Neutral Citation Number: [2024] EWCA Civ 420

Case No: CA-2023-000729

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Lane
[2023] EWHC 655 (Admin)

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 25 April 2024

Before :

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE SINGH
and
LADY JUSTICE ELISABETH LAING

- -

Between :

THE KING **(on the application of PATRICIA STRACK on behalf of The Woodcock Hill Village Green Committee)**	**Appellant**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Respondent**
- and -	
(1) LAING HOMES LIMITED (t/a TAYLOR WIMPEY) **(2) HERTSMERE BOROUGH COUNCIL**	**Interested Parties**

- -
- -

David Holland K.C. and Joseph Thomas (instructed by **Richard Buxton Solicitors**) for the **Appellant**
Hugh Flanagan (instructed by the **Treasury Solicitor**) for the **Respondent**
Douglas Edwards K.C. and Michael Rhimes (instructed by **Gowling WLG (UK) LLP**) for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented

Hearing date: 24 January 2024

Further written submissions: 26 and 27 March 2024

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Approved Judgment

This judgment was handed down remotely at 4.07pm on 25 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals:

Introduction

1. Did an inspector determining an application to deregister part of a village green and exchange adjacent land under section 16 of the Commons Act 2006 ("the 2006 Act") fall into error by wrongly "conflating" the interests of those with legal rights of recreation over the green with the interests of those local inhabitants who had no such rights? That is the central question in this case.

2. On behalf of the Woodcock Hill Village Green Committee ("the committee"), the appellant, Patricia Strack, appeals against the order of Lane J. dated 24 March 2023, by which he dismissed her claim for judicial review of the decision of the inspector appointed by the respondent, the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State"), granting an application made under section 16 of the 2006 Act by the first interested party, Laing Homes Limited (trading as Taylor Wimpey) ("Laing Homes Ltd."), to deregister part of Woodcock Hill Village Green lying to the south-west of Vale Avenue in Borehamwood, and exchange land. The second interested party, Hertsmere Borough Council, has played no part in the proceedings.

3. The inspector's decision letter is dated 24 May 2022. Ms Strack's claim for judicial review was issued on 2 August 2022. It was advanced on two grounds. Ground 1 was the contention that the inspector erred in law when addressing the "interests of the neighbourhood", by proceeding on the basis that "the public" have a right to use a town or village green and by considering the interests of those living outside the "neighbourhood" as defined at the time of registration. Ground 2 asserted that the inspector failed to consider the "fallback" – that Ms Strack and others would exercise their "right to maintain and enhance the accessibility and ecological value of the release land". Lane J. rejected Ms Strack's argument on both grounds.

The issues in the appeal

4. The grounds of appeal raise three issues. First, did the inspector err in conflating the rights of the residents of the defined neighbourhood on which the registration of the village green was based – to whom I shall refer as "qualifying inhabitants" – with the interests of those who held no such rights? Second, did he misinterpret and misapply the Government's "Common Land Consents Policy"? And third, did he err in his consideration of the "fallback"?

The legislation for the registration and deregistration of town and village greens

5. Section 15 of the 2006 Act provides for the registration of town and village greens. It replaced the previous statutory regime for registration under the Commons Registration Act 1965 ("the 1965 Act"). It makes provision for the registration of new town and village greens where, among other things, subsection (2), subsection (3) or subsection (4) applies. One of the relevant conditions in each of those three subsections is that "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 for a period of at least 20 years" (subsections (2)(a), (3)(a) and (4)(a)). This provision mirrored the wording of section 22 of the 1965 Act, as amended by section 98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act"), which had added "any neighbourhood within a locality" as a category of those who could apply to register a town or village green.

6. Section 16 of the 2006 Act provides a statutory mechanism for deregistration and exchange of land. It states:

> "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.
>
> (2) If the release land is more than 200 square metres in area, the application must include a proposal under subsection (3).
>
> (3) A proposal under this subsection is a proposal that land specified in the application ("replacement land") be registered as common land or as a town or village green in place of the release land.
>
> …
>
> (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.

…".

7. Section 16 replaced section 147 of the Inclosure Act 1845, which had permitted exchange of land where it "would be beneficial to the Owners of such respective Lands". It provided for regard to be had to a broader set of interests. Paragraph 7.3 of the Explanatory Memorandum to the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, S.I. 2007 No. 2589 ("the 2007 Regulations") explains how the statutory provisions for deregistration were intended to work:

> 7.3 … 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."

8. Section 17 of the 2006 Act provides:

> "17. Deregistration and exchange: orders
>
> …
>
> (5) Where immediately before the relevant date any rights are exercisable over the release land by virtue of its being, or being part of, a town or village green –
>
> (a) those rights are extinguished on that date in respect of the release land; and
>
> (b) where any replacement land is registered in its place, those rights shall become exercisable as from that date over the replacement land instead.
>
> …".

The Common Land Consents Policy

9. The Common Land Consents Policy, published by the Department of Environment, Food and Rural Affairs in November 2015, provides guidance on the determination of applications under section 16(1) of the 2006 Act.

10. In section 3, "Protecting commons – our policy objectives", paragraph 3.1 sets out that the 2006 Act "enables government" to "safeguard commons …", to ensure their "special qualities … are properly protected", and to "improve the contribution of common land to enhancing biodiversity …". Paragraph 3.2 states that, to achieve the objectives, the consent process "seeks to achieve", among other things, that "[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".

11. In section 5, "Other Considerations", paragraph 5.1 states:

> "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] 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. … An inadequate exchange will seldom be satisfactory, whatever the merits of the case for deregistration might otherwise be."

"Modern Town and Village Greens – Drawing the Threads Together"

12. The parties drew our attention to Lord Carnwath of Notting Hill's paper entitled "Modern Town and Village Greens – Drawing the Threads Together", which was published in the "The Conveyancer and Property Lawyer" in 2023 ((2023) 87 Conv., Issue 3, p.223). In that paper Lord Carnwath sets out a cogent argument for reform of the statutory and policy framework for town and village greens. He is particularly critical of the drafting of section 16 and the policy relating to it in the Common Land Consents Policy. He observes (on p.231) that "the drafting of this part of the legislation, so far at least as it applies to village greens, is sloppy in the extreme", and (on p.232) that "the operation of [the Common Land Consents Policy] within the specific statutory criteria is far from clear". We, of course, must take the statutory provisions and corresponding policy as they are, not as they might have been or might yet become if legislative reform took place.

The registration of the village green

13. The village green was registered in 2008, on an application made by Ms Strack. The inspector who determined the application defined the "particular neighbourhood" whose residents used the application land for recreational purposes by reference to particular streets.

The proposed deregistration and exchange

14. The application for deregistration was made on 5 November 2020. The "release land" was an area of 33,000 square metres within the existing village green, comprising rough grassland with trees and shrubs, hedgerows and footpaths, both mown and worn. The "replacement land" was an area of 36,000 square metres lying to the north of Barnet Lane and to the west of the village green, comprising grazed pasture and woodland. The "release land" was owned by Laing Homes Ltd.. The "replacement land" was owned by third parties, but held under a contract by Taylor Wimpey. The "improvement land" was an area of 24,000 square metres within the existing village green but outside the "release land". A further 43,000 square metres of land within the existing green was

unaffected by the application. Laing Homes Ltd. undertook in a planning obligation under section 106 of the Town and Country Act 1990 to carry out a scheme of ecological enhancement on the "improvement land" and the future maintenance and management of both the "replacement land" and the "improvement land".

The evidence and submissions before the inspector

15. An inquiry into the application sat for five days in January and March 2022, followed by the inspector's site visit.

16. The case put forward by Laing Homes Ltd. was, essentially, that the proposed deregistration and exchange would provide land of greater size and utility, with improved accessibility for users of the village green, including those living to its west. And there would be a legally enforceable scheme for ecological enhancement and for the future maintenance and management of both the "replacement land" and the "improvement land".

17. The objectors to the application, including Ms Strack, maintained that the benefits to accessibility and biodiversity put forward by Laing Homes Ltd. were insufficient to outweigh the detriment that would be suffered by those with rights over the village green. They said the proposal's impact on biodiversity should be assessed against the "fallback" of the "release land" being cultivated and maintained by the committee. And they contended that Laing Homes Ltd.'s withdrawal of permission in 2018 for the committee to maintain and enhance the green, which had at first been respected, was ineffective – because that work was itself a lawful pastime.

18. In closing the objectors' case, their counsel, Mr Joseph Thomas, said (in paragraph 30 of his closing speech):

> "30. There will be a new access on Barnet Lane which brings the Town and Village Green marginally closer to the communities to the Southwest; however, that benefit such as it is must be placed in its proper context – it does not serve the agreed neighbourhood. … [Given] the statutory weight to be given to the interests of the neighbourhood, this benefit such as it is should be given minimal weight."

19. In his closing submissions for Laing Homes Ltd., its counsel, Mr Douglas Edwards K.C., explained that the "[inhabitants] of the neighbourhood relied on to establish registration of [the village green] become vested, upon registration, with a right to use the registered green for lawful sports and pastimes" (paragraph 15, footnote 2). Under the heading "The interests of the neighbourhood", Mr Edwards described (in paragraph 20) the extent of the defined neighbourhood by reference to specific streets and said (in paragraphs 20 and 21):

> "20. … 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.
>
> 21. All parties at the inquiry have focused, when considering s.16(6)(b) 2006 … on the neighbourhood identified through the process of registration of the WHVG. It is however the case that, in accessibility terms, the Replacement Land will bring the WHVG closer to residents to the west than is now the case."

The inspector's decision letter

20. The inspector referred (in paragraph 13) to the four matters identified in section 16(6) of the 2006 Act, which formed the four headings of his "Assessment". He referred (in paragraph 14) to the guidance for determining applications under section 16 in the Common Land Consents Policy.

21. Under the first heading – "The interests of persons occupying or having rights in relation to the release land" – he said this (in paragraph 15):

> "15. The release land is owned by Laing Homes (TW), the applicants. There are no registered rights of common over it. 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."

22. Moving next to consider "The interests of the neighbourhood", he noted that "[the] 2006 Act does not define the term 'neighbourhood'", but that "published guidance [in the Explanatory Memorandum to the 2007 Regulations] makes it clear that the term should be taken to refer to the local inhabitants" (paragraph 16). He went on to say (in paragraph 17):

> "17. 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."

23. He noted that "the main use of the land had been for walking, including walking with dogs and/or children" (paragraph 18). Maintenance and improvement work had been co-ordinated by the committee, to which he referred as "the WHVGS". The committee was "said to have members from 300 households, predominantly within the defined neighbourhood …" (paragraph 19). Prior to 2018 "most of this work by [the committee] was carried out with the permission of the landowner, the current applicants, but permission was withdrawn in 2018 and since then little or no work has been carried out" (paragraph 20). It was "clear that residents of the neighbourhood greatly value the village green and have invested considerable time and effort into its maintenance and improvement over a lengthy period" (paragraph 21).

24. The release land was, said the inspector, "overlooked by adjacent residential development" and was "largely overgrown and difficult to access with the exception of one well-trodden footpath", and that "other parts of the green are more intensively used" (paragraph 22). He continued:

> "22 … Nevertheless, the release land is 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 is approved."

25. He described the replacement land's "different character", with "a relatively flat grassed area … and belt of woodland" (paragraph 24). On the question of access to the replacement land, he said:

> "24. … It is further away from many properties in the defined neighbourhood than the release land. However, a proposed new access point from Barnet Lane at the south-west corner of the land would make the revised village green more easily accessible from properties to the west."

26. The replacement land "would offer the opportunity for a greater range of activities" for the green (paragraph 26).

27. Summarising his findings and conclusions here, the inspector said:

> "27. Overall, the proposed deregistration and exchange will affect the interests of the neighbourhood by restricting access to the closest part of the village green to some of the defined neighbourhood. It will also reduce the amount of semi-natural grassland that is accessible. On the other hand, the release land is arguably the least attractive part of the village green for many users and the replacement land will offer the potential for a wider range of activities on the green and will 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.
>
> 28. On balance, although the strength of local opposition to the application is understandable, it is my view that the potential benefits resulting from the proposals outweigh the perceived disadvantages with regard to the interests of the neighbourhood."

28. In dealing with "The public interest" (in paragraphs 29 to 57), he first considered "Nature Conservation" (in paragraphs 29 to 39). He noted that the designation of two local wildlife sites "will not be affected by the application …" (paragraph 29). He then addressed the objectors' submissions on the "fallback":

> "30. It was common ground between the parties that the nature conservation value of the release land has 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. It can be expected that this process will continue unless active maintenance is resumed.
>
> 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."

29. He went on to say (in paragraph 35) that "a few critical factors should be borne in mind". He said that approval of the application "would not result in the loss of any habitat", and that the "conservation value [of the release land] may continue to degrade to some extent, but this will occur irrespective of whether the application is approved or not unless maintenance work resumes" (paragraph 36). He then said:

> "37. The landscape improvement proposals put forward by the applicants and the proposed funding for future management should result in enhancement of the nature conservation value of the replacement land and the improvement land relative to the present condition of these areas.
>
> 38. Nature conservation is only one of several factors that should be taken into account. Although the opportunity for the enjoyment and study of nature is an important public benefit of the existence of the village green, it is not one that should exclude provision of opportunities for other lawful sports and pastimes also to be enjoyed."

and he concluded:

> "39. 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 are likely to enhance the nature conservation value of those areas."

30. Under the sub-heading "Public Access", he noted that two of the village green's existing six access points would be lost, but one of those, on Vale Avenue, would be relocated, the other, on Byron Avenue, might be restored with the council's permission as landowner, and a new one would be created on Barnet Lane (paragraphs 46 and 47). His findings and conclusions here were these:

> "48. Analysis by a transport consultant on behalf of the applicants, which was not challenged by objectors, showed that 23 out of 480 households within the defined neighbourhood would no longer be within 400m (5 minutes) walk of an

> access point if the application is approved and no new access from Byron Avenue made available. All 23 of these households would still be within 500m of access points. If all households in the area are considered, 8 out of 713 would no longer be within 400m but an additional 195 would be within 800m (10 minutes) walk and a further 282 within 1200m.
>
> 49. This analysis suggests 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. I also note that residents from the west would be able to access the revised green without having to walk an additional 350m approximately along the steep and relatively narrow footway adjacent to the busy Barnet Lane.
>
> …
>
> 51. Overall, approval of the application would not in my view have a significant adverse effect on public accessibility to the village green and would bring benefits to some users."

31. The inspector's "Conclusions on the public interest" were that "[overall], the proposed deregistration and exchange will have little adverse effect on the public interest and potentially will bring some benefit" (paragraph 57).

32. Under the heading "Other matters" he concluded that the proposed funding for the maintenance and management of the improved areas "should be capable of being used to effectively ensure that landscaping works are properly managed and new planting well established" (paragraph 58).

33. His final "Conclusion" was that "[the] proposals in the application satisfy all the criteria set out in Section 16(6) of the 2006 Act", and that "[the] application should therefore be granted" (paragraph 60).

The judge's conclusions on ground 1 of the claim

34. Lane J. was "in no doubt" that the meaning of the word "neighbourhood" in section 16(6)(b) did not merely mean the "neighbourhood within a locality" for the purposes of section 15 (paragraph 69 of the judgment). If registration had come about as a result of the use of a town or village green by the inhabitants of a "locality" as opposed to a "neighbourhood", a green registered on that basis would fall outside the scope of section 16(6)(b). Paragraph 7.3 of the Explanatory Memorandum made it clear that the expression "neighbourhood" should be taken to refer to "local inhabitants", without recourse to the history of the original registration (paragraph 71). If the concept of the "neighbourhood" in section 16(6)(b) were confined in the way suggested in the claim, there would have been "no need for paragraph (b) at all" (paragraph 74).

35. The judge did not accept that paragraph 15 of the decision letter conflated the rights of "the defined neighbourhood" and "the position of the public" (paragraph 76). The decision letter, read as a whole, made plain that the inspector was aware of the

distinction. The language in paragraph 15 reflected the practical situation identified by Lord Carnwath at paragraph 56 of his judgment in *Barkas v North Yorkshire County Council* [2014] UKSC 31. The judge identified several parts of the decision letter where the inspector specifically addressed the interests of the "defined neighbourhood" (paragraph 77), and pointed to Laing Homes Ltd.'s closing submissions setting out the correct legal position (paragraph 78). He concluded "that the inspector considered in significant detail how the application would affect the interests of the inhabitants of the defined neighbourhood" (paragraph 79).

36. Rejecting the "central plank" of Ms Strack's argument on ground 1 – 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" and that this was a case in which "the interests of rights holders are distinct from others' and may indeed take precedence" (paragraph 80) – the judge said "the statutory scheme contains no such hierarchy", and there was "no suggestion" that priority should be given to section 16(6)(a) of the 2006 Act over the other sub-paragraphs in section 16(6) (paragraph 81).

37. He did not think that paragraph 5.1 of the Common Land Consents Policy assisted Ms Strack (paragraph 84):

> "84. … I do not consider the last sentence [of that paragraph] 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 decide, on balance, whether the proposed exchange is or is not 'inadequate'".

38. He concluded therefore that, "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. …", and that, "[on] the proper interpretation of the statutory scheme, … the decision letter discloses no legal error" (paragraph 85). And he continued:

> "86. … 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 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 [the] defined neighbourhood, as regards access, finding a marginal adverse effect, compared with the significantly improved access from the wider area, notably to the west."
>
> …

> 88. Accordingly, it is in my view manifest that the inspector was considering the interests of the "neighbourhood" in the correct way. … [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."

The first issue: did the inspector conflate the interests of the qualifying inhabitants with the interests of the general public?

39. For Ms Strack, Mr David Holland K.C. based his argument on this issue on the proposition that town and village green rights vest only in the residents of the locality or neighbourhood on which the registration itself had been based, and that those living outside that defined locality or neighbourhood are "trespassers". This, he submitted, has been consistently recognised by the courts (see, for example, the judgment of Buller J. in *Fitch v Rawling* (1795) 2 H. Bl. 393, at pp.398-399). And Parliament had acknowledged it when legislating separately for town and village greens and common land in the 1965 Act, the 2000 Act and the 2006 Act.

40. Mr Holland submitted that town and village green rights are "property rights" conferred by common law. They run with the land and are vested in all residents for the time being of the defined locality or neighbourhood. They are similar to easements, which are property rights whose benefit is enjoyed by the landowner and any other occupiers of the land. They are not properly described as "public rights". They do not vest in "the general public" or "the public at large", but only in a section of the public within a defined area. In interpreting legislation that interferes with these rights, they should be treated with the importance traditionally accorded to property rights (see, for example, the judgment of Lord Collins of Mapesbury in *Sainsbury's Supermarkets Ltd. v Wolverhampton City Council* [2010] UKSC 20, at paragraph 9).

41. In his skeleton argument, Mr Holland described section 16(6)(b) of the 2006 Act as "otiose" and "obscure". In his oral submissions he concentrated on the proposition that the concept of "the interests of the neighbourhood" in subsection (6)(b) did not extend to the interests of those living outside the "defined neighbourhood" in gaining access to and using the green for recreation. They are merely "trespassers" when they do that. In enacting section 16(6)(b) Parliament may have intended the decision-maker to have regard to other interests of those living in the "neighbourhood" but outside the "defined neighbourhood", such as their views of the green or across it. But if it had meant the interests of "trespassers" to be considered, section 16 would have said so explicitly. In any event it cannot have contemplated a simple balancing exercise in which such interests have equivalent status to the rights of the qualifying inhabitants.

42. Mr Holland submitted that the inspector appears to have assumed that residents of the wider neighbourhood were not trespassers. His statement, in paragraph 15 of the

decision letter, that "the public have the right to access the land" shows a clear misunderstanding of the law. In several places – for example, in paragraphs 24, 27, 48 and 49 of the decision letter – he had treated the interests of those living outside the "defined neighbourhood" who would be trespassers on the village green as if they were relevant to the assessment under section 16(6). Balancing the legal rights of those living in the "defined neighbourhood" with the interests of trespassers, or doing so without giving priority to those with legal rights, was not a legitimate exercise. The interests of trespassers could not lawfully be given equal status and weight to the interests of those with a legal right to use the village green. Taking trespassers' interests into account was to have regard to an "irrelevant consideration". If, however, they were relevant, they should be given "minimal weight". And for the inspector to give them the weight he did was *Wednesbury* unreasonable.

43. Mr Hugh Flanagan for the Secretary of State and Mr Edwards for Laing Homes Ltd. supported the judge's analysis. They submitted that the decision letter shows no misunderstanding of the statutory provisions for deregistration, or of the principles in the relevant case law. The inspector did not confuse or conflate the interests of the qualifying inhabitants with those of the general public.

44. One must begin, I think, by considering the nature and effect of such rights as arise from the registration of a town or village green under section 15.

45. As was recognised by the House of Lords in *Oxfordshire County Council v Oxfordshire City Council* [2006] 2 A.C. 674; [2006] UKHL 25 ("the Trap Grounds case") upon registration of a village green, a legal right to use the green for lawful sports and pastimes vests in the inhabitants of the locality on which registration was based (see the speech of Lord Hoffmann, at paragraph 69; the speech of Lord Scott of Foscote, at paragraph 104; the speech of Lord Rodger of Earlsferry, at paragraph 114; and the speech of Lord Walker of Gestingthorpe, at paragraph 124).

46. We were taken by counsel to several cases in which the courts have endeavoured to capture the essential character of the rights of qualifying inhabitants to use a town or village green for recreation. Such rights have been described in various ways, and there is, it seems, no single, categorical phrase to define them.

47. In arguing that these are "property rights", similar to easements, Mr Holland relied on a passage in the judgment of Sir George Jessel M.R. in *Hammerton v Honey* (1876) 24 W.R. 603, where he said that "[what] is called a right of recreation and amusement, of air and exercise, or the playing of all manner of lawful games and pastimes, is a right in the nature of an easement which may well be claimed by custom". The rights may, I accept, be described as "proprietary in nature" (see G. Laurence K.C., A. Bowes and S. Adamyk, "Acquiring public rights over land held for statutory purposes", published in "The Conveyances & Property Lawyer" in 2023 ((2023) 1 Conv., at p.51), though it seems doubtful that the right to enter on and use a town or village green arising under the statutory scheme for registration introduced by the 1965 Act could exactly be equated to an easement. Such rights attach to a defined locality or neighbourhood rather than to a dominant tenement. They are not registered at the Land Registry. And those living in the relevant locality or neighbourhood are not able to abandon or surrender them. The term "quasi-easement", used in some of the authorities, may be appropriate.

48. Mr Flanagan and Mr Edwards submitted that rights to use town and village greens for recreation can properly be described as "public rights", in the sense of their being rights vested in a section of the public, comprising the residents of a defined locality or neighbourhood. They cited a number of cases, including several that were finally decided in the Supreme Court or the Court of Appeal, in which town and village green rights have been referred to in those or similar terms: for example, "the exercise of public rights in village and town greens", in the judgment of Lady Rose in *R. (on the application of Day) v Shropshire County Council* [2023] A.C. 955 (at paragraphs 58 and 59); "[registration] of land as a TVG has the effect that the public acquire the general right to use it as such", and "… the public must use their recreational rights in a reasonable manner …", in the judgment of Lord Sales and Lord Burrows in *TW Logistics Ltd. v Essex County Council* [2021] A.C. 1050 (at paragraph 65); "… a public right is being asserted", in the judgment of Lord Carnwath in *Barkas* (at paragraph 61); "… the assertion of a public right", in the judgment of Lord Hope in *R. (on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] 2 A.C. 70 (at paragraph 67); and "… an application [to register a town or village green] is a claim that a public right exists", in the judgment of Sullivan J., as he then was, in *Laing Homes Ltd. v Buckinghamshire County Council* [2004] 1 P. & C.R. 36 (at paragraph 122; see also paragraphs 82, 84, 86, 103, 104 and 128).

49. The facts and circumstances in which the relevant determination had to be made were different in each of those cases, and can also be distinguished from those of the case before us. But there is a thread of consistency in the courts' willingness to refer to the rights over a town or village green as "public" rights. As Mr Flanagan and Mr Edwards submitted, although this expression does not represent in precise terms the legal status of such rights, it conveys the reality of their enjoyment by those members of public in whom they are vested, namely the qualifying inhabitants.

50. This reality is reflected in the proposition stated by Lord Sales and Lord Burrows in *TW Logistics*:

> "65 The position which has been mapped out in these authorities, therefore, is this. Registration of land as a TVG has the effect that the public acquire the general right to use it as such, which means the right to use it for any lawful sport or pastime … . However, the exercise of that right is subject to "give and take" principle … . This means that the public must use their recreational right in a reasonable manner, having regard to the interests of the landowner … . The standard of reasonableness is determined by what was required of local inhabitants to allow the landowner to carry on its regular activities around which the local inhabitants were accustomed to mould their recreational activities during the qualifying period.
>
> 66 The application of this standard means that after registration the landowner has all the rights that derive from its legal title to the land, as limited by the statutory rights of the public. … If there was some fluctuation in the level of the landowner's activity during the qualifying period, the standard of reasonableness applicable to the public's use of their recreational rights should reflect what the local inhabitants had shown themselves willing to accept for a reasonably sustained period or periods of time. … The landowner also has the right to undertake new and different activities provided they do not interfere

> with the rights of the public to use the land for lawful sports and pastimes." (emphasis added)

51. In the light of the relevant authorities, therefore, it seems reasonable to refer to the rights generated under the registration provisions of the 2006 Act as "public" rights in a broad sense of that concept, reflecting their attachment to a locality or neighbourhood and their being vested in those members of the public resident in that defined area. This description is, I think, compatible with their "proprietary" nature.

52. Much emphasis was given by Mr Holland to his submission that those users of a town or village green who are not qualifying inhabitants are properly described simply as "trespassers". It is, as one would expect, uncontentious that the right to use a town or village green belongs only to residents of the defined locality or neighbourhood on which the registration of the green was based. Mr Flanagan and Mr Edwards both accepted that those living outside the defined locality or neighbourhood would be "tolerated trespassers". But they pointed to the practical reality that obtains after a green has been registered, which is that, as Lord Carnwath recognised in *Barkas*, it is likely to be difficult or impossible for the landowner to distinguish between users with legal rights over the green and those without such rights.

53. In *Fitch v Rawling* three men, one a local resident, in defending an action in trespass for the playing of cricket on private land, relied on a custom that local people used the land for recreation. It was held that the local resident could rely on the custom but that the two outsiders were "trespassers". Buller J., with whom Heath J. and Rooke J. agreed, observed that "Customs must in their nature be confined to individuals of a particular description". The court's decision in that case has been mentioned with approval in several of the modern cases. It has largely been seen as authority for the principle that the rights of the qualifying inhabitants over a town or village green are established by custom (see, for example, the speech of Lord Hoffmann in *Ex parte Sunningdale* [2000] 1 A.C. 335, at p.172B, and also his speech in the Trap Grounds case, at paragraphs 5 and 51, cited by Dyson L.J. in *Lewis v Redcar*, at paragraph 22; and the judgment of Sullivan J. in *Laing Homes Ltd.*, at paragraph 63).

54. In *Barkas* the Supreme Court considered whether local residents seeking registration of a new village green had used the land "as of right". Lord Neuberger, with whom Baroness Hale, Lord Reed and Lord Hughes agreed, observed (in paragraph 27 of his judgment), that those who used the land without a licence or right to do so are trespassers, and that "a 'tolerated trespasser' is still a trespasser". Support for this observation was to be found in the judgment of Fry J. in *Dalton v Henry Angus & Co.* (1881) 6 App. Cas. 740, 774, in which he held, as Lord Neuberger put it (at paragraph 28), that "acquiescence in the trespass … does not stop it being trespass". Lord Neuberger went on to say this:

> "29 Thus, if a trespass has continued for a number of years, then the fact that it has been acquiesced in (or passively tolerated or suffered) by the landowner will not prevent the landowner claiming that it has been and is unlawful, and seeking damages in respect of it (subject to the constraints of the Limitation Act 1980). For the same reason, if such a trespass has continued for 20 years and was otherwise as of right, it will be capable of giving rise to a prescriptive

> right. On the other hand, if the landowner has in some way actually communicated agreement to what would otherwise be a trespass, whether or not gratuitously, then he cannot claim it has been or is unlawful – at least until he lawfully withdraws his agreement to it. …".

55. Lord Carnwath, in his judgment in *Barkas* (with which Baroness Hale of Richmond, Lord Reed and Lord Hughes agreed), endorsed (at paragraph 55) the principle established in the Trap Grounds case that the rights are vested in "the inhabitants of the relevant locality … rather than the public at large". He went on, however (at paragraph 56), to recognise the practical difficulties of this position:

> "56 … It may be that in practice, once land is registered under the Act, no attempt is (or can realistically be) made by owners or others to distinguish between different groups of users. However, it seems clear in principle that a local link of some kind remains an essential feature both of the use and of the resulting rights."

56. This is not to say that those who make use of a town or village green for recreation but who are not qualifying inhabitants enjoy the same "rights" as are enjoyed by the qualifying inhabitants themselves. But it is to recognise that in fact they are likely to use the green in the same way, and that the landowner may well find it difficult to prevent them from doing that, and indeed may make no effort to do so. There is, of course, no doubt that a different legal status from that of the qualifying inhabitants as rights holders applies to those who are not in that cohort. The precise status of those without the rights of qualifying inhabitants will depend on the particular circumstances of the case. This is elementary and not in dispute.

57. In this case I do not think it would be realistic to describe simply as "trespassers" those local inhabitants who are not rights holders but are knowingly permitted by the landowner to use the village green in exactly the same way as the qualifying inhabitants. Strictly speaking, I accept, that is how the law may regard them. But in reality, as Mr Flanagan and Mr Edwards acknowledged, they may properly be regarded as "tolerated trespassers". In making the application for deregistration, Laing Homes Ltd. relied on the fact that the village green, incorporating the "replacement land", would become more accessible to people who were not qualifying inhabitants. The creation of additional access points, one of them on Barnet Lane, would make it easier for those living outside the "defined neighbourhood" to come on to and use the village green after the proposed deregistration and exchange had taken place. Members of the public who were not qualifying inhabitants would thus be encouraged to use the green for recreation as if they were. This does not seem to have been contested at the inquiry.

58. The provisions in section 16 of the 2006 Act embody the "modern regime" – as it is described in paragraph 7.3 of the Explanatory Memorandum – for the deregistration of town and village greens. It is fair to say that the interpretation of these provisions, and in particular section 16(6)(b), is not an entirely straightforward task. But in my view it can also be said that the statutory regime Parliament has put in place demonstrates its intention to accommodate both the legal significance of town and village green rights

and the practical reality of a green being used by members of the public who do not have such rights vested in them.

59. Section 16(6) specifies a very broad range of considerations to which the decision-maker must have regard. The considerations in paragraphs (a), (b) and (c) are framed in terms of the "interests" identified. These "interests" are not confined merely to "rights". Nor are they confined to "legal interests" alone. The interests of rights holders are brought in under paragraph (a), but paragraphs (b), (c) and (d) go considerably further. How the decision-maker is to go about the task of determining an application for deregistration by having regard to the specified considerations is not prescribed. It is imperative that he has regard to all four of them; the word "shall" is mandatory. But so long as he does that, it is open to him to proceed as he sees fit. It is likely that this will require a balance to be struck between the different factors in play. When striking that balance the decision-maker must not omit any consideration relevant to the determination, nor may he double-count. The assessment carried out in a particular case will necessarily depend on the facts and circumstances of that case. It will engage the decision-maker's exercise of evaluative judgment. And the outcome can be challenged on conventional public law grounds.

60. Two points may be made here. First, section 16(6) does not exclude the interests of those residents of a "neighbourhood" who are not the holders of rights over a town or village green but who will nevertheless be able gain access to it, and will use it, after deregistration. These would extend to the interests of those who have been knowingly allowed by the landowner to come on to the green as "tolerated trespassers" at points of access deliberately provided by him.

61. And secondly, the statutory scheme allows for the possibility that the likely effects of deregistration on the interests of those who enjoy legal rights over a town or village green can be outweighed by the effects on the interests of those who do not enjoy such rights. There is no hierarchy or order of priority in the considerations specified in section 16(6), either in the statutory provisions themselves or in policy. None of those four considerations is given priority over the others. There is no ranking, no presumption that one in particular will normally prevail over the others, and no prescription of the weight to be given to each. It will be necessary in every case for the decision-maker to have regard to all of these considerations, conscious that the interests of those who hold rights over the green, whatever the precise nature of those rights may be, are legal rights distinct from the other interests he is required to take into account. Unless Parliament were to recast the statutory regime, or the Government to issue new and different policy for deregistration, the weight given to each of the interests under section 16(6) will remain a matter of judgment for the decision-maker in every case, challengeable only on conventional public law grounds.

62. In oral argument Mr Holland did not press his submission that section 16(6)(b) is "otiose". But it is perhaps sensible to consider the point. The word "neighbourhood" is not defined in the 2006 Act. As a matter of statutory interpretation, however, I think subsections (6)(a) and (6)(b) must be read as relating to different considerations: in subsection (6)(a), "the interests of persons having rights in relation to, or occupying, the release land …", and, in subsection (6)(b), "the interests of the neighbourhood". Subsection (6)(b) captures "interests" additional to those of persons "having rights in relation to, or occupying, the release land". The residents of the "neighbourhood within a locality" whose use of the land led to its registration as a town or village green under

section 15 hold the right to use the green for recreation, and their interests would therefore already be covered by section 16(6)(a). If subsections (6)(a) and (6)(b) are to be given different meanings, as Parliament presumably intended, the concept of a "neighbourhood" in subsection (6)(b) cannot be synonymous with the concept of "any neighbourhood within a locality" for the purposes of registration in section 15. Had Parliament intended the word to have the same meaning as in section 15, it would not, I think, have used a different formulation. In my view, subsection (6)(b) enlarges the decision-maker's remit by extending the relevant considerations to the interests of a wider group of persons than the qualifying inhabitants. It is not limited to those local inhabitants who, as qualifying inhabitants, hold rights over the town or village green in question and on whose use of the green the registration under section 15 was based. Subsection (6)(b) relates to the "interests" of the "neighbourhood" in its entirety.

63. After registration, members of the public who do not hold rights over a town or village green as qualifying inhabitants but who nevertheless use it for recreation in the same way as those who do hold such rights may have an "interest" in their unimpeded and regular use of it, notwithstanding that they are using it as "tolerated trespassers". The concept of "the interests of the neighbourhood" in section 16(6)(b) is sufficiently broad to represent that reality. As Mr Edwards submitted, this understanding reflects the statutory purpose spelt out in the Explanatory Memorandum.

64. In my view therefore, when the inspector came to consider – as he was required to do – "the interests of the neighbourhood" under section 16(6)(b), he was entitled to have regard to the interests of all the inhabitants of that neighbourhood, including not only the interests of the residents of the "defined neighbourhood" as rights holders but also the interests of those who use the village green in the same way as "tolerated trespassers". It would be wrong to suppose that the interests of the qualifying inhabitants and those of other local inhabitants were necessarily in tension or conflict with each other. To describe them simply as "competing" interests would be misleading. To some extent, though not identical, they were aligned. The likely effects upon them needed to be assessed with that in mind, while recognising the differences where they arose.

65. Did the inspector do that lawfully? In my view he did. I am not persuaded that his decision letter betrays the errors of law alleged. His assessment of the proposed deregistration and exchange of land was, I think, complete and properly reasoned. He dealt appropriately with the matters in dispute on the evidence and submissions presented at the inquiry, recognising throughout that only the qualifying inhabitants would have a legal right to use the village green, including the replacement land, and that other members of the public using it would not. The judge's conclusions to this effect seem to me to be legally sound.

66. In the sphere of planning decision-making, when the court is considering an inspector's report or decision letter it will concentrate on the real substance of what he has said. It will not substitute its own views for the conclusions he has reached in the exercise of his own expert judgment. It will not seek an assessment going beyond what is necessary to decide, in the public interest, the main controversial issues between the parties. It will not expect perfection in the language used. It will ask itself whether the inspector has gone about his task lawfully, without legal mistake or misdirection. And it will do so by reading his report or decision letter fairly and as a whole. The essential principles are well known (see the leading judgment in this court in *St. Modwen Developments*

Ltd. v Secretary of State for Communities and Local Government [2018] PTSR 746, at paragraphs 6 and 7). They apply equally, in my view, to inspectors' decision letters in the realm of town and village greens (see the judgment of Holgate J. in *R. (on the application of Tadworth and Walton Residents' Association) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 972 (Admin), at paragraphs 40 to 44).

67. Applying that approach, I do not think paragraph 15 of the decision letter, under the heading "The interests of persons occupying or having rights in relation to the release land", exposes any misdirection of law.

68. Four conclusions emerge. First, it was not wrong for the inspector to split his assessment in the way he did. How that assessment was set out was a matter for him, so long as he had regard to each of the considerations specified in section 16(6). He was entitled to address the rights of the residents of the "defined neighbourhood" as well as the interests of other local inhabitants under the second of his four headings, "The interests of the neighbourhood", corresponding to section 16(6)(b), rather than dealing with those rights under the first heading, "The interests of persons occupying or having rights in relation to the release land", which corresponded to section 16(6)(a). In paragraph 15, under that first heading, he effectively acknowledged that the interests of qualifying inhabitants as rights holders could properly be considered under section 16(6)(a). He expressly noted the rights in question and said he would deal with them later in the decision letter. It is clear from paragraph 15, therefore, that the structure he adopted for his assessment was deliberate. To criticise the structure he chose would be to put form above substance. What he had to do in the end was to establish by the exercise of his own judgment whether all four of the considerations in section 16(6), taken together, would justify the proposed deregistration or not. Taking due account of the rights of the qualifying inhabitants was indispensable in that exercise. So too was the need to have regard to the interests of other local inhabitants within the reach of section 16(6)(b). There can be no criticism of the inspector for having considered under subsection (6)(b) the interests of residents of the "neighbourhood" who lived outside the "defined neighbourhood". Those interests could also have been considered under subsection (6)(c) ("the public interest"), or, indeed, under subsection (6)(d) ("any other matter considered to be relevant"). In substance, whichever course the inspector had chosen to take, the result of his overall assessment would, I think, have been no different.

69. Secondly, the complaint made of the third sentence in paragraph 15 – which says that "[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" – is not, in my view, well founded. I do not think the words "the public have the right to access the land" should be read as misrepresenting the character and effect of the right enjoyed by the qualifying inhabitants. Indeed, they match the terms in which that right has been described in recent judgments in the Supreme Court. It is not a misconception to regard the right as "public" in the sense that it is enjoyed by those members of the "public" resident in the neighbourhood on which registration of the green in question was based. The inspector was not obliged to say more than he did about the right itself. He did not have to resolve a dispute about the character of the right in question, for there was no dispute. He acknowledged that it was a "right", and that it was a right "to access the land for the purpose of lawful sports and games". Its

precise legal nature was not in contest. But in any event the inspector was assisted by Mr Edwards' closing submissions reminding him that the "[inhabitants] of the neighbourhood relied on to establish registration of [the village green] become vested, upon registration, with a right to use the registered green for lawful sports and pastimes". In these circumstances, the suggestion that he was unfamiliar with the relevant right, or that he misunderstood what it meant, is, I think, misplaced. No support for that suggestion is to be found in the decision letter.

70. Thirdly, when one reads the decision letter as a whole, it is, I think, plain that the inspector did take into account the interests of the rights holders. When addressing "The interests of the neighbourhood" in paragraphs 16 to 28, and "The public interest" in paragraphs 29 to 57, he did not confuse the qualifying inhabitants' legal rights with the interests of those who did not hold such rights. Crucially, he did have regard to the interests of the qualifying inhabitants as rights holders. He took care to distinguish, where it was necessary to do so, between the "defined neighbourhood" and the "neighbourhood". This distinction is repeatedly made in the relevant parts of his assessment, including paragraphs 16, 17 to 28 – in particular paragraphs 21, 22 and 27 – and paragraph 49. As I have already said, he was entitled to consider under section 16(6)(b) the interests of residents of the wider neighbourhood in accessing the replacement land. It is clear that he understood what he meant by the expression "defined neighbourhood", which he described in paragraph 17 as "the neighbourhood of the existing village green" that had been "precisely defined prior to its registration in 2008 …". By contrast, one sees his reference in paragraph 16 to the expression "the neighbourhood" in section 16(6)(b), and to the indication in the Explanatory Memorandum that this expression embraced the "local inhabitants", including both the inhabitants of the "defined neighbourhood" and those of the wider neighbourhood. His differentiation between the "neighbourhood" and the "defined neighbourhood" was accurate and consistent. It reflected his awareness of the relevant differences in the interests involved and the likely effects upon them. Thus, for example, in paragraph 21 he referred simply to the residents of "the neighbourhood" greatly valuing the village green and investing considerable time and effort in its maintenance and improvement. In paragraphs 22 and 27 he dealt with the likely effects on the interests of inhabitants of the "defined neighbourhood". In paragraphs 24 and 27 and in paragraphs 48 and 49, he came to different conclusions on the accessibility of the village green, after the proposed deregistration and exchange, to those living in the "defined neighbourhood" and to the inhabitants of a wider area, including residents of properties to the west. And in paragraph 28 he stated his conclusion on the benefits and disadvantages to the interests of "the neighbourhood". Nowhere did he attribute any relevant legal rights to those who did not hold them. His findings and conclusions on the accessibility of the replacement land for those living outside the defined neighbourhood, under the heading "The interests of the neighbourhood" in paragraphs 16 to 28, and under the sub-heading "Public Access", in paragraphs 46 to 51, went only to the physical accessibility of the green, not to any supposed legal right to go on to it.

71. And fourthly, in undertaking his assessment, the inspector did not err in law. His approach was lawful. The balancing exercise he undertook was in itself entirely legitimate. It met the requirements of section 16(6) of the 2006 Act. It was not vitiated by any *Wednesbury* error. The interests of those without legal rights were not an "irrelevant consideration". The inspector was not obliged to give those interests merely "minimal weight". As he was entitled and indeed required to do under the statutory

scheme, in considering the likely effects of the proposed deregistration and exchange of land he clearly had regard to the interests of the residents of the "defined neighbourhood" as rights-holders. But he did not fail to take into account any other relevant interest specified in section 16(6). He had regard to them all and accorded each of them the weight he thought appropriate, conscious as he did so that there was no hierarchy, priority or weighting prescribed either in the statute itself or in relevant policy. This was, necessarily, a question of fact and evaluative judgment for him as decision-maker. In exercising that judgment, he was obviously well aware that only those living in the "defined neighbourhood" had rights to use the village green for recreation. His overall assessment displays a comprehensive and appropriate balancing of positive and negative factors. In that balance he gave weight to the interests of the residents of the "defined neighbourhood", including – though not limited to – the accessibility of the town or village green to them upon deregistration and the consequences for their enjoyment of the rights they hold. Likewise, he gave weight to the interests of other local inhabitants, who did not enjoy such rights, and also to the public interest. None of his individual conclusions, including those relating to likely effects on the rights of the residents of the "defined neighbourhood", and in particular his conclusion in paragraph 49 that the proposal's impact on the ability of qualifying inhabitants to access the green would be only a "marginal adverse effect", are criticised in these proceedings. In short, contrary to Mr Holland's submissions, there was nothing unlawful in the approach the inspector took. Nor could the conclusions he reached be regarded as irrational in the *Wednesbury* sense, or otherwise flawed by any public law error.

72. It follows that I cannot accept Mr Holland's main submission on this issue – that the inspector wrongly conflated, or elided, the rights of the residents of the defined neighbourhood with the interests of those who did not hold such rights. There was no such conflation or elision. The inspector's assessment under section 16(6) was, in my view, lawful.

The second issue: did the inspector err in his interpretation and application of the Common Land Consents Policy?

73. Mr Holland submitted that the correct approach to deregistration, as described in paragraph 5.1 of the Common Land Consents Policy is to ensure that the residents of the "defined neighbourhood" should be left "no worse off" by deregistration. In holding that it was only necessary for the decision-maker to balance different interests, the judge gave too much credence to the fact that paragraph 5.1 does not refer to the rights of the "defined neighbourhood". Paragraph 5.1 does not merely call for a "global assessment" of relevant interests. It shows the "high bar" that applications for deregistration should meet.

74. Mr Flanagan and Mr Edwards submitted that the interpretation of the policy in paragraph 5.1 contended for by Mr Holland is incorrect. For town and village greens the policy applies the "no worse off" test overall to the several interests to which section 16 relates, not merely to the rights of the inhabitants of the "defined neighbourhood" – which are not actually mentioned in the policy. Mr Edwards submitted that the policy requires an "in the round" assessment of the relevant factors.

75. I reject Mr Holland's argument on this issue. His suggested interpretation of paragraph 5.1 of the Common Land Consents Policy is, in my view, both incorrect and impractical.

76. The court's approach to the interpretation of planning policies and similar forms of policy is well established. It will not construe such policies as if they had been drafted with the precision one would expect to see in a contract or a statute. It will draw the meaning of the policy from the words used, having regard to the context in which the policy sits (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraph 19). It should avoid putting a gloss of its own upon the terms of the policy. It should read the policy with realism and common sense (see the leading judgment in *Monkhill v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 74, at paragraph 26). It will remember that such policy is intended to aid reasonably consistent and predictable decision-making (see the judgment of Lord Sales and Lord Burnett in *A v Secretary of State for the Home Department* [2021] UKSC 3, at paragraphs 34 and 39).

77. Following those principles, I do not think it is right to read paragraph 5.1 of the Common Land Consents Policy as requiring each set of interests identified in section 16(6)(a) to (d), individually, to gain by the deregistration and exchange proposed, or at least to suffer "no net harm", as Mr Holland suggested. The true meaning of the policy is that there should be an assessment overall of the likely effects of the proposal on all the interests referred to in paragraphs (a) to (c), and, under paragraph (d), also having regard to "any other matter considered … relevant" by the decision-maker. It does not require a net benefit for, or at worst a neutral impact on, each of the interests identified. It expects a general and complete assessment of the effects of the proposal on all of those interests.

78. The policy focuses on the "primary objective" of the Secretary of State: "to ensure the adequacy of the exchange of land in terms of the statutory criteria", in the plural. It also speaks in the plural of "the interests (notably the landowner, commoners, and the wider public)", concepts spanning the range of interests referred to in section 16(6). It states the Secretary of State's expectation that those "interests", plural, will be "no worse off in consequence of the exchange than without it, having regard to the objectives in Part [3] above". And it refers to the replacement land being "equally advantageous to the interests", plural again (emphasis added).

79. The use of these expressions, in my view, makes it clear that the policy does not compel or contemplate an assessment in which the effects of the proposed deregistration and exchange on each of "the interests" are required, separately, to be either positive or neutral, either benefiting each individual category of interests or leaving it "no worse off". It does not impose such a test. Nor is it necessary to infer such a test to make sense of the policy. On its proper construction, the policy calls for the decision-maker to ascertain whether the exchange of land will be adequate when considered against all the "statutory criteria", and not necessarily also against each criterion on its own. It looks to the decision-maker to assess the effects of the proposal on the specified considerations as whole, some of them possibly pulling in different directions – as Mr Edwards submitted they may. And it does not state a more onerous requirement for the replacement land than that it should be "equally advantageous to the interests".

80. The judge was therefore right, I think, to conclude that the interpretation of paragraph 5.1 of the Common Land Consents Policy advanced on behalf of Ms Strack is wrong. That interpretation is inimical to the purpose of section 16(6) of the 2006 Act to achieve, in each case of proposed deregistration and exchange, a balanced and complete assessment of effects on the several interests engaged.

81. Finally here, in my view the inspector clearly proceeded on a correct understanding of the Common Land Consents Policy. He neither misinterpreted the policy nor misapplied it. He assessed the likely effects of the proposed deregistration and exchange on all of the specific interests identified in section 16(6) and he also considered other relevant matters, bringing his assessment to an overall conclusion in paragraph 60 of his decision letter. That process of decision-making complied with the requirements of the policy.

The judge's conclusions on ground 2 of the claim

82. On ground 2 of the claim, Lane J. found that the inspector "did have express regard to what [Ms Strack] refers to as the fallback option, of local residents, including [herself], maintaining the release land". This was evident from paragraphs 30 and 31 of his decision letter, where he recorded the objectors' contention that they did not need permission to resume the kind of maintenance work they had carried out before Laing Homes Ltd. withdrew consent for it (paragraph 95 of the judgment). The judge went on to say that the inspector "did not need to reach a conclusion on who was right, as a matter of law" because "he placed weight on the fact that, in practice, little work had been carried out since permission for it was withdrawn by [Laing Homes Ltd]"; he was entitled to do this "as a matter of judgment" (paragraph 97). The judge concluded that there was "no *non sequitur*" in the inspector's reasons on this issue, and no failure to have regard to a material consideration (paragraph 99). He expressed no view on the extent to which "nature conservation activities" of the kind previously undertaken by Ms Strack and others on the release land could be said to be a "lawful sport or pastime" (paragraph 100).

The third issue: did the inspector err in his consideration of the "fallback"?

83. Mr Holland submitted that, when considering "Nature Conservation" as an aspect of the "public interest" in paragraphs 29 to 39 of the decision letter, the inspector failed to resolve the disputed question of whether the continued maintenance of the release land for "nature conservation" by the residents of the "defined neighbourhood" would be possible and lawful without the permission of Laing Homes Ltd.. The "fallback" required him to consider what would happen in the future, not just that maintenance had stopped when consent was withdrawn. By the time of the inquiry the committee had taken legal advice and now believed, correctly, that it could lawfully resume maintenance work without permission. In several cases it had been accepted that those with rights to use land for lawful sports and pastimes were permitted, in law, to maintain that land for the exercise of those rights, or as a form of recreation in itself (see, for example, *Mounsey v Ismay* (1863) 1 H. & C. 728, *Lancashire v Hunt* (1894) 10 T.L.R. 310, *White and others v. Taylor and another (No. 2)* [1969] 1 Ch. 160). The inspector

failed to see that this was not merely "an important public benefit" to be considered under section 16(6)(c) but inherent in the rights of residents of the "defined neighbourhood", and relevant therefore under section 16(6)(a). The owner of a village green cannot enhance his case for deregistration by simply refusing to permit maintenance work by residents of the "defined neighbourhood". Indeed, submitted Mr Holland, for the landowner to prevent such work would be unlawful.

84. In my view, the judge's analysis on this issue was essentially correct. The inspector did not err in dealing with the objectors' "fallback" argument.

85. I doubt the appropriateness of describing the situation envisaged here as a "fallback option" or "fallback position". I think one must be careful not to misapply the case law on "fallback" development in planning decision-making. The relevance of a "fallback" as a material consideration in planning decisions is normally as an alternative form of development that could be carried out by the applicant if planning permission is not granted for the proposal under consideration (see the leading judgment in *R. (on the application of Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at paragraph 27). Here, by contrast, the concept of a "fallback" is being applied to a course of action said to be lawfully open to objectors to the proposed deregistration of a village green if that deregistration does not proceed. That is a different situation.

86. But in any case the inspector did take into account the so-called "fallback" as a material consideration, and he did so appropriately and sufficiently. The weight to be given to it, if any, was a matter for him as decision-maker, subject only to challenge on public law grounds. What he had to do, it should be remembered, was to establish to his own satisfaction whether the proposal before him, if approved, would have unacceptable effects on "Nature Conservation". He did that. His ultimate conclusion in paragraph 39 of his decision letter – that the proposal was unlikely to result in any significant adverse effect on nature conservation, and likely to enhance nature conservation value on the replacement land and the improvement land – is not directly attacked in the claim. He could properly come to that conclusion without having to decide the legal question of the rights holders' entitlement to carry out maintenance work on the village green. On a fair reading of paragraphs 29 to 39 of the decision letter, it is clear that he did not ignore the objectors' argument that they lawfully could and would undertake such work, but did not conclude that the effects of the proposed deregistration and exchange on nature conservation would be unacceptable overall.

87. The inspector's discussion of the effects on "Nature Conservation" in that passage of the decision letter shows he did not ignore the contention that the rights holders intended to resume maintenance work for "nature conservation" and that this was something they could legitimately do without obtaining the consent of Laing Homes Ltd. as landowner. It is also plain, as a matter of fact, that he did not reject the possibility of this happening, or the proposition that it would be, as the objectors contended, an activity within the lawful exercise of the rights arising from registration to use the village green for lawful sports and pastimes. On the contrary, he expressly incorporated these matters in his assessment. But having done so, and taking into account everything else bearing on his consideration of the likely effects of the proposal before him on "nature conservation", he was able to conclude, on balance, that those effects would not be unacceptable. In reaching that conclusion he did not find it necessary to resolve the legal question of the rights holders' entitlement to carry out maintenance work on

the village green. He took the intentions of the rights holders at face value, regardless of their legality, along with every other relevant factor. In short, he did not accept that the likelihood of some benefit to "nature conservation" being realised if the proposed deregistration and exchange did not go ahead would negate the acceptability of the effects on "nature conservation" if it did.

88. It was reasonable to approach the matter, as he did, in the knowledge of what had previously happened, including the fact – as he said in paragraph 31 – that "little work has been carried out since the withdrawal of permission in 2018". He did not have to address the fact that legal advice, recently given, had evidently supported the objectors' suggestion that maintenance work carried out by rights holders for the purposes of nature conservation would not require the landowner's consent or was itself a "lawful sport or pastime". It was enough to recognise the parties' dispute on that question as one of the matters he took into account in coming to the conclusion he did.

89. Thus the inspector's treatment of the so-called "fallback" is not, in my view, invalidated by any misdirection of law. His exercise of evaluative judgment on the likely effects of the proposal on nature conservation was not unreasonable in the *Wednesbury* sense. His conclusion was rational. And it was clearly and adequately reasoned. He did not fail to have regard to any material consideration. In short, he committed no public law error.

90. On that analysis of the inspector's consideration of the "fallback" there was no need for him to grapple with the question of whether ecological enhancement and maintenance qualifies, in itself, as a "lawful sport or pastime", or falls within the right of qualifying inhabitants to use a town or village green for recreation. Nor is there any need for us to express a conclusion on that question, though we heard counsel's submissions. The point is not an easy one. And I think it should only be decided, on full argument, when the need arises.

Materiality and section 31(2A) of the Senior Courts Act 1981

91. I have had the benefit of reading in draft the judgment of Singh and Elisabeth Laing L.JJ.. Although we agree on the relevant law, and also on the second and third main issues in the appeal, we disagree on the first – specifically on the question of whether the inspector fell into error in his assessment of the proposal on its merits. However, I share their conclusion, in the light of the further submissions we invited after the hearing, that the error they have identified could not be regarded as material. I also agree that in the circumstances of this case section 31(2A) of the Senior Courts Act 1981 applies, because in any event it is, I think, highly likely that if the error in question had not been made the outcome for Ms Strack would not have been substantially different. The inspector's conclusion, in paragraph 49 of his decision letter, that the "application would have only a marginal adverse effect on accessibility from the defined neighbourhood" has not been challenged in these proceedings, nor could it reasonably be. And even if he did go wrong in paragraph 15, as Singh and Elisabeth Laing L.JJ. have held he did, his mistake could not have upset his conclusion, as a matter of judgment, that the benefits of the proposed deregistration and exchange outweighed any disadvantage when the balance was struck.

Conclusion

92. For the reasons I have given, I would dismiss the appeal.

Lord Justice Singh and Lady Justice Elisabeth Laing:

93. We are grateful to the Senior President of Tribunals ("SPT") for setting out the factual and legal background to this appeal, which we need not repeat. We agree with him that Grounds 2 and 3 should be rejected. We also agree with his analysis of the legal principles which arise under Ground 1. Where we respectfully differ from him is in the application of those principles to the particular circumstances of this case. Despite the cogent way in which the SPT has expressed his reasons, we have reached the conclusion that the inspector did err in law in his decision letter in this particular case.

94. Nevertheless, we would dismiss the appeal on Ground 1. The reason concerns the significance of that error of law. We consider either that the error is immaterial, or, if it is not, that the test in section 31(2A) of the Senior Courts Act 1981 ("the 1981 Act") is met. In other words, even if the inspector had not erred in law as we think he did, it is inevitable that he would have reached the same conclusion, or it is highly likely that the outcome would not have been substantially different for Ms Strack. In either event, the appeal fails. We say more about this point in paragraphs 106-115 below.

(1) Did the inspector err in law?

95. At paragraph 13 of the decision letter the inspector correctly directed himself as to the requirements of section 16(6)(a)-(d) of the 2006 Act. It is clear from the structure of the rest of the decision letter that the inspector then addressed each of those four matters in that order.

96. The first matter he addressed was the interests of persons occupying or having rights in relation to the release land, at paragraph 15:

> "The release land is owned by Laing Homes (TW), the applicants. There are no registered rights of common over it. 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."

97. Reading that passage fairly, it is reasonable to suppose that, when he used the phrase "the public" twice in the same sentence, he meant the same thing. He was clearly flagging that he would consider the effect of the application on the interests of the public later in the decision letter and that this would include its effect on the "right" of the public to access the land for the purpose of lawful sports and pastimes.

98. The inspector then addressed the interests of the neighbourhood at paragraphs 16-28. He addressed the public interest at paragraphs 29-57. Finally, he addressed other matters at paragraphs 58-59.

99. In his discussion of the interests of the neighbourhood, he said the following at paragraph 24:

> "The replacement land adjoins the western edge of the existing green but is different in character to the release land and other parts of the existing green. It consists of a relatively flat grassed area, used for grazing until recently, and a belt of woodland. It is further away from many properties in the defined neighbourhood than the release land. However, a proposed new access point from Barnet Lane at the south-west corner of the land would make the revised village green more easily accessible from properties to the west."

100. At paragraph 27, the inspector said the following:

> "Overall, the proposed deregistration and exchange will affect the interests of the neighbourhood by restricting access to the closest part of the village green to some of the defined neighbourhood. It will also reduce the amount of semi-natural grassland that is accessible. On the other hand, the release land is arguably the least attractive part of the village green for many users and the replacement land will offer the potential for a wider range of activities on the green and will 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."

101. When considering the public interest, in particular under the heading 'Public Access', the inspector said the following, at paragraphs 48-49:

> "48. Analysis by a transport consultant on behalf of the applicants, which was not challenged by objectors, showed that 23 out of 480 households within the defined neighbourhood would no longer be within 400m (5 minutes) walk of an access point if the application is approved and no new access from Byron Avenue made available. All 23 of these households would still be within 500m of access points. If all households in the area are considered, 8 out of 713 would no longer be within 400m but an additional 195 would be within 800m (10 minutes) walk and a further 282 within 1200m.
>
> 49. This analysis suggests 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. I also note that residents from the west would be able to access the revised green without having to walk an additional 350m approximately along the steep and relatively narrow footway adjacent to the busy Barnet Lane."

102. In our view, the inspector erred in law at paragraph 15 of the decision letter when he said that the relevant legal rights belonged to "the public". The correct legal position was set out by Lord Carnwath JSC in *Barkas* at paragraphs 53-57. At paragraph 55, Lord Carnwath said that the Trap Grounds case establishes that the rights so created are available to "the relevant inhabitants", which he took to mean that in principle they were available to the inhabitants of the relevant locality, rather than to the public at large. At paragraph 56, he continued that it may be that in practice, once land is registered under the Act (there the Commons Registration Act 1965), no attempt is (or can realistically be) made by owners or others to distinguish between groups of users. However, it seemed clear in principle that a local link of some kind remains an essential feature both of the use and of the resulting rights.

103. Although, as the SPT points out at paragraphs 48-50 of his judgment, there are dicta in judgments of the Supreme Court which have used the phrase "a public right" in this context, the issues in cases such as *Day* and *TW Logistics* were different from the issue which has arisen on this appeal. As Lord Carnwath made clear in *Barkas*, the phrase "a public right" is perfectly understandable to paraphrase the nature of the legal rights concerned but it is not strictly accurate. Indeed, as we read paragraphs 56-57 of his judgment, the SPT acknowledges that the strict legal position is "elementary".

104. In any event, whether it was correct or permissible for the inspector to describe that right as a "public right" is not the issue. In paragraph 15, the inspector was identifying the group of people who had that right (whatever it might properly be called). He identified that group as "the public" (which we understand to be the public generally), and not as the inhabitants of the defined neighbourhood. To that extent, he erred in law.

105. Returning to the decision letter, in our view, the inspector never set out that he perceived any distinction in law between the position of the inhabitants of the relevant neighbourhood and other inhabitants, in particular those to the west of the replacement land. For example, at paragraphs 24 and 27, and again at paragraphs 48-49 of the decision letter, the inspector appears to have proceeded on the basis that the interests of the two categories of persons were the same. That is not correct as a matter of law, because the inhabitants of the defined neighbourhood have legal rights, whereas the others do not. This is also clear from the terms of section 17 of the 2006 Act, which sets out the legal consequences of a successful application for deregistration under section 16: the inhabitants of the defined neighbourhood acquire legal rights over the replacement land, whereas others in the neighbourhood do not.

106. We agree with the SPT that (i) the concept of "interests" is wider than "rights"; (ii) the range of interests which have to be taken into account under section 16 of the 2006 Act is broad and includes the interests of people in the neighbourhood in the wider sense than the defined neighbourhood; (iii) there is no hierarchy of interests in section 16; and (iv) the weight to be given to the various matters which the inspector had to be taken into account was for his judgment, subject only to *Wednesbury* review. We also agree with the SPT, at paragraph 66, as to the general approach that must be taken to the interpretation of a decision letter. One sentence in paragraph 15 of the decision letter must not be read in isolation or out of context. But, when the decision letter is read fairly and as a whole, unlike the SPT, we have reached the conclusion that the inspector did err in law.

107. It is likely that the reason why the inspector proceeded as he did was because of the way in which the case for each party had been put to him at the inquiry. It is clear from the various written submissions that we have seen that the authorities which have played a major part in this appeal (in particular *Barkas*) were not drawn to his attention. It is not surprising therefore that he did not refer to them or appreciate their legal effect. The issue which has become the main issue on this appeal was not given the prominence before the inspector that it has since received.

(2) What is the significance of that error?

108. That all said, we have also reached the conclusion that it is clear what the position would have been if the inspector had directed himself correctly in law.

109. At the Court's invitation the parties submitted written arguments after the hearing on two questions:

(1) if the inspector did err in law, whether any such error was material; and

(2) if any such error was material, whether it was an error to which section 31(2A) of the 1981 Act applies.

110. On behalf of the Appellant it is submitted that the error of law by the inspector under Ground 1 was material and that section 31(2A) does not apply. Alternatively, it is submitted that the Court should disregard section 31(2A) on the grounds of exceptional public interest under section 31(2B).

111. The Appellant submits, first, that the inspector erred under Ground 1 in that it was "illegitimate" to balance away the rights of the qualifying residents against the interests of others who are, in law, trespassers. It is submitted that the inspector was not entitled to engage in that balancing exercise and it simply cannot be said that it is highly likely that the outcome would not have been substantially different but for that reason.

112. Alternatively, it is submitted that inherent in the balancing exercise the inspector undertook was a judgment about the weight that he afforded the benefits and disbenefits to the different groups concerned (including the residents of the defined neighbourhood and the residents outside that neighbourhood). It is submitted that the Court cannot assume that the inspector would have accorded the same weight to each interest had they been properly understood.

113. On behalf of the Respondent and the First Interested Party it is submitted that any error as alleged in Ground 1 was not material; in the alternative, even if there was a material error, it is highly likely that the outcome for the Appellant would not have been substantially different if the inspector had not made that error.

114. It is submitted in particular that, the terms of section 16(6) of the 2006 Act clearly permit the inspector to have regard to a broad range of interests. The weighing of those interests was then a matter for the inspector, subject only to *Wednesbury* review.

115. In our view, it is clear that the inspector engaged in what was essentially a balancing exercise. He was entitled to have regard to the various interests, even if they were not

strictly speaking legal rights, and the question of the weight to be given to those interests was essentially a matter for his judgment. As the SPT has explained, the inspector went carefully through the various interests that he had to weigh in the balance, including the rights of those concerned under section 16(6)(a) of the 2006 Act. In paragraphs 16-28 he considered the interests of those who live in the defined neighbourhood (see paragraph 17). His conclusion about their interests (paragraph 28) was that "the potential benefits resulting from the proposals outweigh the perceived disadvantages with regard to the interests of the neighbourhood". In strict theory there is a difference between "the interests of persons having rights etc" and "the interests of the neighbourhood", but in the context of this reasoning they seem to us to be as good as identical. He decided in paragraph 28 that "the potential benefits resulting from the proposals outweigh the perceived disadvantages with regard to the interests of the neighbourhood". The conclusion he reached was essentially one of weight and judgment for him. We agree with the SPT, at paragraph 71 above, that the inspector's conclusion was not irrational in the *Wednesbury* sense.

116. Accordingly, we have reached the conclusion that any error under Ground 1 by the Inspector was not material; and that, in any event, section 31(2A) clearly applies. Relief must therefore be refused by the Court. We do not consider that this is a case in which the public interest exception permitted by section 31(2B) ought to be applied by this Court. The inspector's decision was essentially one taken on the particular facts of this case.

117. For the above reasons we too would dismiss this appeal.