Neutral Citation Number: [2023] EWHC 655 (Admin)

Case No: CO/2786/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2023

Before :

MR JUSTICE LANE

- -

Between :
THE KING
(on the application of)

PATRICIA STRACK **On behalf of Woodcock Village Green Committee)**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**
-and-	
LAING HOMES	**First Interested Party**
-and-	
HERTSMERE BOROUGH COUNCIL	**Second Interested Party**

- -
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Mr J Thomas (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr H Flanagan (instructed by **the Government Legal Department**) for the **Defendant**
Mr D Edwards KC and **Mr M Rhimes** (instructed by **Gowlings Solicitors**) for the **First Interested Party**
The **Second Interested Party** was not represented

Hearing date: 15 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane:

A. WOODCOCK HILL VILLAGE GREEN

1. The claimant challenges the decision of 24 May 2022 of an inspector appointed by the defendant, whereby he allowed an application by the first interested party, under section 16 of the Commons Act 2006, for the deregistration and exchange of land in respect of a village green. The release land comprises 33000m² of the existing Woodcock Hill Village Green to the south-west of Vale Avenue. The replacement land comprises 36000m² of land north of Barnet Lane and to the west of Woodcock Hill Village Green.

2. The site was granted town and village green status in 2008, following an application by the claimant. The claimant and other local residents were able to demonstrate the requirements for registration, including that the land had been used for twenty years for lawful sports and pastimes by a significant number of the inhabitants of any locality or of any neighbourhood within a locality, as required by section 15 of the 2006 Act. The registration inspector held that "The user evidence supports the applicant's case that the application land has been used for recreation by a significant number of the inhabitants of a particular neighbourhood." The relevant neighbourhood was specifically defined by the inspector by reference to particular roads. Prior to a purported withdrawal of permission in 2018, the local residents had maintained the release and retained land and enhanced the site's ecological value.

3. The first interested party made an application to deregister and exchange adjacent land and an inquiry was launched by the defendant. The key issues before the appointed inspector included whether the deregistration and exchange were in the public interest and the neighbourhood's interest.

4. The combined objectors (of whom the claimant was one) argued that the proposal would reduce the biodiverse "currency" of the land, and that the first interested party's case concerning the purported enhancements to biodiversity were not robust. The combined objectors argued that any assessment of the proposal should be assessed against a 'fallback' option of the release land being cultivated and maintained by the existing Woodcock Hill Village Green Committee, who had a track record of investing in the land and had a robust plan in place to retain its ecological value. The combined objectors argued that they had a right to undertake maintenance and enhancement activities on the land for the purpose of nature conservation (essentially a form of communal gardening) and that the first interested party's withdrawal of permission to maintain the land, whilst respected at the time (2018), was actually on closer scrutiny of no effect since the combined objectors were allowed to maintain and enhance the land as a lawful sport or pastime.

5. The combined objectors also argued that any purported accessibility benefits for others that arose from the deregistration and exchange had to be weighed against the interests of the neighbourhood, who would now be further away from much of the "new" town and village green.

B. THE INSPECTOR'S DECISION LETTER

6. At paragraph 15 of the decision letter of 24 May 2022 ("DL"), the inspector set out the provisions of section 16 of the 2006 Act. Above paragraph 15 is the heading "The interests of persons occupying or having rights in relation to the release land". Paragraph 15 recorded that the land was owned by the first interested party. The inspector noted "the public have the right to access the land for the purpose of lawful sports and pastimes, and the effect of the application on the interests of the public are considered later".

7. Paragraphs 16 to 28 of the DL have the heading "The interests of the neighbourhood". Paragraph 16 stated that the 2006 Act does not define the term "neighbourhood". However, published guidance makes it clear that the term should be taken to refer to the local inhabitants. The guidance is contained in the Explanatory Memorandum to the Deregulation and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007 ("the 2007 Regulations").

8. At paragraph 17 of the DL, the inspector noted that in this case, the neighbourhood of the existing village green was precisely defined prior to its registration in 2008. This consisted of properties in specified streets to the north and east of the green.

9. At paragraph 18 the inspector observed that the village green was registered on the basis that it had been used by inhabitants of the neighbourhood for lawful sports and pastimes for a period of twenty years prior to 1 December 2001. In practice it was noted that the main use of the land had been for walking, including walking with dogs and/or children.

10. At paragraph 19, the inspector recorded that since registration, volunteers from the local community, coordinated by the Woodcock Hill Village Green Society, had carried out maintenance and improvement work on the green. This included the clearing of brambles and scrub in order to keep footpaths open, planting of trees, excavation of ponds and the placing of benches, along with fundraising, to support these activities. The Society was said to have members from 300 households, predominantly within the defined neighbourhood, who each paid a membership fee per annum.

11. At paragraph 20, the inspector noted that, prior to 2018, most of this work was carried out with the permission of the first interested party. However, permission was withdrawn in 2018 and since then, little or no work had been carried out.

12. At paragraph 21, the inspector said it was clear that residents of the neighbourhood greatly valued the village green and had invested considerable time and effort in its maintenance and improvement over a lengthy time. Accordingly, it was understandable, the inspector considered, that the prospects of the results of their efforts being lost insofar as the release land was concerned was regarded as a cause for concern and a reason for opposing the approval of the application. Although it was proposed that the Village Green Committee to be established by the management company which will be responsible for the future maintenance of the land to be improved if the application was approved, would include representatives of the local community, this was not regarded as adequate compensation.

13. At paragraph 22, the inspector noted that the release land is the northernmost and lowest-lying part of the existing village green. It is overlooked by adjacent residential

development. On his visit, it was largely overgrown and difficult to access, with the exception of one well-trodden footpath. The land rose to the South and reportedly other parts of the green were more intensively used. Nevertheless, the inspector considered that the release land was closest and most accessible to a large proportion of properties in the defined neighbourhood by way of access points on Vale Avenue and Byron Avenue. That would no longer be available if the application was approved.

14. At paragraph 24, the inspector noted that the replacement land adjoined the western edge of the existing green, but was different in character to the release land and other parts of the existing green. It consisted of a relatively flat grassed area used for grazing until recently, and a belt of woodland. The inspector observed that this was further away from many properties in the defined neighbourhood than the release land. He considered, however, that a proposed new access point would make the revised village green more easily accessible from properties to the West.

15. At paragraph 25, the inspector noted that it was argued on behalf of some objectors that the release land was in Borehamwood and the replacement land in Elstree. It was alleged that the two communities were different in character. The inspector considered that that may well be the case. However, he saw no reason why one community should take precedence over the other with regard to access to the village green. He also noted that the two communities were jointly represented by a single town council and various other bodies.

16. At paragraph 26, the inspector noted that because the replacement land was different in character to the release land and the rest of the village green, it would offer the opportunity for a greater range of activities to take place on the green.

17. At paragraph 27, the inspector concluded that, overall, the proposed deregistration and exchange would affect the interests of the neighbourhood by restricting access to the closest part of the village green to some of the defined neighbourhood. It would also reduce the amount of semi-natural grassland that is accessible. On the other hand, the release land was arguably the least attractive part of the village green for many users, and the replacement land would offer the potential for a wider range of activities on the green and would make it more accessible for some people not currently resident within the previously defined neighbourhood. Also, proposed works on the improvement land should enhance the attraction of that part of the green.

18. At paragraph 28, the inspector concluded that, on balance, although the strength of local opposition to the application is understandable, in his view, the potential benefits resulting from the proposals outweighed the perceived disadvantages with regard to the interests of the neighbourhood.

19. Paragraphs 29 to 57 of the decision occur under the general heading “The public interest”. Paragraphs 29 to 39 have the sub-heading “Nature Conservation”. At paragraph 30, the inspector held that it was common ground between the parties that the nature conservation value of the release land had already been degraded to some extent by the spread of brambles, nettles and scrub as a result of maintenance work having been curtailed since 2018. He noted that it could be expected that this process would continue unless active maintenance was resumed.

20. At paragraph 31, the inspector observed that the applicants had indicated that they had no intention of renewing the permission for the local community to carry out maintenance work on the site. It was suggested on behalf of objectors that there might not be a need for some of this work to be permitted, as it could be construed as a lawful sport or pastime appropriate to a village green. This suggestion was disputed by the applicants and it appeared to the inspector to be the case that, to date, little work had been carried out since the withdrawal of permission in 2018.

21. Beginning at paragraph 32, the inspector noted that a great deal of information and opinion had been submitted regarding the existing and potential value of the application land for nature conservation. At paragraph 33, the inspector recorded the argument of the objectors that the applicants could have done much more to protect and enhance the nature conservation value of the release land and to provide a more natural and biodiverse environment for the replacement land. However, the inspector observed that the landscaping proposals put forward included the planting of a wide range of native trees and shrubs.

22. At paragraph 35, the inspector said that he did not consider it necessary to analyse all the available information in detail, although he had read and considered it all. However, a few critical factors should be borne in mind. At paragraph 36, the inspector recorded that there were no proposals for development of any sort on the release land. To that extent, approval of the deregistration would not result in the loss of any habitat. He also noted, again, that the conservation value of the release land might continue to degrade to some extent, but that this would occur "irrespective of whether the application is approved or not unless maintenance work resumes."

23. At paragraph 37, the inspector said that the landscape improvement proposals put forward by the applicants should result in enhancement of the nature conservation value of the replacement land and the improvement land relative to the present condition of those areas.

24. At paragraph 38, the inspector considered that nature conservation was only one of several factors that should be taken into account, although the opportunity for the enjoyment and study of nature was an important public benefit of the existence of the village green. It was not one that should exclude provision of opportunities for other lawful sports and pastimes also to be enjoyed.

25. At paragraph 39, the inspector said that, overall, the proposed deregistration and exchange of village green land would appear unlikely to result in any significant adverse effect with regard to nature conservation; and the proposed landscape works on the replacement land and improvement land were likely to enhance the nature conservation value of those areas.

26. Paragraphs 40 to 45 of DL deal with landscape issues. Paragraphs 46 to 51 deal with public access. Having assessed the evidence on access, the inspector, at paragraph 49, found that the analysis suggested that approval of the application would have only a marginal, adverse effect on accessibility from the defined neighbourhood, but would significantly improve access from a wider area, notably that to the west of the green. The inspector also observed that residents from the west would be able to access the revised green without having to walk an additional 350 metres, approximately, along the steep and relatively narrow footway adjacent to the busy Barnet Lane.

27. At paragraph 51, the inspector concluded that, overall, approval of the application would not have a significant adverse effect on public accessibility to the village green and would bring benefits to some users.

28. Having dealt with archaeological remains and features of historic interest, of which there were little, the inspector noted at paragraph 58, under the heading "Other matters", that the proposed funding to be provided for maintenance and management was questioned by the objectors. The inspector said he had seen no breakdown of how the figure of £370,000 was arrived at or how it was intended to be spent. That was, the inspector thought, a matter for the proposed management company to address.

29. At paragraph 59, the inspector noted that a person held a grazing licence on part of the replacement land. This was, however, terminable on one month's notice and would not therefore affect the implementation of proposed works.

30. Under the heading "Conclusion", paragraph 60 of the decision stated that the "proposals in the application satisfy all the criteria set out in Section 16(6) of the 2006 Act. The application should therefore be granted."

C. STATUTORY AND POLICY FRAMEWORK

31. Section 15 (registration of greens) of the 2006 Act provides that any person may apply to register land as a town or village green in a case where, *inter alia,* subsection (2), (3) or (4) applies. Section 15(2)(a), (3)(a) and (4)(a) each contain, as one of the relevant conditions, that "a significant number of the inhabitants of any locality [have] indulged as of right in lawful sports and pastimes for a period of at least 20 years".

32. Section 16 of the 2006 Act provides (so far as relevant):

> **16. Deregistration and exchange: applications**
>
> (1) The owner of any land registered as common land or as a town or village green may apply to the appropriate national authority for the land ("the release land") to cease to be so registered.
>
> …
>
> (6) In determining the application, the appropriate national authority shall have regard to—
>
> (a) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);
>
> (b) the interests of the neighbourhood;
>
> (c) the public interest;
>
> (d) any other matter considered to be relevant.
>
> …

> (8) The reference in subsection (6)(c) to the public interest includes the public interest in—
>
> (a) nature conservation;
>
> (b) the conservation of the landscape;
>
> (c) the protection of public rights of access to any area of land; and
>
> (d) the protection of archaeological remains and features of historic interest."

33. The Common Land Consents Policy, published by the Department of Environment, Food and Rural Affairs in November 2015, provides

> **3 Protecting commons — our policy objectives**
>
> 3.1 The 2006 Act, along with earlier legislation on common land, enables government to:
>
> • safeguard commons for current and future generations to use and enjoy;
>
> • ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected; and
>
> • improve the contribution of common land to enhancing biodiversity and conserving wildlife.
>
> 3.2 To help us achieve our objectives, the consent process administered by the Planning Inspectorate seeks to achieve the following outcomes:
>
> - our stock of common land and greens is not diminished so that any deregistration of registered land is balanced by the registration of other land of at least equal benefit;

34. At section 5, the same document provides:

> 5.1 The Secretary of State's primary objective in determining applications under section 16(1) is to ensure the adequacy of the exchange of land in terms of the statutory criteria. Therefore, even where an applicant makes an otherwise compelling case for an exchange, the Secretary of State's expectation will be that the interests (notably the landowner, commoners, and the wider public) will be no worse off in consequence of the exchange than without it, having regard to the objectives set out in Part [3]4 above.
>
> Her expectation is more likely to be realised where the replacement land is at least equal in area to the release land,

> and equally advantageous to the interests**.** So the Secretary of State will wish to evaluate the exchange in terms of both quality and quantity. An inadequate exchange will seldom be satisfactory, whatever the merits of the case for deregistration might otherwise be.

35. The Explanatory Memorandum to The Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2017 states under Policy Context that:

> 7.3 The Commons Act 2006 repeals section 147 and enables the deregistration of common land or town or village green, and where appropriate, the registration of other land in its place, without exchanging titles to the lands. This measure enables an application for exchange to be considered under a modern regime, which provides for a proper balance between those who are involved in the exchange and those who are affected by it. This includes taking account of the interests of common rights holders, the neighbourhood (i.e. local inhabitants) and the wider public interest, including in particular nature conservation, the conservation of the landscape, and the protection of public access rights.

D. THE CLAIMANT'S CHALLENGE

36. For the claimant, Mr Thomas advances two grounds of challenge. Ground 1 contends that the inspector erred when considering the interests of the neighbourhood. There are two aspects to ground 1. First, the inspector erred in law when he stated and then proceeded on the basis that "the public" have a right to use a town and village green. Secondly, Mr Thomas says the inspector erred in law when he considered the interests of those outside the neighbourhood, having defined "the neighbourhood" as that identified at registration.

37. On the first aspect, Mr Thomas says that the inspector was wrong at paragraph 15 of the DL to say that the "public have the right to access the land for the purpose of lawful sports and pastimes". Mr Thomas points out that it is only the "relevant inhabitants" who have a right to recreation on a town and village green. The public do not. That is a right exclusive to the inhabitants, distinct from the interests of others. Mr Thomas submits that this legal error infected the inspector's overall conclusion and thus vitiated the decision.

38. Mr Thomas points to paragraph 25 of the DL, where the inspector said that there was "no reason why one community should take precedence over the other with regard to access to the village green". The obvious point, Mr Thomas submits, that one group has rights whilst the other does not, therefore appears to have been overlooked by the inspector. The inspector misdirected himself that the public at large have a right to use the town and village green.

39. The public at large do not have a lawful right to engage in sports and pastimes on the village green. At most, such people have an implied permission to use the land. That is clear from a line of authorities, confirmed in Oxfordshire County Council v the

Oxford City Council [2006] UK HL 25, also known as the Trap Grounds case, where at paragraph 69 of the judgments, Lord Hoffmann said that the effect of registration was to give rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the land.

40. In Barkas v North Yorkshire County Council [2014] UK SC 31, Lord Carnwath said:

> "55. The link with a local authority was material not only to proof of qualifying user, but also to the rights resulting from registration. The 1965 Act itself gave no indication on that issue. However, in *Oxfordshire County Council v Oxford City Council*.... it was established that the rights so created were available to "the relevant inhabitants" (para. 69 per Lord Hoffmann). I take that to mean that in principle they were available to the inhabitants of the relevant locality ("the local inhabitants": per Lord Scott para 104-106), rather than to the public at large".

41. Mr Thomas reiterates that the right, exclusive to the inhabitants, to engage in lawful sports and pastimes is distinct from the interests of others. This means that a proper assessment of the criteria under section 16(6) can only occur on a proper understanding of the law. Some affected by the proposal have a right to use the relevant land, whilst others merely have implied permission to do so. That has consequences because, in Mr Thomas' words "rights matter". Those rights were the right to access and enjoy land and to have an ongoing defence against trespass. The inspector praised the residents for their considerable investment in the green and their record over a lengthy period of improving the land. It was, Mr Thomas said, doubtful that the residents would have made such sacrifices had it not been "their" village green.

42. The importance of having a right to recreation, is, according to Mr Thomas, most clearly demonstrated by the case of Fitch v Rawling (1795 2 H. BL. 394). There, the defendants were accused of trespass for playing cricket on the plaintiff's land. One defendant had a defence since he was from the relevant parish. The other two defendants, however, had no such defence, because they were from further afield.

43. Since the right to recreation cannot be withdrawn for rights holders, but can be for others, there may therefore be cases, such as the present, where the interests of rights holders are distinct from those of others and may indeed take precedence over them. For example, Mr Thomas says that the parish may use a village green for cricket and rounders, but the replacement land may only be suitable for football. In such a situation, consideration would need to be given to the preference of those with rights for cricket and rounders, even though football is generally more popular.

44. The importance of disentangling the rights of the relevant inhabitants is, Mr Thomas admits, critically important for applying the Common Land Consents Policy. This provides that the Secretary of State's expectation will be that the interests of the landowner, commoners, and the wider public will be no worse off in consequence of the exchange. That means all separate rights holders will be no worse off. That in turn, requires the interests and rights of those persons to be considered separately.

They cannot merely be aggregated, which is what the inspector did in the present case.

45. The claimant challenges the structure employed by the inspector in the DL. The inspector did not include a separate section regarding the interests of those having rights in relation to the release land. At paragraph 15, the rights holders do not feature. Instead, their private interests are conflated with that of the public interest. The distinct interests were not assessed, contrasted or balanced one against another.

46. In particular, at paragraph 25 of the DL, the inspector held that there were a number of reasons why one community, essentially the rights holders, should not take precedence over the other, that is to say, those without rights, as regards access to the village green. Mr Thomas contends that the obvious point that one group has rights whilst the other does not, was not here considered. The legislation and guidance require specific consideration of the effect that the deregistration and exchange will have on the interests of those with such rights.

47. In similar vein, at paragraph 26 of the DL, the inspector stated that there will be a greater range of activities taking place on the new green. However, Mr Thomas submits that there was no consideration of the interests of the rights holders *as* rights holders to undertake certain activities on certain parts of the green. Similarly, at paragraph 49 of the DL, the adverse impacts regarding accessibility for the rights holders were effectively offset by greater access for the public at large. Despite purporting to be analysing the interests of the neighbourhood, the interests of those actually resident in the defined neighbourhood, who hold rights, were outweighed by the interests of others. Any precedence for the rights holders did not inform the inspector's analysis. Ultimately, therefore, the inspector expressly equated the interests of the defined neighbourhood with the public at large and negated the precedent that rights holders inevitably enjoy as such. This was, according to Mr Thomas, a clear legal error that rendered his judgement legally unsound.

48. Turning to the second aspect of ground 1, which is that the inspector erred when he included those outside the neighbourhood, having adopted the definition of the pre-defined neighbourhood from the original inquiry, Mr Thomas submits this means the inspector took account of an immaterial consideration. In the alternative, the claimant invites this court to endorse the proposition that the interests of the qualifying residents as rights holders, have never been evaluated.

49. At paragraphs 16 and 17 of the DL, the inspector defined the neighbourhood. He noted the published guidance which says that the expression "neighbourhood" should be taken to refer to the local inhabitants. However, at paragraph 17 of the DL, the inspector said that in the present case, "the neighbourhood of the existing village green was precisely defined prior to its registration in 2008. This consisted of properties in specified streets to the north and east of the green". According to Mr Thomas, the inspector made no further attempt to define the neighbourhood. Given that the residents of the neighbourhood that was defined at the time of registration have rights, whilst those in other areas do not, if the inspector had intended to depart from the neighbourhood which had been "precisely defined", some alternative explanation would have been needed and some conclusion drawn about what constituted the neighbourhood.

50. In this regard, Mr Thomas seeks to draw support from what the inspector said at paragraph 24 of the DL. There, the inspector noted that a proposed new access point from Barnett Lane would make the revised village green more easily accessible from properties to the west. There is, at this point, no evaluative judgment about the identity of the neighbourhood. Accordingly, this part of the DL is fully consistent with the contention of the claimant that the inspector took into account a consideration outside his conception of the neighbourhood.

51. No other alternative definition of the neighbourhood was given. Accordingly, even if the DL is given a benevolent reading consistent with case law, Mr Thomas contends that the inspector defined the neighbourhood as the pre-defined neighbourhood.

52. At paragraph 27 of the DL, when weighing the interests of the neighbourhood, the inspector took into account the interests of others and explicitly balanced those against the predefined neighbourhood. This contrasted with the fact that at paragraph 16 and 17 of the DL, the inspector had limited himself to the predefined neighbourhood.

53. According to the claimant, this error matters. It cannot be dismissed as a minor error. The suggestion that the interests of those outside the neighbourhood would in any event fall under section 16(6)(c) or (d) fails to deal with the point that the Consents Policy is clear at paragraph 5.1 that each consideration must be assessed and satisfied separately. A failure to deal with these as discrete and separate issues is a failure to have regard to the policy and, thus, a failure to have regard to a material consideration.

54. Further or alternatively, the inspector never took into account and never properly weighed the interests of those with rights in respect of the green, including the claimant and other members of the committee. It was the contention of the claimant throughout that the interests of those in the defined neighbourhood are given specific prominence within the statutory scheme and the Consents Policy. This contention was not given proper consideration by the inspector when he took into account the interests of other local inhabitants.

55. Mr Thomas submits that even if the inspector was making an evaluative judgment that the neighbourhood for the purposes of section 16 was wider than the predefined neighbourhood, this did not avoid the problem that the inspector still failed to take into account the rights of those living in the predefined neighbourhood but merely equated them with the interests of the public as a whole. That can be seen from paragraph 15 of the DL.

56. Ground 2 concerns what is described as the failure of the inspector to consider the fallback option. The claimant says that a viable fallback option was a material consideration. The claimant and others have the right to maintain and enhance the accessibility and ecological value of the release land. This is both as a form of recreation in its own right and as an incidence to their rights to enjoy the land for ordinary forms of lawful sport and pastime. The claimant and her neighbours have a track record of maintaining the land. They proposed to carry on doing so. The claimants say that the inspector failed to consider this fallback option.

57. Mr Thomas submits that a fallback option is a material consideration. In the planning context, its relevance was expressly considered in R v (the Secretary of State for the Environment and Havering London Borough Council ex parte Ahern (London) Ltd [1998] Env. L.R. 189. In that case, the deputy high court judge accepted that, whether a fallback position lawfully exists and whether there is a likelihood of its being implemented, were capable of being material considerations. If the answer to the second question was yes, then a comparison must be made between the proposed development and the fallback option. Mr Thomas says there is no reason in principle why a fallback option should not be a material consideration in an application for registration and exchange under section 16 of the 2006 Act.

58. In support of the submission that nature conservation is a lawful sport and pastime, Mr Thomas relies on TW Logistics Ltd v Essex County Council and another [2021] 2 W.L.R. 363, where at paragraph 65, Lord Sales held that the right in question extends to any lawful sport or pastime, whether or not this corresponded to the particular recreational uses to which the land was put in the 20-year qualifying period. By the same token. Lord Hoffmann in the Trap Grounds case, held at page 356, that "sports and pastimes" were not two classes of activities. Rather, they were a "single composite class". Lord Hoffmann said that "as long as the activity can properly be called a sport or a pastime, it falls within the composite class". Furthermore, he held that sports and pastimes include activities which would so be regarded in the present day. On this issue, he agreed with Carnwath J in R (Suffolk County Council ex party v Steed) 1995 70 P. and C. R. 487, who said the dog walking and playing with children were in modern life, the kind of informal recreation which may be the main function of a village green.

59. The claimant submits that nature conservation can properly be called a pastime, whether or not assessed against modern standards. The qualifying residents in the present case had voluntarily given up their time over many years to maintain the land. Alternatively, the right to cultivate and enhance the land could be seen as an incidental right to enhancing the surroundings for other lawful sports and pastimes.

60. In this regard, Mr Thomas relies on Lancashire v Hunt (1894), 10, TLR 310 which held that a right acquired by custom will extend to the incidents of games, such as the pitching of a cricket tent in connection with matches.

61. The claimant has an established track record of maintaining the land. She and those in her position intend to carry on doing so. At paragraph 19 of DL, the inspector noted the evidence regarding the clearance of brambles and scrubs in order to keep footpaths open, as well as the planting of trees, the excavation of ponds and the placing of benches on the land. Mr Thomas says that there is no reason to doubt the wish of the claimant and others to continue doing these things.

62. The inspector failed to consider the fallback option with regard to nature conservation. That subject was one of the explicit criteria under section 16 of the 2006 Act. Instead, the inspector took up the invitation of the first interested party to ignore the matter. This constituted a legal error.

63. Mr Thomas criticises the inspector for leaving the central issue unresolved of whether the claimant and others could and would maintain the release land. The inspector failed to address the possibility that maintenance work would in fact resume. On a fair

reading of paragraph 36 of the DL, the inspector was not anticipating that maintenance work would resume. On the contrary, he was anticipating that degradation would continue. Given his overall conclusion at paragraph 39, the inspector was therefore proceeding on the basis that the *status quo* would continue. However. The expectation of further degradation had to be assessed against the inspector's previous finding that the residents had invested considerable time and effort into the maintenance and improvement of the land over a lengthy period. The inspector was guilty of a *non sequitur* in that, having praised the claimant and her neighbours for what they had done, the inspector nevertheless found that the release land will degrade. This was only comprehensible on the basis that the inspector ignored the prospect of the residents maintaining and enhancing the release land. This amounted to a failure to have regard to a material consideration.

E. DECIDING THE CLAIM

Ground 1

64. In order to address ground 1, it is necessary to travel back in time. Under section 22 of the Commons Registration Act 1965, as originally enacted, a town or village green required use by inhabitants of a defined locality. The courts interpreted "locality" as an administrative area known to law, such as a parish or electoral ward. It was, thus, fatal to a registration application that persons did not come from a single, legally-defined locality. As explained in Trap Grounds at paragraphs 9 to 11, this "locality rule" became the "pinch-point through which many claims... failed to pass".

65. In response to this problem, Parliament amended the 1965 Act, so that a town or village green could be secured in reliance on use by the inhabitants of a neighbourhood within a locality, rather than just the inhabitants of a locality. Section 15 of the 2006 Act continues to provide the opportunity for registration of land as a green through the requisite use by the inhabitants of a locality or of a neighbourhood within it.

66. Section 16 of the 2006 Act replaced section 147 of the Inclosure Act 1845. That provision permitted the exchange of land where it "would be beneficial to the Owners of such respective Lands". The 2006 Act sought to institute a more modern system of exchanging common land, which would have regard to a broader range of interests than the former owners. As paragraph 7.2 of the Explanatory Memorandum to the 2007 Regulations explained, section 147 did not enable proper account to be taken of the public interest in an application. Section 147 was also, in effect, a conveyancing process "for which Departmental officials are not qualified".

67. Paragraph 7.3 of the Explanatory Memorandum says that the new legislation:

> "…enables an application for exchange to be considered under a modern regime, which provides for a proper balance between those who are involved in the exchange and those who are affected by it. This includes taking account of the interests of common rights holders, the neighbourhood (i.e. local inhabitants) and the wider public interest, including in particular nature conservation, the conservation of the landscape, and the protection of public access rights."

68. As pleaded, ground 1 is based on the submission that the phrase "the interests of the neighbourhood" in section 16(6)(b) of the 2006 Act is confined to the "neighbourhood" which was relied upon when the town or village green was first registered and in which, formally at least, were vested the right to use it following registration. As will be apparent from my description of the claimant's case, the ambit of ground 1 has broadened (without, I accept, becoming a separate ground for which permission would have been required). It is, nevertheless, still convenient to deal first with the meaning of "neighbourhood". This will also assist in addressing Mr Thomas's submission that the inspector defined the "neighbourhood" as the pre-defined neighbourhood (that is to say, the neighbourhood whose inhabitants proved the requisite twenty years of use, so as to achieve registration in 2008) but that he wrongly went on to consider the interests of those who fell outside that definition.

69. Although one starts from the position that a word or phrase in a particular Act bears the same meaning throughout, that assumption can be displaced. In the present case, I am in no doubt that the use of "neighbourhood" in section 16(6)(b) is different from the use of that word in section 15; and that a "neighbourhood" for the purposes of section 16(6)(b) does not mean merely the "neighbourhood within a locality" in which "a significant number of the inhabitants... indulged as of right in lawful sports and pastimes on the land for a period at least 20 years".

70. As Mr Edwards KC points out, if registration has come about as a result of use of the town or village green by the inhabitants of a "locality" as opposed to a "neighbourhood" in its section 15 sense, then a green so registered will fall outside the scope of section 16(6)(b). There is no corresponding provision within section 16 which addresses the interests of a "locality" in the way in which the claimant says section 16(6)(b) does, where a town or village green is registered as a result of use by the inhabitants of a neighbourhood. That points powerfully to giving "neighbourhood" in section 16(6)(b) a wider meaning.

71. This is acknowledged in the Explanatory Memorandum, which makes clear at 7.3 that the expression should be taken to refer to "local inhabitants", without recourse to the history of the original registration. That, in turn, supports the reference in the Explanatory Memorandum to a "modern regime", which provides a balance between those who are involved in the exchange and those who are affected by it, taking account of the interests of neighbourhood (in its broad sense) and the wider public interest.

72. I agree with the first interested party that the claimant's interpretation would, in addition, raise practical difficulties. A town or village green may have been registered many years ago. It may not be clear what the original area which led to registration was. Such matters are not necessarily recorded on the register. If they can be identified, the original area may well have changed considerably, such as due to new development. This further supports the conclusion that Parliament intended the expression to have a broader meaning in section 16.

73. The first interested party points out that it is clear the word "neighbourhood" in section 39(1)(b) must have the same broader meaning as in section 16(6)(b). Section 39 deals with consents in respect of the carrying out of works, pursuant to section 38. Section 39(1)(a) requires the appropriate national authority to have regard to "the interests of persons having rights in relation to, or occupying, the land (and in

particular persons exercising rights of common over it);". Section 39(1)(b) refers to "the interests of the neighbourhood". If "neighbourhood" bears only the narrow meaning for which the claimant contends, section 39(1)(b) would be otiose.

74. If "neighbourhood" in section 16(6)(b) is confined in the way suggested in the claimant's statement of facts and grounds, there would, in fact, have been no need for paragraph (b) at all. As rights holders, the persons within the neighbourhood would be within section 16(6)(a).

75. Mr Thomas suggests that this last point assists what he now advances as the primary aspect of ground 1; namely, that the inspector conflated the rights of the inhabitants by reference to which registration occurred and the position of those in the wider area; in particular, those living to the west of the proposed replacement land. It is, accordingly, to this aspect that I now turn.

76. I do not accept that, in paragraph 15 of the DL, the inspector conflated the rights of "the defined neighbourhood" (i.e. the neighbourhood by reference to which registration was effected) and the position of the public. Reading the DL as a whole, I find the inspector was plainly aware of the distinction between those with a formal legal right to use the village green and the wider public who either make use of, or would make use of, the replacement land (in particular, the residents to the west). At paragraph 15, the inspector, in undertaking the practical exercise of making a decision on the section 16 application, was simply reflecting the reality that although, strictly, rights attached to the local inhabitants "in practice, once land is registered under the Act, no attempt is (or can realistically be) made by owners to distinguish between different groups of users": Lord Carnwath at paragraph 56 of Barkas.

77. I agree with Mr Thomas that if the language of paragraph 15 had been carried forward into the rest of the DL, then there might have been a question as to whether the inspector was, in fact, aware of the legal position of the inhabitants of the "defined neighbourhood". A perusal of the DL, however, shows that this was emphatically not the case. On the contrary, the inspector carefully and repeatedly distinguished between the "defined neighbourhood" and the broader "neighbourhood". This can be seen from paragraphs 17, 19, 22 and 27 of the DL.

78. My conclusion that the inspector made no error in this regard is reinforced when one observes that, in the first interested party's closing submissions to the inspector, the position of those with rights was made pellucid. In particular, paragraph 20 of those submissions referred to the inhabitants of certain named residential streets, explaining that it "was on the basis of use by the inhabitants of this neighbourhood that the WHVG became registered and, in a formal sense, it is the inhabitants of this neighbourhood that are vested with the right to use the registered green for lawful sports and pastimes".

79. I agree with Mr Flanagan that it is clear from the DL that the inspector considered in significant detail how the application would affect the interests of the inhabitants of the defined neighbourhood. He noted, in particular, that there would be some adverse impact on their interests, including that the most accessible area of the village green would no longer be available: paragraph 22. It is also evident from paragraphs 29 to 39 that the inspector was aware of the interest of inhabitants of the defined neighbourhood in enhancing the nature conservation aspects of the release land.

80. At this point, it is necessary to deal with a central plank of the claimant's case under ground 1. It was argued by the claimant before the inspector that the interests of those living to the west of the replacement land and the railway tunnel were of less relevance than the interests of the inhabitants of the defined neighbourhood. This point carries over into the statement of facts and grounds. It also features as part of Mr Thomas's skeleton argument and oral submissions, such as in paragraph 31 of the former, where it is said that "there may be cases such as this where the interests of rights holders are distinct from others and may indeed take precedence". The example is given of a parish using a village green for cricket and rounders; whereas the proposed replacement land is suitable only for football. In such a situation, consideration would need to be given to the preference of those with rights.

81. Properly read, however, the statutory scheme contains no such hierarchy. On the contrary, section 16(6) is clear. The appropriate national authority is required to have regard to three categories of interests. There is no suggestion that the interests of persons having rights in relation to the release land (sub-paragraph (a)) fall to be treated any differently from "the interests of the neighbourhood" or "the public interest" (sub-paragraphs (b) and (c)). Nor, indeed, is there any requirement for priority to be given over those "interests", viz-a-viz "any other matter considered to be relevant" (sub-paragraph (d)).

82. This legislative silence is particularly striking, given that the drafter has seen fit to add in parentheses in sub-paragraph (a) the words "and in particular persons exercising rights of common over [the release land]." Properly read, that phrase does no more than specifically identify a particular category of rights holder. It is noteworthy that the rights of those, such as the claimant, are not even highlighted in this way.

83. There is nothing in the Explanatory Memorandum which casts doubt on what I have just said. I must, however, deal with paragraph 5.1 of the Common Land Consents Policy, upon which Mr Thomas relies. This says that "… even where an applicant makes an otherwise compelling case for an exchange, the Secretary of State's expectation will be that the interests (notably the landowner, commoners and the wider public) will be no worse off in consequence of the exchange than without it, having regard to the objectives set out in part [3] above". Paragraph 5.1 ends by saying that "an inadequate exchange will seldom be satisfactory, whatever the merits of the case for deregistration might otherwise be."

84. I do not consider that paragraph 5.1 assists the claimant. Unlike the landowner, commoners and - significantly - the wider general public, the rights of local inhabitants over the town or village green are not highlighted in the paragraph. I do not consider the last sentence indicates that each interest group must be shown to suffer no disbenefit, or else the application for exchange must be refused. On the contrary, to interpret the sentence in the way for which Mr Thomas contends would hobble the statutory scheme. In any exchange, there are likely to be winners and losers. The task facing the relevant national authority is to have regard to the positions of all, so as to decide, on balance, whether the proposed exchange is or is not "inadequate".

85. Thus, properly interpreted, not only does the statutory scheme not impose a hierarchy, it does not empower the decision maker to give inherent weight to a particular type of

interest, as compared with another. On the proper interpretation of the statutory scheme, therefore, the DL discloses no legal error.

86. I do not accept Mr Thomas's criticism of the structure of the DL or his submission that the DL represents a "box-ticking" exercise as opposed to the weighing of all relevant matters and the striking of a balance. The inspector was alive to, and had regard to, the interests of the inhabitants of the defined neighbourhood. He also had regard to the interests of the wider neighbourhood including, in particular, those living to the west of the proposed replacement land. As paragraph 28 of the DL makes plain, he struck a balance between those interests. How he did so was a matter of his professional judgment. The same balancing approach can be seen throughout the rest of the DL. In particular, I observe that, at paragraph 49, the inspector balanced the interests of those in defined neighbourhood, as regards access, finding a marginal adverse effect, compared with the significantly improved access from the wider area, notably to the west.

87. Finally on ground 1, Mr Thomas submits that the inspector took into account the interests of those outside his conception of the neighbourhood. I agree with the defendant and the first interested party that this is incorrect. At paragraph 16 of the DL, the inspector referred to the Guidance (ie the Explanatory Memorandum), which provides that "neighbourhood" should be taken to refer to "local inhabitants". It is in this light that the following paragraphs of the DL need to be read. As I have already stated, in those paragraphs, the inspector had regard to the interests of the inhabitants of the defined neighbourhood, as well as the neighbourhood situated in Elstree, as to which, at paragraph 25, the inspector rejected the contention that "one community should take precedence over the other with regard to access to the village green". At paragraph 27, the inspector noted that the replacement land would be more accessible "for some people not currently resident within the previously defined neighbourhood".

88. Accordingly, it is in my view manifest that the inspector was considering the interests of the "neighbourhood" in the correct way. As I have explained earlier, the inspector did not err in adopting this broad approach to what is meant by "neighbourhood" in section 16. In fact, on the correct interpretation of the legislation, he would have erred had he not done so, such as by confining his analysis to the inhabitants of the defined neighbourhood.

89. There is, furthermore, no reason to infer that the inspector had regard to the interests of persons not falling within the "neighbourhood" in the section 16(6)(b) sense. But even if he had done so, the inspector was still entitled to have regard under section 16(6)(c) to the public interest.

90. Overall, I can see no indication that the inspector ranged further than he was permitted (or, more accurately, required) by section 16(6).

91. Ground 1 accordingly fails.

Ground 2

92. Ground 2 contends that the inspector erred in his consideration of what the claimant describes as the fallback option. A fallback option or position normally denotes a state

of affairs (usually of an adverse nature) which will arise, without the need for further consent, in the event that planning permission is refused for a particular form of development of land.

93. I agree with Mr Flanagan that recourse to concepts of fallback need to be treated with caution, given that the present context involves a different statutory framework and set of principles. I also note the observation in Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314 that, in the planning context, " fallback cases tend to be fact specific" (paragraph 27).

94. Regardless of whether it is accurate to speak of fallback in the present context, the essence of the claimant's argument on ground 2 concerns the way in which the inspector dealt with the public interest concerning nature conservation (paragraphs 29 to 39 of the DL). Mr Thomas's case is that, whatever may have been the position in the recent past concerning maintenance and enhancement of the proposed release land for the purposes of nature conservation, the inhabitants of the defined neighbourhood have a right to improve the land, by (amongst other things) cutting back shrubs and brush, creating ponds and installing benches. The claimant contends that the inspector failed to take this into account and thereby committed a public law error.

95. I find that the inspector did have express regard to what the claimant refers to as the fallback option, of local residents, including the claimant, maintaining the release land. This is evident from paragraphs 30 and 31 of the DL. There, the inspector recorded the contention of the objectors that they did not need permission to recommence such maintenance work as they had undertaken, prior to the first interested party withdrawing its consent to those activities.

96. At paragraph 31, the inspector said:-

> "31. The applicants have indicated that they have no intention of renewing the permission for the local community to carry out maintenance work on the site. It is suggested on behalf of objectors that there might not be a need for some such work to be permitted as it could be construed as a " lawful sport or pastime" appropriate to a village green. This suggestion is disputed by the applicants, and it appears to be the case that to date little work has been carried out since the withdrawal of permission in 2018 ".

97. The inspector was, therefore, fully alive to the respective positions of the parties, so far as these concerned activities relating to nature conservation. The inspector did not need to reach a conclusion on who was right, as a matter of law. This was because, as is plain from paragraph 31, the inspector placed weight on the fact that, in practice, little work had been carried out since permission was withdrawn by the first interested party. As a matter of judgment, the inspector was entitled to place significant weight on that undoubtedly correct factual position. As a result, no more needed to be said about the fallback option.

98. It is also relevant to note that, at paragraph 38 of the DL, the inspector observed that nature conservation was only one of several factors to be taken into account and that, although the opportunity for the enjoyment and study of nature was an important

public benefit, "it is not one that should exclude provision of opportunities for other lawful sports and pastimes also to be enjoyed".

99. It therefore follows that there was no *non sequitur* in the inspector's reasoning on this issue. Nor was there any failure to have regard to a material consideration.

100. Accordingly, just like the inspector, I decline the invitation from Mr Thomas and Mr Edwards to express a view on the extent to which the sorts of nature conservation activities previously undertaken by the claimant and others on the release land could be said to fall under the heading of a lawful sport or pastime.

101. Ground 2 therefore fails.

F. CONCLUSION

102. This application is dismissed.

103. I reiterate what I said at the conclusion of the hearing; namely, that I consider each of the parties before me has been very well-served by their respective counsel.