lancaster. In 2001 the old ward was abolished and a new Scotforth East Ward was created, excluding the university. The inspector noted that "[although] the [City of Lancaster (Electoral Changes) Order 2001] uses the structure of abolishing existing wards and creating new ones, the abolition and creation were simultaneous when the Order came into effect and there is no time within the relevant period when a locality known as Scotforth East Ward did not exist" (paragraph 17 of the decision letter). She found that the Scotforth East Ward had "been in existence throughout the relevant period and the change in boundary of the ward to remove the University, does not

seem … to have altered the identifiable community of Scotforth East" (paragraph 21). She concluded that the Scotforth East Ward was a "qualifying locality" (paragraph 31).

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68. In the court below, as before the inspector, the county council argued that the Scotforth East Ward could not be a "locality" under section 15 of the 2006 Act because it had not been in existence throughout the relevant 20-year period and had only come into being in a legal sense in 2001. Rejecting that argument, Ouseley J. concluded (in paragraph 25 of his judgment) that the inspector had dealt with this question as one of "fact and degree", and had found, in effect, that the population of Scotforth East Ward "in whatever form, was the same identifiable community, with or without the University" – a "common sense and practical approach" of the kind one sees in *Bremner v Hull* (1866) L.R. 1 C.P. 748 and *R. v Hundred of Oswestry (Inhabitants)* (1817) 6 Maule and Selwyn 1278. The inspector was entitled to find that the present Scotforth East Ward was "the continuation of a sufficient part of the former Ward for continuity to remain between the two, by whatever means the change or interruption was brought about" (paragraph 28).

69. Mr Edwards put forward the same argument before us. An administrative area, such as an electoral ward, could not be relied on as a qualifying "locality" under section 15 if it had not existed, in the same form, throughout the relevant 20-year period. Scotforth East Ward had not existed, or at least had not existed in the same form, throughout that period. It could not be, said Mr Edwards, that the "locality" – or part of it – to which rights become attached upon registration can either come into existence or be modified in its extent during the qualifying period for the application. Ouseley J.'s conclusion on this question could not be reconciled with what Carnwath L.J. said in paragraph 62 of his judgment in *Adamson v Paddico*. The "locality" relied upon here was clearly not an "historic district to which rights have long become attached". It had come into being only after the beginning of the relevant 20-year period. *Bremner v Hull* and *Hundred of Oswestry (Inhabitants)* – to which Ouseley J. referred – were cases in which long-standing customs had already been established. They did not concern changes in the extent of an administrative area while rights were still becoming established. The statutory scheme, Mr Edwards submitted, requires an applicant to show continuous use by the inhabitants of a "locality" that has existed in the same form of "legal entity", and whose boundaries have remained "substantially unchanged" throughout the relevant period (see, for example, the judgment of Patten L.J., with whom Carnwath and Sullivan L.JJ. agreed, in *Taylor v Betterment Properties* [2012] 2 P. & C.R. 3, at paragraph 63). If the "locality" could change during that period, it would be impossible to judge whether that requirement had been met. This would go against the principle to which Lord Hope referred in his judgment in *Lewis* (at paragraph 71): "… an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other". But in any event, submitted Mr Edwards, the inspector did not identify the relevant "baseline" against which the existence of a qualifying "locality" was to be assessed.

70. I am unable to accept that the county council's appeal can succeed on that argument. As Mr Buley and Mr Westaway submitted, the crucial question here is whether the fact that the boundaries of Scotforth East Ward had been changed during the relevant 20-year period meant, in itself, that a period of use beginning before and continuing after the date of the boundary change could not be relied upon, regardless of the degree of continuity between the ward as it was and the ward as it then became. Mr Edwards' submissions, if correct, would have radical consequences. Very minor boundary changes could stop time running during the relevant 20-year period. Well-founded applications for registration could fail for boundary

changes of no real significance. It is necessary here to look at the reality. Was there, or not, a continuous, identifiable locality in existence throughout the relevant 20-year period, notwithstanding the boundary changes? This, I think, is the relevant point to be considered, in the light of what Carnwath L.J. said in paragraph 62 of his judgment in *Adamson v Paddico*.

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71. I share Ouseley J.'s understanding of that passage in Carnwath L.J.'s judgment as referring to events during the 20-year period prior to registration, rather than the position after registration – as Mr Edwards contended. But I also agree with Ouseley J. that even if Carnwath L.J. was considering only the effect of a change in the extent of a locality after a green had been registered, there is no reason in principle why a change in boundaries in the course of the relevant 20-year period should preclude registration, whereas the same change after registration should be regarded as leaving the rights unaffected (paragraph 23 of Ouseley J.'s judgment). The statutory concept of a "locality" must surely have the same meaning and significance both before and after registration. Carnwath L.J. referred to the concept of an "identifiable community" remaining in existence. The sense of this, as Ouseley J. emphasized (in paragraph 24 of his judgment), is that the community in question must not have significantly changed. The context in which Carnwath L.J. said what he did was the need to identify a relevant "locality" during the period of 20 years in which the land had been used in such a way as to give rise to a right of registration. This is confirmed by his reference to a locality which had not existed "in any legal form" until after the 20-year period had begun.

72. In my view the inspector's approach and conclusions were correct in law. They were consistent with what Carnwath L.J. said in paragraph 62 of his judgment in *Adamson v Paddico*, and with long established principles in authority relevant to changes in administrative boundaries – for example, *Bremner v Hull* and *Hundred of Oswestry (Inhabitants)*. Whether the boundary changes resulting in the formation of the new Scotforth East Ward were significant or not was classically a matter of fact and degree for her. She did not describe the question in that way, but it is plain from the relevant parts of her decision letter that this was how she dealt with it. And she was entitled to find and conclude as she did. The boundary changes themselves, and the simultaneous abolition and re-creation of Scotforth East Ward, did not preclude the ward's legal existence as a "locality" for the relevant 20-year period. So long as it had existed in some clearly identifiable form throughout, the mere fact that its boundaries had been adjusted in that period would not, of itself, be enough to prevent its existence as a coherent and continuous "locality".

73. Mr Buley also submitted, as he did to Ouseley J., that even if it were arguable that the boundary change in 2001 had prevented Scotforth East Ward from being a relevant "locality" throughout the relevant 20-year period, the inspector would inevitably have found there had been a constant "neighbourhood" within that ward throughout the relevant period. Ouseley J. did not find it necessary to reach a conclusion on this argument. But he doubted that he would have refused to quash the inspector's decision had he been persuaded that her approach to the existence or otherwise of a "locality" was misconceived (paragraph 30 of his judgment). I think he was right. The inspector was not invited to consider the application for registration on the alternative basis of a "neighbourhood" comprised in the Scotforth East Ward as it was after the boundary changes, and made no findings on that basis. Though the question is academic if my conclusions on this issue are right, I also agree with the judge on this point.

Issue (4) in the Lancaster appeal – a geographical "spread" of users?

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74. Before the inspector in the Lancaster case the county council argued that it was necessary to show a geographical "spread" of users throughout the "locality" relied on, and that there was an insufficient "spread" of users throughout the Scotforth East Ward to justify registration on the basis of that ward as a "locality". The inspector said she had "heard no evidence from the inhabitants of some areas of [the locality]" (paragraph 31). But she did not accept that a geographical "spread" of users over the "locality" was a legal requirement.

75. Mr Edwards pointed to the requirement in section 15(3) of the 2006 Act that a significant number of the inhabitants "of any locality", or "of any neighbourhood", had to be shown to have used the land in the prescribed way, not a significant number of the inhabitants merely of "a part of any locality", or "a part of any neighbourhood". Without this requirement, he submitted, there would be a potential disparity between the geographical "spread" of the inhabitants whose use had led to the acquisition of rights over the land and those who would enjoy the benefit of the rights acquired. Parliament cannot have intended that. It would offend the principle of "equivalence" emphasized by Lord Hope in *Lewis*. To recognize the need for there to be a "spread" of inhabitants across the whole "locality" would be consistent with Sullivan J.'s understanding of the concept of a "significant number" favoured in *R. v Staffordshire County Council, ex parte McAlpine Homes Ltd.* [2002] 2 P.L.R. 1 (at paragraph 71) – that "... the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers". This does not require the court to read words into section 15. The concept of a "significant number" of inhabitants has a spatial as well as a numerical sense. There did not have to be an even spread of users throughout a "locality" or "neighbourhood", but a reasonable distribution of users across that area. This would be a matter for a registration authority to judge – just as it had to consider whether the number of users was a "significant number".

76. Ouseley J. rejected this argument. He acknowledged (in paragraph 33 of his judgment) that there may well be some "mismatch" between "the area whence came the actual users who established the rights" and "the area to which the rights would attach after registration". But he could not see what purpose would be served by preventing registration if a "spread" of users could not be shown. This was not a test Parliament had chosen to adopt in enacting section 15 of the 2006 Act (paragraph 34). Nor was it supported by any decision of the court (paragraphs 35 to 38). Comments made by some inspectors suggesting the existence of such a test did not have the force of authority (paragraph 39).

77. Here too I agree with the judge, essentially for the reasons he gave.

78. As Mr Buley submitted, there is no reason to think that Parliament intended in this respect to change the law as it was under the 1965 Act, whose corresponding provisions (in section 22) did not include the requirement for a geographical "spread". If such a requirement had been intended, one would have expected it to have been provided expressly, as was the requirement for there to be a "significant number of users" within a "locality" or "neighbourhood". In the absence of any such express provision, I can see no need to add a gloss to that requirement stipulating also a "spread" of users. And in my view it would be wrong to do so. This would introduce a further, non-statutory, criterion for registration, which would be highly subjective, uncertain and liable to produce inconsistency – whether or not it was implicit that the spread must be "even" or "uniform". A "locality" may be a small

area or relatively large. However large it is, inhabitants who live near the green for which registration is sought are more likely to use it than those who live further away. The requirement for use by a "significant number of inhabitants" is not rendered "meaningless" by that, as Mr Edwards argued. And once again, there is no breach of the "principle of equivalence". That principle is not offended by the lack of a "geographical spread" of inhabitants who have used the land, any more than it is by the fact that some inhabitants of the "locality" will acquire rights over the land even though they themselves have not actually used it, or done so for a period of 20 years.

79. Other attempts to persuade the court that such a requirement ought to be inferred have failed. Conclusions similar to Ouseley J.'s were reached by Patterson J. in *R. (on the application of Allaway) v Oxfordshire County Council* [2016] EWHC 2677 (Admin) (at paragraphs 69 to 73). In *Adamson v Paddico* ([2011] EWHC 1606 (Ch)) Vos J., as he then was, said this (at paragraph 106):

> "106. … I was not impressed with [counsel's] suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives me to such an illogical and unfair conclusion. …".

80. I would endorse that view. To similar effect was an observation made by H.H.J. Behrens, sitting as a deputy judge of the High Court, in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch) (at paragraph 90) – which was not doubted by the Court of Appeal in that case ([2010] EWCA Civ 1438]) – that it "cannot … have been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users".

Issue (5) in the Lancaster appeal – use "as of right"?

81. The concept of use "as of right" meaning "as if it were by right" – in contradistinction to "of right" or "by right" – was explained by Lord Neuberger in *Barkas* (at paragraph 14). In a later passage he agreed with Lord Carnwath "that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use … , it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land". In his view it was "very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years" (paragraph 24).

82. This, however, is not a case of that kind. The county council had never allocated the land at Moorside Fields for public use. The contention here was that the inspector failed to grasp the significance of evidence that members of the public using the land had been challenged and controlled by teachers at the school, and, in particular, that this evidence showed that any unchallenged or uncontrolled use had been by permission.

83. On the question of whether the use of the land had been "by force", the inspector found that such signs as had been put up "did not render use of the land "vi"" (paragraph 85 of the

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decision letter). The only part of the land whose use by members of the public had been challenged was Area B. The inspector concluded that "the landowner's actions would not have conveyed to a reasonable user that their use of Area B was contentious", and that "use of the Application Land was not by force" (paragraph 98). As to "Precario – implied permission", having considered the county council's submission that members of the public "were excluded when the landowner wished to use the land for his own purposes" (paragraph 104), she said this (in paragraph 105):

> "105. I do not agree with this submission. There is no evidence that the School had a policy of excluding users on a systematic basis and there is no evidence that the occasional challenge by a member of staff, to, for example, teenagers on quad bikes, demonstrated to members of the public that access depended upon the School's or anyone else's permission. To the contrary, I agree with the Applicant that the general impression is one of peaceful co-existence. Furthermore, on the occasions when there was a conflict between use by the School and by members of the public, there is evidence that rather than asking people to leave, staff asked people to put their dogs on leads or keep to the perimeter, or even abandoned lessons."

and (in paragraph 110):

> "110. In this case the landowner has failed to "do something". The evidence of occasional challenge and the need to pay for various activities at a School fair are insufficient to show to the reasonable onlooker that a right to exclude was being exercised. The presence of a dog waste bin on Area B and the occasional laminated notice made by the children at the school indicating that people should clean up after their dogs do not take matters any further. I conclude that this is not a case where the landowner had given the inhabitants implied permission to use the land and accordingly, use of the Application Land was not precario."

84. Mr Edwards submitted that if a landowner is to decide whether he should resist the use of his land by members of the public, he must be able to know that a right is being asserted. When such use has been permitted, it cannot have been "as of right", and land cannot be registered as a green unless its use had been "as of right" throughout the relevant 20-year period. If a landowner controls the use of his land, or temporarily excludes others from it to enable him to use it for his own purposes, he may be taken impliedly to have given permission – as, for example, in *Newhaven Port and Properties*, where controls exerted through bye-laws had given rise to an implied permission (see also the speech of Lord Bingham in *Beresford v Sunderland City Council*, at paragraph 5). Here, Mr Edwards submitted, the evidence demonstrated that the use of the land was being regulated by the county council, and was therefore permissive and not "as of right". The inspector was wrong to conclude otherwise. In finding the land had been used "as of right", the inspector had taken account of irrelevant matters and her conclusion was perverse. She accepted (in paragraphs 96 and 105 of her decision letter) that during the relevant 20-year period there had been occasions when members of the public had been asked by staff at the school to leave Area B, or to keep to the "perimeter" of the land, or to put their dogs on leads. Mr Edwards submitted that this demonstrated an "implied permission" to use the land when its use by members of the public was not resisted, and was enough to demonstrate that such use had not been "as of right" (see the judgment of David Richards L.J. in *Winterburn v Bennett* [2017] 1 W.L.R. 646, at paragraphs 35 to 41). The county council did not have to put up signs, or adopt a "policy" for

resisting trespass. But in any event the inspector did not deal with the implications of the restrictions on the use of the land by members of the public to which she had referred.

85. Ouseley J. rejected that argument. Having referred to relevant authority, including *Barkas*, *Newhaven Port and Properties* and *Lewis*, he said it was clear that the question of implied permission and the significance of the challenges to use of the land had been "fully considered". It was for the inspector to judge whether those challenges reflected "give and take" and "responses to poor behaviour by certain members of the public". Her decision was rational. It did not turn on any contentious issue of law as to whether a licence had been explicitly communicated. Mr Edwards' submissions had not grappled with the "inaction" of the school, and the county council, despite "the known activities of the public over 20 years". There had been "no signing of note requiring behaviour of a certain sort, no policy requiring incidents to be reported, no vigorous reaction by the head teacher or [the county council] itself". All this, said the judge, can "properly be seen as acquiescence" (paragraph 94 of the judgment).

86. I agree. The question of whether the use of the land could lawfully be considered to have been "as of right" – "nec vi, nec clam, nec precario", as illuminated in this context by Lord Hoffmann in *R.* v. *Oxfordshire County Council, ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 (at p.350) – depended on the inspector's findings of fact on the evidence. Unless her approach was demonstrably wrong in law, the issue was a question of fact and judgment for her. She did not misdirect herself on the law. As Ouseley J. held, she was entitled to find that the occasional challenges made by school staff to members of the public did not call into question their use of the land in principle, but were, in fact, merely an attempt to accommodate conflicting uses. Overall, she was entitled to find, on the evidence, that the position was "one of peaceful co-existence". That was her critical finding on this question. The argument that she fell into error is, in truth, a disagreement with her findings of fact and the conclusions to which she came in the light of those findings. Her findings of fact are not shown to have been inaccurate or incomplete, nor were her conclusions on the evidence perverse, or otherwise unlawful.

Issue (2) in the Leatherhead appeal – were Surrey County Council's reasons adequate?

87. Regulation 36(3)(a) of the Commons Registration (England) Regulations 2014 provides a duty to give reasons when an application for registration of a green has been "granted or a decision … made to give effect to a proposal, in whole or in part …". Under regulation 9(2) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, in force at time of the decision in the Leatherhead case, the notice of decision issued by the registration authority had to include, when the application for registration was rejected, the reasons for that decision. But if the application was successful, there was no explicit duty to state reasons.

88. The inspector said (in paragraph 118 of his report) that the land lay "roughly in the middle of the claimed neighbourhood" and was "a cohesive feature, but possibly the only one within the claimed neighbourhood". He went on to say (in paragraph 119) that he had "found it very difficult indeed to identify separate neighbourhoods within the town (in other words, where the characteristics of one area distinguish it from surrounding areas) …". When he came to consider the claimed neighbourhood (in paragraph 177) he said:

"177. Neighbourhood

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(a) The term 'neighbourhood' is an ambiguous term. It may mean *'the vicinity'* of a place or person (see e.g. *Stride v Martin [1897] 77 LT 600*) but it may also refer to an area that is recognisable as having a degree of coherence such that people would recognise it as being separate or different from the areas immediately surrounding it. It is, in this sense, that the term 'neighbourhood' is used in the 2006 Act. It seems plain to me that a neighbourhood must be understood as meaning a cohesive area which is capable of meaningful description in some way. But beyond that it has no particular requirement, and whether the claimed neighbourhood is made out is a question of fact.

(b) In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression, and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is not a neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

(c) The residential properties comprised a mix of styles and ages and there was nothing in the way of facilities (that is, with the exception of the land itself) serving predominantly the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve (or rather served in the case of St Mary's Primary School) a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such [as] a small parade of shops with a post office, licenced premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of those features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses, when asked to cast their mind to it, considered that their neighbourhood was simply the area in their own particular vicinity or where their friends mainly lived. I also think that most of the applicant's oral witnesses were unduly influenced by being presented with App/1 in their support of the claimed neighbourhood.

(d) It was also significant that a number of the applicant's witnesses took the view that the neighbourhood should in fact have been more extensive than claimed. In other words, there was no unanimity amongst the applicant's witnesses that App/1 was the true neighbourhood. … For instance, more than one witness was puzzled as to why the church was not included within the claimed neighbourhood (whereas the church hall on the other side of the road was) which struck me as a bizarre omission. … .

(e) Lastly, this neighbourhood has no name. That is not a necessary requirement, but if there is historical cohesiveness in respect of an area, one might expect it to have acquired some form of collective description.

(f) I have also borne in mind that when Parliament amended the Commons Registration Act 1965 to permit registrations to take place by reference to *'a neighbourhood within a locality'* it intended to make it easier to register TVGs, and did so by allowing them to be registered by reference to a concept that was not precise either as to definition, or as to boundary (see *Oxfordshire* per Lord Hoffmann at [27]). However, notwithstanding this, my conclusion for the reasons I have set out above (i.e. because the area does not have sufficient individual cohesiveness or community identity) is that the claimed neighbourhood is not a 'neighbourhood' within the meaning of the 2006 Act.

(g) It seems to me that if Parliament had intended that a neighbourhood should be interpreted to mean the area in which the recreational users reside, then it would have said so. Moreover, whilst I accept that the bar is set low in the *Leeds Group* litigation, having been to the area in this case and heard the evidence, I take the view that, as a matter of fact and degree, the applicant has fallen well short of what is required to be proved in order to satisfy the neighbourhood element."

The inspector therefore recorded as one of his findings of fact (in paragraph 178(e)) that "the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act". And his recommendation (in paragraph 178(f)) was that "[because] the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG … the application to register … should be rejected".

89. That recommendation was supported in the Commons Registration Officer's report for the meeting of Surrey County Council's Planning and Regulatory Committee on 23 September 2015. Having quoted parts of paragraph 177 of the inspector's report, the officer advised the members (in paragraph 20):

> "20. Village Green status is acquired over land where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. The evidence provided with this application, and the subsequent investigations, show that this criteria has not been met."

90. Before the meeting the parties sent further representations to the county council on the concept of "neighbourhood". The representations submitted by Dr Bowes for Mr Jones were before the committee when it met. It was accepted by the county council before Gilbart J. that the representations made on behalf of NHS Property Services by their solicitors, Capsticks, were not. Capsticks' representations sought to rebut Dr Bowes', urging the committee to adopt the inspector's conclusions on the "neighbourhood" issue.

91. The minutes of the committee meeting record that the local member, Councillor Hall, spoke. He is recorded as having said that he "[knew] the area well" and that "the green space gets a lot of public use"; that "an area does not need to have shops to be considered a neighbourhood"; that the area had "sheltered housing, a scout hut and other community facilities"; and that "[the] area is a cohesive community and has proved the green space is used". The "[key] points raised during the discussion" were recorded:

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> "1. The Commons Registration Officer introduced the report and informed the Committee that a neighbourhood must have some coherence to be acknowledged. …
>
> 2. The Principal Lawyer explained that the Commons Act 2006 was specific about the criteria which need to be met in order for a piece of land to be granted Village Green status. However, the terms locality and neighbourhood are not defined. Case law has developed which must be considered when seeking to define the terms. The Inspector had found that there was little to differentiate the claimed neighbourhood from the surrounding area and little to suggest cohesiveness. …
>
> 3. Members felt that an area did not require a particular type of building to be considered a neighbourhood. It could be considered that way if residents wish it to be. It simply required a sense of place. It was pointed out that many recent developments were not built with shops but this should not mean that they could not become a neighbourhood or locality. Members queried whether the Inspector's judgement would result in other urban areas being rejected as neighbourhoods, with only rural areas being judged to have met the necessary criteria. Members highlighted that the plans indicated that there was an infant school, recreation ground, allotment and parking area within the claimed neighbourhood. The Chairman countered that different people will have different definitions of neighbourhoods and that the Inspector had used case law to come to his conclusion.
>
> 4. It was noted that the application had met all the other criteria set by the Commons Act 2006.
>
> 5. It was noted that the land owner would not be able to develop or sell the land if it were to gain village green status.
>
> … ."

The committee's resolution, by a majority of six votes to four, was to reject the officer's recommendation and to approve the application to register the land as a village green "for the following reason":

> "Notwithstanding the Inspector's view, Members formed a different impression. Having considered all the evidence before them they came to the view that the criteria laid down by the Commons Act 2006 had been satisfied by the applicant."

92. Gilbart J. acknowledged that the county council was not under a statutory duty to give reasons for its decision, and that it was necessary to look to the European Convention on Human Rights and common law to ascertain whether such a duty existed (paragraph 96 of the judgment). He held that the giving of reasons was "required to achieve compliance with Article 6 of [the Convention]" (paragraph 100). In the light of relevant authority, including the decision of the House of Lords in *R. v Secretary of State for the Home Department, ex parte Doody* [1994] 1 A.C. 531 (in particular, the speech of Lord Mustill at p.565), there was also a duty to give reasons at common law – at least where, "as here, the landowner has made objections, and done so in the context of a statutory duty on the [registration authority] to consider them" (paragraph 107). As to the standard of reasoning required, he concluded – again in the light of familiar authority, including the decision of the House of Lords in *South*

Buckinghamshire District Council v Porter (No.2) [2004] 1 W.L.R. 1953 (in particular the speech of Lord Brown in paragraphs 24 to 36) – that "in a [2006 Act] case the standard must be that the losing party knows why they lost and what the legal justification was for doing so". This, he said, "will include the reasons why a case submitted in accordance with the Regulations was rejected" (paragraph 111).

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93. The judge was satisfied that the county council's committee did address "the central question", which was whether the "neighbourhood" had the "quality of cohesion looked for in [*Cheltenham Builders Ltd.*]" (paragraph 115). He acknowledged (ibid.) that the concepts in this area of the law are "not ones of firm and precise definition", and (in paragraph 116) that "[the] cohesion of a "neighbourhood" is not something which can be assessed by using some recognised technique". As the court had made clear in *Cheltenham Builders*, cohesion was "essentially a matter of impression" (ibid.). The committee's approach could not be criticized. It had considered the inspector's assessment, but had then made its own, which it preferred. Whether there existed a "neighbourhood" was, said the judge, "very much a matter of impression where elected members could have just as much expertise as the inspector". The members were not required "to go through all of his reasoning, nor the various events at the inquiry", but only "to address the "neighbourhood" question as it stood before them, and the arguments for and against the Applicant's case" (paragraph 117).

94. On the question of fairness, it had been submitted to the judge on behalf of the county council that NHS Property Services' letter responding to Dr Bowes' post-inquiry representations on behalf of Mr Jones raised nothing new, and the committee's decision would have been no different had it been taken into account (paragraph 91 of the judgment). The judge accepted that. In his view the committee's decision, and its reasons, were "unaffected" by the applicant's submissions not being before it, and the court's duty under section 31(2A) of the Senior Courts Act 1981 applied (paragraph 143).

95. Before us, Mr Clay again submitted that the members' tersely stated reason for rejecting the inspector's conclusion on the existence of a relevant "neighbourhood", a conclusion endorsed by the officer in her report, was inadequate. Given the significance of the registration of land as a town or village green, the standard of reasoning required was elevated – the more so in this case, because registration would impede the possible extension of the hospital. The members were entitled to differ from the inspector and the officer, but in doing so they could not rely on the inspector's and officer's reasoning (cf. the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 106, at paragraph 7). In this case the inspector had concluded that the evidence given in support of registration was "well short" of demonstrating the cohesion required to establish the existence of a "neighbourhood". If the committee was to disagree with that conclusion it had to explain why, in clear terms – rather than simply stating that they had "formed a different impression". Only the post-inquiry representations of the applicant for registration were before the committee; those of NHS Property Services were not. In these circumstances it was imperative that the county council's reasons should show that the application had been fairly determined. It had to come to grips with the inspector's "evidence-based findings", and it did not do that.

96. In this appeal the defence of the county council's reasons fell to Dr Bowes. Adopting the county council's argument, which had prevailed in the court below, he submitted that the judge's approach was right. He emphasized the judge's conclusion, based on ample authority, that the assessment of whether or not a "neighbourhood" exists for the purposes of

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section 15 of the 2006 Act does not call for "some recognised technique", but is "essentially a matter of impression". As Sullivan J. said in *Cheltenham Builders* (in paragraph 85 of his judgment), the registration authority has to be satisfied that the area said to be a "neighbourhood" has "a sufficient degree of cohesiveness". The county council's reasons did not have to be stated at length. They did not have to deal specifically with each of the inspector's reasons in paragraph 177 of his report. They were addressed to parties who knew what the issues between them were and what the evidence and arguments at the inquiry had been (see Lord Brown's speech in *South Bucks District Council v Porter,* at paragraph 26). There was no substantial prejudice to NHS Property Services. They were not left in doubt as to why they had lost, or, in particular, as to why their contention that a relevant "neighbourhood" did not exist in this case had been rejected.

97. I agree with the judge that, in the particular circumstances of this case, the county council was under a duty at common law to give reasons for its decision to register the land, though no such duty arose under statute – and whether or not this was also necessary to achieve compliance with article 6 of Human Rights Convention. For the judge, this conclusion was reinforced by the fact that one effect of registration of land as a town or village green is to deprive the landowner of the freedom to use it for any purpose inconsistent with its use as a green, and another is the possibility of criminal sanction for the interruption of its use for recreation (paragraphs 98, 99 and 104 of the judgment). As the judge recognized, the force of those considerations is not reduced by the "anomaly" that under the 2014 regulations there is a duty to state the reasons for a decision to register as well as a decision not to register, whereas under the 2007 regulations there is not (paragraph 106). And, as he said, it is the greater where there are objections to the registration, and the landowner himself has objected (paragraph 107).

98. The judge did not have the benefit of this court's decision in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71, or the still more recent decision of the Supreme Court in *Dover District Council v CPRE Kent* [2017] UKSC 79, upholding the Court of Appeal's decision in that case ([2016] EWCA Civ 936) and endorsing its approach in *Oakley* (see the judgment of Elias L.J., at paragraphs 61 and 62). As Lord Carnwath said in his judgment in *Dover District Council* (with which Lady Hale, Lord Wilson, Lady Black and Lord Lloyd Jones agreed), a "principal justification" for imposing a duty to give reasons in *ex parte Doody* was "the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review" (paragraph 51). In *Oakley*, the proposed development's "significant and lasting impact on the local community" was seen as one of the factors giving rise to the local planning authority's duty to give reasons (paragraph 52). As Elias L.J. also pointed out in *Oakley* (in paragraph 62 of his judgment), the duty to give reasons was consistent with the United Kingdom's obligations under the Aarhus Convention (see Lord Carnwath's judgment in *Walton v Scottish Ministers* [2012] UKSC 44, at paragraph 100). Though planning law is a creature of statute, Lord Carnwath stressed that "the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law". In *ex parte Doody* "[fairness] provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision" (paragraph 54).

99. Although those observations related to the decision-making of local planning authorities, they also seem apposite in principle in the context of the statutory regime for the registration of town and village greens, and for essentially similar reasons. In this context too, the

making of decisions affecting the use and development of land, with significant consequences both for the landowner and for the local community, is governed by a self-contained statutory code. And in this case the application for registration had been contested by a public authority landowner at a non-statutory inquiry, the inspector had supported that objection on a potentially decisive point, his conclusions and recommendation had been supported by the authority's professional officers in their advice to committee, but the members resolved to depart from it. In my view, therefore, the judge's conclusion that in this instance the county council was under a common law duty to state its reasons for its decision may be seen as consistent with the Supreme Court's analysis in *Dover District Council*.

100. But in any event there is no dispute – and I agree – that in this case the county council was under a duty at common law to give reasons explaining why it had decided to grant the application for registration, against the recommendation of the inspector. The contentious issue is whether the reasons given were intelligible and adequate.

101. To be intelligible and adequate, a decision-maker's reasons need not be expressed at length. They can be "briefly stated" (see Lord Brown's speech in *South Bucks District Council v Porter*, at paragraph 36). As Lord Carnwath said in *Dover District Council*, "[where] there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision" (paragraph 41); if a planning officer's recommendation is not accepted by members, "it may normally be enough for the committee's statement of reasons to be limited to the points of difference"; and, adopting the words of Sir Thomas Bingham M.R. in *Clarke Homes Ltd. v Secretary of State for the Environment* (1993) 66 P. & C.R. 263 (at pp.271 and 272), the essence of the duty is whether the information provided by the authority leaves room for "genuine doubt … as to what [it] has decided and why" (paragraph 42). There is no universal standard. The intelligibility and adequacy of the reasons provided will always depend on the nature of the issue they are intended to address. Some issues will be essentially a matter of straightforward judgment on ascertained facts, which is not within the realm of any particular expertise, on which divergent conclusions may reasonably be held, and for which a simply and clearly stated disagreement with an inspector's or officer's conclusions may often be enough. Others will compel a more thorough explanation to demonstrate the decision-maker's grasp of "the key issues" and that a "rational conclusion" has been reached "on relevant grounds" (see paragraphs 66 to 68 of Lord Carnwath's judgment in *Dover District Council*).

102. In this case, like the judge, I can accept that the county council's reasons were, in the particular context in which they were provided, clear and sufficient and not unlawful.

103. The sole issue on which the county council's committee found itself in disagreement with the inspector and the Commons Registration Officer was whether there existed a relevant "neighbourhood" for the purposes of section 15 of the 2006 Act. On every other issue, including "statutory incompatibility", they accepted and adopted the inspector's conclusions, as did the officer. They did not have to explain why they agreed with the inspector on those other issues. It could readily be inferred from their resolution, read in the light of the minutes, that they did agree with him, and that they saw no need to provide any reasons differing from, or expanding upon, the conclusions in his report.

104. The question of whether there existed a relevant "neighbourhood" was not, in any sense, a scientific or technical issue. It was a matter of judgment, which, as the judge said, "was essentially a matter of impression". The determining question, in a word, was "cohesiveness"

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– a distinctly impressionistic and protean concept, which allows ample scope for differences of judgment. Was there, as Sullivan J. put it in *Cheltenham Builders* (at paragraph 85 of his judgment), "a sufficient degree of cohesiveness", or not? This was not an issue whose determination required any particular experience or professional expertise. It did not involve the application of any specific statutory or non-statutory criteria. It did not require the application of any recognized method of assessment. It was a matter on which a registration authority could quite properly differ from an inspector or officer, however strongly held the inspector's or officer's view.

105. The inspector himself acknowledged that the existence of a "neighbourhood" was "substantially a matter of impression". Among the considerations to which he referred were the "character of the residential areas", which did not differ substantially from others in the vicinity, the absence of "community facilities" serving only the claimed neighbourhood, the fact that the church was not included in it – whereas the church hall was – and the fact that it had no name. In his view the area did "not have sufficient individual cohesiveness or community identity" to qualify as a "neighbourhood", and "as a matter of fact and degree", the case for registration was "well short" of satisfying this requirement (paragraph 177 of the inspector's report).

106. The minutes of the committee meeting show that the members' discussion focused on the considerations that had weighed with the inspector. The question of "coherence" was identified by the Commons Registration Officer as the relevant question for them to deal with. The Principal Lawyer advised them that there was no statutory definition of "locality" or "neighbourhood". They were reminded of the inspector's finding that there was little to differentiate the claimed "neighbourhood" from the surrounding area, and little to suggest "cohesiveness". They discussed the physical character of the area, the "sense of place", and the presence within the claimed "neighbourhood" of "an infant school, recreation ground, allotment and parking area". It is clear, therefore, that they were aware of the relevant considerations and deliberated on them. This is not to make the mistake of assuming that the record of the members' discussion contained in the minutes indicates the collective or majority view of the committee as a whole. But it is to recognize that the record of the members' discussion, taken together with the inspector's report, to which the minutes refer, forms a context in which the resolution itself is to be understood. The language of the resolution is also significant. It acknowledges the inspector's "view" on the existence of a "neighbourhood". It expresses the committee's disagreement with that view. It explains the disagreement in terms of the members having "formed a different impression" from the inspector's, which shows that they recognized this was indeed a matter of "impression". And it confirms that their own conclusion – that the statutory requirements for registration were met – was based on their consideration of "all the evidence before them".

107. The committee's "different impression" represented its disagreement with the inspector, in the exercise of its own judgment, on the decisive question of "cohesiveness". That is plain. There is no suggestion, nor could there be, that the members could not reasonably and lawfully conclude as they did on this question, in the light of the evidence that had been before the inspector, and his findings of fact. They were entitled to do so. And in my view the reasons embodied in the resolution, though brief, were, in the circumstances, a clear and sufficient explanation of the committee's decision, which would have been understood both by those who had taken part in the registration process and by the wider public as well. They do not fail to meet the requisite standard of reasons in this particular case. Longer or further reasons were not necessary, given the nature of the issue on which the members were

differing from the inspector. The question for the court is not whether fuller reasons might have been better, but whether those actually provided were intelligible and adequate in the sense of explaining why the decision was what it was. These reasons were. They do not betray, or conceal, any error of law in the county council's approach to establishing the existence – or not – of a relevant "neighbourhood". And no prejudice, let alone substantial prejudice, was caused to NHS Property Services. They cannot realistically complain that they do not know why their objection failed. It failed because the committee formed a different impression from the inspector on the relevant evidence.

108. If, however, the contrary view were taken, I would regard this as a case in which the court should nevertheless decline to quash the registration – because in the circumstances I see no real possibility of the committee's decision being different if it were compelled to state its reasons more fully.

109. Finally, I cannot accept Mr Clay's argument that the committee's decision was vitiated by procedural unfairness. As the judge concluded, the fact that Mr Jones' post-inquiry representations on the existence of a relevant "neighbourhood" were before the committee and those of NHS Property Services in rebuttal were not, was, in the circumstances, of no real significance for the committee's deliberations, or its resolution. NHS Property Services had a fair opportunity to put forward their case on this issue before the inspector, and they plainly did so. If this were a case in which the court had to exercise its duty under section 31(2A) of the Senior Courts Act 1981, again in agreement with the judge, I would uphold the county council's decision. There is, in my view, no reason to think that if NHS Property Services' post-inquiry representations had been before the members, the decision might have been different.

Conclusion

110. For the reasons I have given, I would dismiss Lancashire County Council's appeal in the Lancaster case, and I would allow Mr Jones' appeal and dismiss NHS Property Services' cross-appeal in the Leatherhead case.

Lady Justice Thirlwall

111. I agree.

Lord Justice Rupert Jackson

112. I also agree.

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