Neutral Citation Number: [2010] EWHC 530 (Admin)

Claim No: CO/6298/2009

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

Date: 23 March 2010

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

R (OXFORDSHIRE & BUCKINGHAMSHIRE MENTAL HEALTH NHS FOUNDATION TRUST and OXFORD RADCLIFFE HOSPITALS NHS TRUST)

Claimants

and

OXFORDSHIRE COUNTY COUNCIL

Defendant

and

(1) PAUL DELUCE
(2) CHRISTOPHER WHITMEY
(3) ROSIE BOOTH

Interested Parties

Charles George QC and Philip Petchey (instructed by Clarkslegal LLP Solicitors) for the Claimants
Charles Mynors (instructed by the County Solicitor, Oxfordshire County Council) for the Defendant
Ross Crail (instructed by Public Law Solicitors) for the First Interested Party
The Second and Third Interested Parties appeared in person

Hearing dates: 25 and 26 February and 17 March 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This is an application for judicial review of a decision of the Defendant, Oxfordshire County Council ("the Council") made on 6 April 2009, by which it resolved to register an area of land known as Warneford Meadow ("the Meadow") as a new town or village green ("TVG") under the Commons Registration Act 1965 ("the 1965 Act") as amended. Registration itself has not yet been effected due to these proceedings.

2. The resolution was passed following the submission of a report by the County Solicitor and Head of Legal Services in January 2009, recommending registration. That recommendation was itself the result of advice contained in the report of Vivian Chapman QC dated 18 October 2008 ("the Report"), supplemented by his Further Report dated 28 January 2009.

3. The application to register the Meadow as a new TVG was made by Mr Paul Deluce, the First Interested Party in this case, on 19 December 2006. There is no specific procedure under the 1965 Act to hold a public inquiry but the Council decided to hold one under its general powers pursuant to s111 of the Local Government Act 1972. To that end it appointed Mr Chapman as the Inspector. He has very extensive knowledge and experience of this area of the law and has often acted as Inspector in relation to TVG applications.

4. The objectors to the application were the Secretary of State for Health ("SOSH"), the owner of the Meadow, the South Central Strategic Health Authority and the Second and Third Interested Parties in this case, Mr Whitmey and Mrs Booth. In this judgment I shall use the expression "the Authority" to refer to the Claimants, the predecessor authority ie the Oxford Regional Health Authority (responsible for the 1989 signs referred to below) or the South Central Strategic Health Authority, as the context requires. Registration of the Meadow as a TVG has, among other things, the effect of preventing development on the land, or its sale for development which is what the SOSH and the Authority wish to do, in order to generate funds for the provision of new health facilities.

5. The Inquiry took place over 15 days in October 2007, January and May 2008. Following the hearing of much evidence and the receipt of detailed oral and written submissions, the Inspector produced his Report running to some 79 pages. He then received further submissions which commented on the Report and this led to the Further Report in which he confirmed his original recommendation. Accordingly although the decision in question is that of the Council, the focus of this case is upon the Report and Further Report. The Authority contends that they contain errors of law such that his recommendation, and in turn the decision of the Council, should be quashed. Mr Whitmey and Mrs Booth support that claim. It is resisted by the Council and also by Mr Deluce. I heard from Mr George QC for the Authority and Mr Whitmey in person for himself and Mrs Booth. I heard from Mr Mynors for the Council and Ms Crail for Mr Deluce. I am grateful to them all for their assistance and submissions.

STATUTORY BACKGROUND

6. At this stage it is necessary only to set out the definition of the relevant class of TVG with which the Inspector was concerned. It is to be found in s22 (1A) of the 1965 Act as amended by s98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act") which states that land falls within this subsection if:

> "it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and ...(a) continue to do so..."

OVERVIEW OF THE MEADOW AND ITS ENVIRONS

7. The location and layout of the Meadow is shown most clearly on the large map at p276HH of the hearing bundle ("the Map"). It is about 20 acres in size. Its northern boundary is constituted by Roosevelt Drive beyond which is a housing estate called Little Oxford built in 1991. To the north-west is the Warneford Hospital. To its east lies Boundary Brook beyond which is the large complex of the Churchill Hospital. To the west there is an area of long-established housing stretching down from Hill Top Road to the Cowley Road.

8. At the Inquiry Mr Deluce contended that in this case the user was by a significant number of the inhabitants of a neighbourhood referred to as the Divinity Road Neighbourhood ("DRN"). This was said to consist of an area of housing as follows: the northern boundary was the rear of the houses on the north side of Divinity Road, the eastern boundary was the rear of the houses on the east side of Hill Top Road, the southern boundary was Bartlemas Close and the Southfield Park Flats and the western boundary was the Cowley Road. It included the hamlet of Bartlemas, Warneford Road, Minster Road and the Southfield Park Flats. The total number of dwellings in this neighbourhood was 890. The definition of DRN was later amended to include the Meadow itself.

THE INSPECTOR'S CONCLUSIONS

9. Broken down into its constituent parts, the key express requirements of s22 (1A) in this context may be described thus: there must be

   (1) Land on which
   (2) for not less than 20 years
   (3) a significant number of the inhabitants of any .... neighbourhood within a locality
   (4) have indulged in lawful sports and pastimes,
   (5) as of right, and ...
   (6) continue to do so.

10. The Inspector found that Mr Deluce had established each of these elements. However, it is important at this stage to note that the Inspector did not find the relevant neighbourhood to be DRN. Instead, he found it to be a much smaller area within DRN consisting of the houses on Hill Top Road. I shall refer to this neighbourhood as "HTRN". See paragraphs 375 and 380 of the Report. It is not suggested that it was not open to the Inspector to find a different qualifying neighbourhood. Hence the Authority does not challenge that finding. Equally, there is no challenge by Mr Deluce to this finding and given that his application in fact succeeded, it is perhaps difficult to see how he could.

11. It should also be noted that it was and is common ground that of the total estimated number of witnesses who submitted evidence of use of the Meadow, about a third came from HTRN, another third from the residential area to the west of the Meadow excluding HTRN (ie more or less, the balance of DRN) and the final third from the area to the north of the Meadow.

THE ISSUES

12. There is no challenge to the findings that the Meadow constituted land on which the inhabitants of HTRN (being the qualifying neighbourhood) had indulged in lawful sports or pastimes for 20 years and continued to do so. It is common ground that the relevant 20 year period ended on the date of the application ie 19 December 2006, so that it started on 19 December 1986.

13. However, it is (and was before the Inspector) contended by the Authority and Mr Whitmey that such 20 year usage was not enjoyed "as of right". This is because of the erection of certain signs on the Meadow by the Authority between January and March 1989 which read "No Public Right of Way". It was said that these notices rendered the use of the Meadow for lawful sports or pastimes contentious so that an uninterrupted 20 year period of such use could not be shown as at the date of the application. On the application before me it is said that in rejecting that argument and in finding that these notices did not make the user contentious the Inspector made two errors of law:

    (1) First, in deciding what the nature and effect of the notices was, he wrongly took into account the subjective intention of the Authority in relation to the notices, and

    (2) Second, he also took into account on this question certain documents which post-dated the period when the notices were there namely January – March 1989.

14. These alleged errors form ground 1 of the application for judicial review to which I shall refer as "the Notices Issue".

15. In addition it is contended before me (and was contended in the Authority's Further Representations dated 10 December 2008) that the Inspector erred in law in finding that there was sufficient usage of the Meadow by a significant number of the inhabitants of HTRN. This argument is founded upon the contention that although s22 (1A) of the 1965 Act does not expressly say so, it was an implied requirement of the section that not only must the use of the Meadow have been by a significant number of the inhabitants of HTRN, but also that the Meadow was used <u>predominantly</u> by such inhabitants ("the Predominance Test"). If the Predominance Test were to apply to this case, it could not be satisfied because on the evidence only about one-third of the users came from HTRN, the only qualifying neighbourhood found by the Inspector. It is implicit in the Report and made explicit in the Further Report that the Inspector rejected the notion that the Predominance Test applied. No more was required than that the users of the Meadow included a significant number of the inhabitants of HTRN. The fact that they constituted only about a third of the total users was irrelevant. This gives rise to the second ground for judicial review and is a pure question of law ie does the Predominance Test apply to s22 (1A) or not? I refer to it as "the Neighbourhood Issue".

16. Thirdly, the Authority contends before me that the Inspector made a further error of law when he described the consequences of registration of the Meadow as a TVG for users who did not come from HTRN. It is common ground that he did make an error of law here and the sole question is whether this error can be said to have had any material impact on his conclusion that the Meadow be registered. I shall refer to this as "the Subsequent Rights Issue". I deal with each issue in turn.

THE NOTICES ISSUE

The Law

17. It is common ground that the expression "as of right" means not "by right" but "as if by right". In order to be as of right a user must be *nec vi nec clam nec precario* – not by force, stealth or licence from the owner. User by force is not confined to physical force. It includes use which is "contentious". A landowner may render use contentious by, among other things, erecting prohibitory signs or notices in relation to the use in question.

18. In this case the Notices Issue raises the question of the proper approach to deciding whether a particular notice has indeed rendered the use contentious. In this regard I refer first to the judgment of Pumfrey J in *Smith v Brudenell-Bruce* [2002] 2 P & CR 4. After reviewing the relevant authorities, he stated at paragraph 12 that:

> "....a user ceases to be user "as of right" if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when the servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."

19. In *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWHC 1813 (Admin) Sullivan J had to consider the adequacy or otherwise of a sign erected on the owner's land in relation to its user for recreational purposes as part of a claim that it be registered as a TVG. The notice said this:

"*Cleveland Golf Club*
Warning
It is dangerous
to trespass on
the golf course"

20. Sullivan J found that the local people using the land were aware of the notice. He then said this:

> "21. I accept that the wording of the notices should not be considered in the abstract. The surrounding context, including any evidence as to their effect upon those to whom they were directed, should also be considered. The response to a notice may well be an indication as to how it was understood by the recipient. Moreover, the notices should be construed in a common sense rather than a legalistic way because they were addressed not to lawyers but to local users of the land.
>
> 22. If the defendant was not acquiescing in the continued use of its land by local people for recreational purposes, it would have been very easy to erect notices saying, for example, "Cleveland Golf Club. Private property. Keep out" or "Do not trespass", followed by a warning "It is dangerous to trespass on the golf course". The fact that local users took umbrage at being described in the notices erected in 1998 as trespassers does not mean that those notices told them to stop trespassing, as opposed to warning them that if they continued to trespass it would be dangerous....
>
> 23. In the present case there was no evidence before Mr Chapman that the erection of the notices in 1998 had any practical effect whatsoever, much less that it had, even temporarily, 'seen off' the use of the land by local people for recreational purposes. The witness who gave evidence about the notices, Mr Fletcher, said that they had been painted out on the night that they were erected. They were re−painted and re−erected three times and then the club gave up. In these circumstances, given the ambiguity and the wording of the notices (to put their possible meaning at its highest from the point of

view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting those notices in 1998 it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users..."

21. By way of contrast in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43, the relevant sign read:

Oxford City Council.
Trap Grounds and Reed Beds.
Private Property.
Access prohibited
Except with the express consent
Of Oxford City Council

22. From those cases I derive the following principles:

(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;

(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;

(3) The nature and content of the notice, and its effect, must be examined in context;

(4) The notice should be read in a common sense and not legalistic way;

(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in *Brudenell-Bruce* (supra) to "consistent with his means". That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more.[1] As it happens, in this case, no point on means was taken by the Authority in any event so it does not arise on the facts here.

In my judgment the following principles also apply:

[1] The reference to means by Pumfrey J seems to have its source in the quotation in the judgment from *Dalton v Angus* (1881) LR AppCas 740 at p773 where Fry J quotes Willes J's reference to the need of a party claiming a right by acquiescence to show that the servient owner could have done some act to put a stop to the claim "without an unreasonable waste of labour and expense". That suggests that reasonableness comes into any means-related argument. So a simple consideration of means does not seem to be enough. Hence my reservation about Pumfrey J's formulation.

(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean – that is simply another way of asking the question as to what the reasonable user would have made of it;

(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;

(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users.

The Inspector's findings on the Notices

Evidence before the Inspector

23. It is common ground, as the Inspector found, that there were three particular paths on the Meadow as at 1989. One of them, FP80, was already designated as a public footpath. Its route can be seen on the Map. There was another path running on the other side of the Meadow. On the Map it is shown as Right of Way 111. It was not however designated as a public footpath then. That only came in 2002. But it is convenient for present purposes to refer to it as FP 111. Third there was a diagonal path running from one end of the Meadow, where FP 80 and FP 111 meet, to its northern boundary at Roosevelt Drive. It is not marked on the Map but is clearly visible in the photographs at pp276AD and AE of the bundle ("the Diagonal Path"). It is also common ground that two of the signs were placed at points B and C on the Meadow as shown in the plan at p340 and that point C is a place from which the three paths referred to above diverged and is an entrance to the Meadow from Hill Top Road.

24. At paragraphs 360-363 of the Report the Inspector found that over the 20-year period, members of the public used the Meadow for recreational purposes including walking with or without dogs, and children playing. This is not challenged.

25. But the objectors argued that the true effect of the notices erected here ("No Public Right of Way") was to render contentious such recreational use at least over the period January-March 1989. In response, Mr Deluce argued that at best, the notices rendered contentious the use of FP 111 and the Diagonal Path as rights of way and had no impact upon recreational user of the Meadow generally.

26. Before turning to the Inspector's findings it is necessary to summarise the evidence before him on the question of contentiousness.

27. First, and as noted in paragraph 70 of the Report, on 21 November 1988 Mr Pomfret of the Campaign for the Protection of Rural England ("CPRE") applied under s53(2) of the Wildlife and Countryside Act 1981 for a modification order to add further public footpaths on the Meadow to the definitive map. At about the same time, the Authority had noted certain unofficial footpaths on the Meadow and was considering putting up notices. The Inspector noted at paragraph 72 that the Authority wrote to its solicitors, Clarks, about this saying that it intended to erect signs at the points marked X on a plan. The location of the signs was probably as set out in the plan at p340. At paragraph 73 he noted that Clarks sent to the Authority a letter of advice dated 28 December 1988 saying that a modification application had been made by CPRE and that the appropriate wording for the signs was "No Public Right of Way". The application for a modification order was supported by a number of evidence forms from a variety of witnesses as described in paragraph 74. On 27 January 1989 CPRE supplied to the Authority copies of the evidence it relied upon.

28. A newsletter from the local Social and Liberal Democrats called "Focus" probably published in January or February 1989 said this:

> "RHA fails to close footpaths [heading]. Congratulations to walkers on the Hospital Fields who have been cheerfully ignoring the rash of "No Public Right of Way" notices which have sprung up all over our footpaths..The [CPRE] submitted a claim to have these added to the county map last November...why does the RHA want to reduce access to the land behind that, which at present is scheduled as open space? Margaret Godden, your County Councillor has written to ask that very question...."

29. Although not referred to expressly by the Inspector in the Report there was before him this further material:

(1) A letter from Ms Godden to the Authority complaining about the notices referring to the CPRE application, stating that the paths have been walked on for generations and asking what they were to understand from the notices to the south of Roosevelt Drive (there called the hospital access road) and whether the Authority hoped to convert the open space to buildings;

(2) The Authority replied by a letter dated 27 February 1989 stating that:

> "The position is that we do not at the moment accept the CPRE claims that additional footpaths have been established across the Churchill/Warneford site and the matter is in the hands of our solicitors. It is being dealt with as a general matter of estate management and no more than that should be read into the erection of the notices to which you refer."

(3) Ms Godden responded by a further letter, dated 7 March saying that she was at a loss to understand why a public authority should think it proper to "restrict access to open land in its ownership". She also said that she had no doubt that the CPRE would succeed in establishing the new footpaths;

(4) An article in the *Oxford Times* from 24 March 1989 referring to the issue over the paths and referring to the Meadow as a "green lung" area of open space, and a statement from Mr Pomfret who said that the "lung" was very popular and their evidence of usage was excellent. Reference was also made in the article to what was said in the correspondence referred to above.

30. In paragraph 77 the Inspector noted that it was accepted that in 1989 a sign saying "No Public Right of Way" was erected on the Diagonal Path at the Hill Top Road end. Paragraph 79 refers to a letter from the Oxford City Council to the Authority dated 31 March 1989, complaining about the erection of the signs in the Lye Valley area which is where Boundary Brook runs at the eastern edge of the Meadow (ie not the location of the particular paths referred to above). But a response came from Mr Banbury then an employee of the Authority who said that the signs had been put up by the City Council Engineer's Department at the request of the Authority to try and stop the establishment of rights of way not on the definitive map.

31. There were then further applications for modification orders in June and July 1989.

32. Paragraph 81 refers to a draft letter of objection to the Council dated 30 May 1990 in respect of the claimed footpaths. The Inspector said that it was unclear whether such a letter was ever sent, but it was clear from the draft that the stance taken by the Authority was that the public had general recreational access to the whole of the Meadow rather than using specific routes in the nature of rights of way. He then quoted from it as follows:

> "The Health Authority has never had a policy to discourage the use of the site as open space by members of the public, but it has never intended to dedicate any particular route through or around the perimeter of the site as a public footpath ... many ... use the site as a recreational area for walking of dogs, or simply to enjoy the more peaceful atmosphere of the site. Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as open space ... the Authority has not objected in the past [to the use] of the site as open space by the public, but it did in 1985 take steps to prevent people walking animals across the land by the erection of signs at various points, including at the point where the hospital service road intercepts the claimed footpaths."

And he added that he was entitled to infer that the letter was drafted by Clarks on the instructions of the Authority.

33. Paragraph 82 refers to a meeting on 5 October 1990 attended by Mr Banbury and Mr Pomfret and the minutes appeared to suggest that the Authority was taking the stance that it was prepared to allow people to wander the Meadow so long as new rights of way were not created. Paragraph 83 refers to the fact that Clarks wrote to the Authority on 7 November 1990 saying that modification orders should be opposed on the basis that public use was not for passage on defined routes but general use for recreation. So the Authority's own case appeared to rely positively on the fact of use and continuing use of the area generally as opposed to the use of paths for rights of way.

34. Ultimately a modification order was made in 1997 to add the paths 111, 112, 113 and 130 as shown on the Map but the Authority objected again, as it was entitled to do. A letter of objection sent on 3 March 1998 stated that the footpaths were used for general recreational purposes. Paragraph 89 refers to a letter from Clarks to the Council objecting to the 1997 modification order. It referred to the "No Public Right of Way" signs and then stated as follows:

> "Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as open space ... our client objects to proposed footpaths on the grounds that no single right of way for the public has been established in the defined positions shown on the plan attached to the proposed order."

35. After a public inquiry, a revised modification order was made in 2002 including the footpaths shown on the Map.

36. The Inspector heard from numerous witnesses called by Mr Deluce. But many of them did not recall, or recall in any detail, the signs erected in early 1989. The Inspector found this odd but it did not alter his finding that they were indeed there and visible. At paragraphs 150-158 he noted the evidence of a Mr Dunabin on which the Authority placed considerable reliance in the hearing before me. Mr Dunabin lived in Southfield Road from 1986 to 1996 and thereafter at Hill Top Road. At paragraph 153 the Inspector said that Mr Dunabin could remember that in 1989 a sign was erected on the Meadow close to the Hill Top Road end of FP80 saying "No Public Right of Way". He thought that it was intended to deter people from leaving FP80. In paragraph 154 the Inspector said however, that the main purpose of Mr Dunabin's evidence was not to deal with his own use of the Meadow but to give evidence about the neighbourhood from which the users of the Meadow came.

37. The Inspector also referred to the evidence of a Dr Graeme Salmon, also called by Mr Deluce. He had lived in Hill Top Road since 1972. At paragraph 279 the Inspector said Dr Salmon had seen the sign once in 1989. He assumed that its purpose was to prevent the Diagonal Path from being recognised as a public right of way. He said that it was "not inconceivable" that the NHS did not object to the general use of the Meadow. It did not say that no-one could come on it at all.

38. A number of live witnesses were also called by the Authority. They included Mr Banbury who worked as a grounds maintenance manager for various NHS bodies and was responsible for the Meadow from 1980 to 1994. Paragraph 311 refers to the fact that in evidence Mr Banbury produced the plan at p340 showing where the signs were and in his written statement he said that the purpose of the signs was "to prevent access and vandalism on the hospital land and to protect the legal rights of the hospital authority." However, the Inspector went on to say that "the contemporaneous documents suggest that the specific purpose was to prevent the creation of new public rights of way across hospital land. Mr Banbury agreed that none of these signs lasted very long. Many of the signs were torn down very quickly." Save for what he said about the purpose of the signs, the Inspector accepted Mr Banbury's evidence.

39. At paragraph 324 the Inspector referred to the evidence of another witness for the Authority, a Mr Caldwell. He had been employed as the Estates Manager since 1990 and had responsibility for the Meadow between 1990 and 1994. Paragraph 324 notes that when cross-examined about "the case put forward by the Secretary of State in relation to the footpath inquiry ie that there was general public access to the Meadow rather than use of defined paths, Mr Caldwell was unable to offer any explanation for the inconsistency between the Secretary of State's respective cases to the footpath inquiry and to the town green inquiry other than that NHS estates staff were not alerted to the risk of registration of NHS land as a new green until guidance was issued in 2001/2002."

The Inspector's Findings of Fact

40. Section 8 of the Report deals with findings of fact. Under the heading "Recreational Use" the Inspector said at paragraph 363 that he also took into account that "in relation to the footpath modification application it was the landowner's own case that use of the Meadow

by the public was general recreational use of the Meadow not confined to passage on specific paths. This case must have been put forward on the instructions of the landowner and must have reflected the landowner's perception at the time."

41. Then, under "Contentiousness" at paragraph 369, the Inspector said this:

> "I find that in January 1989, the landowner erected a number of signs stating "No public right of way". Two of these signs were on Warneford Meadow (as subject to the present application). These were at points B and C on Mr Banbury's plan JNB1. Point B was where FP 111 left Roosevelt Drive in a southerly direction. That sign was referential to FP 111. Point C was near the Hill Top Road entrance to the Meadow. I find that the sign at point C was referential to FP 111 and the diagonal path. Although Mr Banbury claimed that the purpose of the signs was to restrict general access to the Meadow, I find that the purpose of the signs was to prevent FP 111 and the diagonal path from acquiring the status of public rights of way. First, the case of the landowner in relation to the modification order was that it had no objection to general public recreational access to the Meadow, but only to the creation of public rights of way. Second, if the signs had been intended to forbid general access to the Meadow, I do not understand why they did not say so. With hindsight, it seems odd to challenge the creation of public footpaths but not the creation of a new green, but this is explained by the fact that the landowner was unaware of the law relating to new greens."

The Inspector's recommendation

42. Section 9 of the Report is headed "Applying the law to the facts" and under the heading "...as of right..." at paragraph 384 the Inspector said this:

> "In my judgement, recreational use of the application land by the inhabitants of Hill Top Road ... was not...contentious. Access was predominantly by way of the Hill Top Road entrance to FP 80 which was at all times an open and unobstructed lawful entrance. For the reasons explained above, I do not consider that the landowner took any steps which made informal recreational use of the application land by local people contentious...
>
> - The 1989 "no public right of way" signs were erected in an attempt to prevent FP 111 and the diagonal path from becoming public rights of way and did not purport to, were not intended to, and did not in fact restrict general use of the Meadow for recreation by local people ...
>
> If one asked whether the landowner was doing everything, consistent with his means and proportionately to the user, to contest and to continue and to endeavour to interrupt recreational use of the Meadow as a whole, one could only answer in the negative. The cases explain that the thinking behind the *nec vi* requirement is that if use is *vi* (being forcible or contentious) such use negatives the inference that the landowner is acquiescing in the recreational use of his land. It appears to me in this case that the evidence strongly shows that the landowner did acquiesce in general recreational use of his land. He said as much in his case to the footpath inquiry."

The Further Report

43. Following the making of the Report on 15 October 2008 and on about 10 December 2008 the Authority produced detailed Further Representations. Paragraphs 42-58 thereof took issue with the Inspector's finding that the notices were not effective to render the user contentious. Paragraph 49 quoted from paragraph 369 of the Report and then paragraph 50 stated that the Authority did not accept that the landowner's case was that it had no objection to general public recreational access but only to the creation of public rights of way. Rather "it was its position that [it] ..*never had a policy to discourage the use of the site as open space by members of the public and....[it] has not objected in the past to the site as open space by the public*..There **is** a difference." On any view the Authority here was stating what its position was at the time.

44. Paragraph 51 then said that the intention of the landowner was however irrelevant. "A notice must be interpreted objectively and in relation to its effect on users of the land, not by reference to what the landowner was trying to achieve by erecting it." In paragraph 52 it was said that there could be an exception to this; if for example the landowner had told people that it had no objection to their use of the land for recreational purposes this would evidently give the notice a "special meaning which it would not generally bear." Paragraph 53 said that the above addressed what the notices were intended to do. The key question was what the notices in fact did and reference was then made to the judgment of Sullivan J in *Lewis* (supra) at paragraph 21. In that regard further submissions were made at paragraphs 54-58 including a reference to the article in the *Oxford Times*.

45. Then, on 23 January 2009 Mr Deluce submitted a Response to, among other things, the Authority's Further Representations. Paragraphs 7 to 20 contain detailed points in answer on the question of the notices. Paragraph 8 referred to paragraph 81 of the Report and said that the draft letter from May 1990 showed that the objectors were now trying to attribute to the notices a meaning not even perceived by the landowner at the time. Paragraph 12 said that the notices would have indicated to a reasonable person that the landowner's thinking was to try and prevent the establishment of rights of way, and that the contemporaneous evidence (referred to in paragraphs 70-73 and 79 of the Report) showed what that thinking was. Paragraph 13 stated that the notices were subjectively and objectively intended to negative an intention to dedicate rights of way.

46. On 28 January 2009 the Inspector produced his Further Report. On the question of the Notices he simply said this in paragraph 14:

> "I have reviewed again the advice in my Report ..in the light of the objectors' comments. I adhere to the view that these signs did not render contentious general recreational use of the Meadow and I re-affirm the findings and comments at paragraphs 369 and 384 of my Report. I find the arguments in paragraphs 7-20 inclusive of the applicant's response to be convincing."

47. The Recommendation of the County Solicitor of January 2009 was stated to be for the reasons given in the Report and Further Report, and the Resolution of 6 April was in the same terms.

The Authority's points on the Notices Issue

48. Although Mr George QC made it very clear that the Authority's challenge here was based on two alleged errors of law (set out in paragraph 13 above) and that there was no challenge to the Inspector's findings based on irrationality, he nonetheless addressed the Court in some detail on the efficacy of the notices generally, as did Mr Mynors and Ms Crail. Although I am not sitting in general review of the Inspector's advice here it is necessary for me to address the more general arguments both because they set the context for the specific challenges and because Mr Mynors and Ms Crail argue that if and to the extent that there were errors of law, the Inspector would still have reached the same conclusion - see *Simplex GE (Holdings) and Another v Secretary of State for the Environment and the City and District of St. Albans District Council* (1989) 57 P. & C.R. 306 per Cumming-Bruce LJ at p327 – and thus the decision of the Council to register should not be quashed.

49. In my judgment the facts overwhelmingly pointed to the conclusion that under the principles referred to in paragraph 22 above and in particular looking at the notices objectively in context, they did not render the recreational user contentious. This is for the following brief reasons:

(1) The notices were clearly directed to the paths nearby. The Inspector found that the notice at point B was referential to FP 111 and that at point C referred to FP111 and the Diagonal Path. They could not have referred to FP 80 as this was already a public right of way. Given those facts the obvious meaning to be ascribed to them was that those paths were not to, and did not, give rise to a public right of way;

(2) There was no reason why they should be taken objectively to refer to recreational use of the Meadow as a whole. Mr George QC said that a sign referring to there being no right of way is not necessarily limited in its scope to a particular path and he gave the example of an open field with no paths on it at all. That may be so in that context but that is not this case. Here the notices were by paths and have been found as a fact to refer to them and there is a quite separate and distinct use of the Meadow which has nothing to do with the paths, or is only incidentally related to them, namely the general recreational user; here the notices only make sense if they relate to the paths and rights of way in relation to those paths. They are in fact silent as to any other use of the paths for example crossing them while walking the dog or "milling around" in their vicinity;

(3) If the Authority had wanted to render user of the land as a whole contentious, it could and should have said so by using an appropriately worded notice; see the examples referred to by Sullivan J in paragraph 22 of *Lewis* (supra) or that used in the *Oxfordshire* case (supra), as referred to in paragraphs 20 and 21 above. The Inspector made this obvious point in paragraphs 369 and 384 of the Report. See also paragraphs 11 and 14 of Mr Deluce's Response. And there would also have been many more signs, given the number of different access points, as can be seen from the photograph at p276AD; the fact that the users from HTRN may have concentrated on the entrance at point C is no answer to this argument;

(4) There is in fact no body of evidence from users to challenge this interpretation of the notices. Mr George QC placed emphasis on the evidence of Mr Dunabin referred to at paragraph 36 above because he was from HTRN. But in fact he did not live there at the material time in 1989. On the other hand, Dr Salmon, whose evidence is referred to at paragraph 37 above, did. And if anything, his evidence supported Mr Deluce's case not that of the Authority; moreover the Inspector was entitled to reject Mr Dunabin's view of the sign in his determination of what he thought, objectively, it meant to the users in general. There is no challenge to any such rejection;

(5) The form of notice here is a classic response to an application for the establishment of further public footpaths, bringing into play the evincing of a contrary intention for the purposes of s31 (1) and (3) of the Highways Act 1980; and see paragraphs 10 and 13 of Mr Deluce's Response.

50. Against that background I deal with the alleged errors of law. First it is necessary to consider what the Inspector meant when he referred to "contemporaneous" documents or evidence in paragraphs 311 and 314. The context of this was Mr Banbury's evidence. I agree that some

of that material is likely to have included letters between the Authority and Clarks, its solicitors, and the May 1990 draft letter. But it may well also have included the letters to and from Councillor Godden. It needs also to be remembered that the question of the purpose of the notices from the Authority's point of view arose here because of the evidence of Mr Banbury, which it chose to adduce, that there was a wider purpose to the notices than the prevention of new rights of way. That being so, the Inspector can hardly be criticised for making a finding on that point even if to some extent it related to the subjective intent of the Authority. The same is true of that part of paragraph 369 where the Inspector rejects Mr Banbury's claimed purpose.

51. More pertinent are the Inspector's references to the Authority's "case" in respect of the footpath application. In paragraph 324 he refers to its case on "the footpath inquiry" (ie general public access as opposed to use of defined paths), in paragraph 363 he refers to the Authority's "own case" to that effect in relation to the footpath modification application and in paragraph 369 he refers to its case in relation to the footpath modification order. I accept that knowledge of what the Authority's case was is likely to have been drawn in part from the internal documents referred to above. I also accept that some aspects of the footpath application process came some considerable time after early 1989 so that what was said at that later stage would not itself qualify as communications to the users at the time when the notices were up. But it is not clear when the Authority first enunciated its "case" in relation to footpaths. What can be said is that the letter to Councillor Godden did explain its position in that specific context – and on a fair reading is clearly limited to the question of rights of way. Moreover the references by Councillor Godden to "restricting access to" the open space suggest a contemporaneous view by her (and presumably the users she was speaking for) that the perceived problem was reduced access, not prohibition of user. So the "case" mounted by the Authority is not exclusively to be drawn from later internal documents. And certainly, at the Inquiry it does not appear as if the Authority was drawing any firm lines in terms of date by reference to the footpath application, such that any "case" mounted by the Authority must have been long after the signs had gone.

52. Moreover as is clear from the last part of paragraph 369 of the Report, part of the reason why the Inspector found that the notices had the more limited purpose is because they would have said something different if it was wider.

53. The actual finding on the notices is at paragraph 384. First the Inspector said that the notices were not referential to the Meadow as a whole. He then said that they did not purport to and were not intended to and did not in fact restrict general use. "Purport" is a reference to objective meaning and intention may have referred to both subjective and objective intent. And what they did in fact is clearly not a matter of subjective intent. The last sub-paragraph of paragraph 384 directly applies that part of the judgment of Pumfrey J in *Brudenell-Bruce* (supra) referred to in paragraph 18 above, concluding that the landowner did not do everything proportionately to the user to interrupt recreational use. The Inspector then said that the evidence showed that the landowner had acquiesced in the general user and the landowner had said as much in his case to the footpath inquiry. Even on this last point if the landowner had said subsequent to the erection of the signs in 1989 that it <u>had</u> acquiesced in the general recreational use there would be nothing to stop the Inspector inferring (as I think he was) that this is what it was doing back in 1989. And that is not a matter of subjective intent either. (See also what the Authority itself said was its position in paragraph 50 of the Further Representations, referred to in paragraph 43 above). So taken as a whole I cannot

see that this paragraph relied on some pure expression of subjective intent to any significant degree at all.

54. It is then said that the Inspector did not in his Further Report directly address the question of the legitimacy of relying on evidence of subjective intent as raised by the Authority in paragraph 51 of its Further Submissions. That is true, but the Authority made many other submissions apart from that one and there were many arguments raised by Mr Deluce in his Response which did not rely upon such evidence and the Inspector expressly accepted all of his further arguments.

55. Mr Whitmey has argued that the Authority's objection to a lesser burden on the land (use of paths as public rights of way) must have by implication and without more included objection to a greater burden ie recreational use of the entire Meadow. I disagree. The two users are simply different. Objection to one does not of itself entail objection to the other. Mr Whitmey also argued that time only started to run against the Authority in June 1999 when the law changed. There is nothing in this. The ability to establish class (c) rights was there in the 1965 Act and in any event ignorance of the law is no excuse. Finally the fact that one of the Councillors on the Committee apparently thought that the Authority could have protected itself by locking the gates for one day, which would not in fact have worked since there was a public footpath, is irrelevant. The Committee clearly adopted the reasoning in the Report and Further Report in its entirety.

56. In my judgment the overall thrust of the Inspector's reasoning did not depend on evidence which did no more than state (a) what the Authority's subjective intent was or (b) a position taken by it which could have had no reference back to its position as at early 1989. While therefore I am prepared to hold that there was an error of law because there was, or may have been, <u>some</u> reliance on uncommunicated subjective intent and/or post-March (or even February) material, it can be safely disregarded, applying the principles in *Simplex* (supra). The Inspector would have come to the same conclusion even absent such reliance.

57. I should add that if this matter goes further, Ms Crail reserves the right to argue in addition, (a) that as the notices here were disregarded this deprived them of any effect and (b) that a "no public right of way" sign is not even capable of rendering contentious, public use for passage of the path to which it refers. See paragraphs 16 and 17 of her Skeleton Argument.

<u>THE NEIGHBOURHOOD ISSUE</u>

The Inspector's findings

58. I have referred in paragraph 10 above to the fact that the Inspector found that the relevant neighbourhood was not DRN but HTRN. He explained the reasoning behind this at paragraph 375 of the Report. At the end of that paragraph he said that he thought that the purported DRN was an artificial construct, the team behind the applicant considering that it was necessary to identify a single neighbourhood which recreational users of the Meadow predominantly inhabited.

59. In paragraph 376 he said that if HTRN was a neighbourhood, as he found, he had no difficulty in concluding that a significant number of its residents used the Meadow for recreational purposes throughout the relevant period.

60. In its Further Representations the Authority submitted first that it looked "odd" for the Inspector to find a different neighbourhood than that contended for. However it is not suggested that he was not entitled *per se* to take that approach. But the point of principle taken by the Authority was that there should be a "fit" between the area where the users came from and the neighbourhood identified. Here it was said that there was no such fit because the users were said by Mr Deluce to come from DRN yet the neighbourhood was found to be HTRN, which is only a part of DRN.

61. This point was addressed by Mr Deluce at paragraphs 44 - 46 of his Response. He argued that if a significant number of the inhabitants of a neighbourhood used the land (as they did here) it was not open to the Council to refuse registration just because other users came from elsewhere. He thus rejected the "fit" argument advanced by the Authority. He also contended that it was clear from the amendment introduced by the 2000 Act, giving rise to s22 (1A) that if there was any ambiguity as to whether there was a "fit" requirement Parliament's intention had been to remove any such requirement. Specific reference was made in paragraph 45 to the speech of Baroness Farrington, the Government spokesman who moved the amendment. Further the description of the amendment process given by Lord Hoffmann at paragraph 26 of the *Oxfordshire* case was cited at paragraph 46 of the Response.

62. The Inspector dealt with this matter at paragraph 12 of the Further Report where he said this:

> "The third point is, I acknowledge, an important point and one on which there is not yet any clear guidance from the courts. ... under the new wording it is sufficient if a significant number of qualifying users are inhabitants of any locality or neighbourhood within a locality. The new wording does not require qualifying users to come predominantly from a single locality or neighbourhood within a locality. I agree with the applicant that his construction is supported by passages from Hansard, but I consider that the statutory wording is unambiguous and that recourse to the principle in *Pepper v Hart* is not required. I agree with the applicant's submission that there is no requirement in the statutory wording for a "fit" between a neighbourhood and the area inhabited by qualifying users. ... I remain of the view that the law is as stated in paragraphs 24-25 and 380 of my report."

The Authority's challenge

63. Although the point was originally raised as one of "fit" the real point made by the Authority is that the Predominance Test applies to s22 (1A). So the application could only succeed here if the users of the Meadow predominantly came from HTRN. But on the evidence, they did not. So it is said that the Inspector erred in law because he did not accept that the Predominance Test applied.

Emergence of the Predominance Test

64. Prior to the amendment effected by the 2000 Act, s22 stated that a TVG was

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

65. I have added the letters in square brackets so as to denote the three different classes of TVGs often referred to as giving rise to class (a) (b) or (c) rights. Class (a) are allotted rights, (b) are customary and (c) are the statutory prescriptive rights at issue in this case.

66. In *R v Oxfordshire County Council Ex p. Sunningwell Parish Council* [2000] 1 AC 335, the House of Lords was concerned with a challenge to a resolution to refuse to register 8 acres of glebe land as a TVG. In that case it was a village green in the traditional sense because the land was near to the village church. There was a public inquiry as in this case and as here the Inspector was Mr Chapman. A number of issues were raised but one concerned the question of who used the land. A point was taken that the glebe was used not only by the villagers but also by other people. Lord Hoffmann explained and dealt with the point thus at pp357E-358B:

> "This brings me conveniently to Miss Cameron's second point, which was that the evidence of user was too broad. She said that the evidence showed that the glebe was also used by people who were not inhabitants of the village. She relied upon *Hammerton v. Honey* (1876) 24 W.R. 603, 604, in which Sir George Jessel M.R. said: "if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom."
>
> That was with reference to a claim to a customary right of recreation and amusement, that is to say, a class b green. Class c requires merely proof of user by "the inhabitants of any locality." It does not say user *only* by the inhabitants of the locality, but I am willing to assume, without deciding, that the user should be similar to that which would have established a custom.
>
> In my opinion, however, the findings of fact are sufficient to satisfy this test. It is true that people from outside the village regularly used the footpath. It formed part of a network of Oxfordshire Circular Walks. But there was little evidence of anyone other than villagers using the glebe for games or pastimes. Mr. Chapman does record one witness as saying that he had seen strangers enjoying informal recreation there. He summed up the position as follows:
>
> "The evidence of the [parish council's] witnesses and of the members of the public who gave evidence was that informal recreation on the glebe as a whole (as opposed to use of the public footpath) was predominantly, although not exclusively, by inhabitants of the village. This made sense because there is nothing about the glebe to attract people from outside the village. The [board] accepted that the village was capable of being a 'locality'…"
>
> I think it is sufficient that the land is used predominantly by inhabitants of the village."

67. There was some debate before me whether this enunciation of the Predominance Test was part of the *ratio* of *Sunningwell* or not. This is because it was based on an assumption that the user for class (c) rights should be the same as the user for class (b) customary rights. For present purposes however I shall treat it as if it is part of the *ratio*. The other members of the House of Lords agreed with Lord Hoffmann and this part of his judgment forms part of the headnote. Moreover it was regarded as such by Carnwath LJ in the Court of Appeal in *Oxfordshire* (supra) at [2006] Ch 43 at paragraphs 63 and 64 and indeed by Lord Hoffmann himself in that case at [2006] 2 AC 674 at paragraph 25.

68. The Authority submits that this further and implicit requirement of s22 in respect of class (c) rights must necessarily have been carried through into its amended successor, s22 (1A). I disagree for the reasons given below.

69. First, the provision had changed in two material respects. The area from which users must come now includes a "neighbourhood" as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more

fluid concept and connotes an area that may be much smaller than a locality. But in addition the requirement is now not that there is land on which "the inhabitants of any locality ..have indulged.." but rather land on which "*a significant number* of the inhabitants of any locality ..have indulged." It is said that this latter change does no more than state what was obvious anyway – that there needed at least to be a significant number from the locality, rather than just a handful. But without more this need not follow. It could equally indicate a change from a requirement that the users predominantly come from the locality (or now neighbourhood) to a requirement that the users include a significant number from it so as to establish a clear link between the locality (or now neighbourhood) and proposed TVG *even if* such people do not comprise most of the users. That overall, the requirements were relaxed is supported by paragraph 65 of the judgment of Carnwath LJ in *Oxfordshire* (supra) where he said that the 2000 Act introduced

> "the new concept of "*neighbourhood* within a locality", and required no more than a "significant" number of local users. Whatever precisely that expression means (which happily is one of the few issues not before us), it can only have the effect of weakening still further the links with the traditional tests of customary law."

70. Thus there is no reason now to assume that the user required for class (c) rights should be the same as for class (b) rights.

71. On that footing, I reject the notion that the Predominance Test has been carried forward into s22 (1A). That provision is clear in its terms and provided that a significant number of the inhabitants of the locality or neighbourhood are among the users it matters not that many or even most come from elsewhere.

72. However, at best, from the point of view of the Authority, the new provision is ambiguous, in the sense that it is not clear whether the Predominance Test has been imported into it or not. It certainly cannot be said that it is unambiguously the case that it has. That being so and pursuant to the principles laid down in *Pepper v Hart* [1993] AC 593 the Court is entitled to have regard to Parliamentary materials provided that (a) the material consists of one or more statements by a Minister or other promoter of the Bill together with such other parliamentary material as is necessary to understand it and (b) the statements relied upon are clear. See the speech of Lord Browne-Wilkinson at 640B-C. In my judgment, the extracts from Hansard referred to below satisfy both of these conditions.

73. The background can be found in the speech of Baroness Miller on 16 October 2000 at column 864 in support of an amendment to the effect that class (c) rights would apply to land "on which the inhabitants of any locality or residential area have indulged..in lawful sports and pastimes as of right for any period of not less than twenty years ending after 31st July 1990 whether or not other persons have used the land for like purposes." Baroness Miller referred to a "loophole" which may have destroyed (ie prevented registration of) about 50 TVGs. It was said to have arisen because to qualify as a TVG most people using it must live nearby. So if too many people from outside use it they dilute the right of local people to register it. That seems to me to be a layperson's reference to the Predominance Test. Baroness Miller also said that the map must show that there is a recognisable community living close to the land but that this can be difficult to achieve in semi-urban areas. Lord Whitty for the Government said that he would look kindly on this proposal and had reflected on the amendment insofar as it affected the significance of user by outsiders and the circumscribing of a satisfactory community to justify a TVG claim. But he said there may be some difficulty as to precisely how this is done.

74. On 16 November 2000 Baroness Farrington introduced the Government amendment which became s22 (1A). She stated at columns 513-514 that the Government understood the difficulties mentioned by Baroness Miller and the amendment directly addressed two of her concerns.

> "It makes it clear that qualifying use must be by a significant number of people from a particular locality or neighbourhood. That removes the need for applicants to demonstrate that use is predominantly by people from the locality and means that use by people from outside that locality will no longer have to be taken into account by registration authorities. It will be sufficient for a significant number of local people to use the site.."

75. Baroness Farrington then went on to say that the concept of neighbourhood was introduced in the amendment to address the problem of applications being accepted only where it can be shown that the users come from a discrete area like a village or parish (ie the locality test).

76. In my judgment this could not be clearer. The Predominance Test was being removed.

77. That this was the effect of the amendment was also recognised expressly by Lord Hoffmann himself in *Oxfordshire* (supra) at paragraph 26 where he said that the need for users to be predominantly from the local community defined by reference to an ecclesiastical parish or local government area was a loophole and the Government was sympathetic and introduced a "suitable amendment".

78. In paragraph 12 of the Further Report, the Inspector expressly referred to the passages from Hansard set out in paragraph 45 of Mr Deluce's Response and said he agreed that they supported his construction but that for his own part the statutory wording was unambiguous. That approach reflects my own as set out above. On that basis there was no error of law by the Inspector.

79. I should add the following: Mr Mynors (but not Ms Crail) advanced a different argument in relation to the Predominance Test based upon the contention that the inhabitants of a neighbourhood within a locality should be equated with "local people". And if so, the Inspector in fact found that the users predominantly were "local people" because two-thirds of them came from DRN including HTRN. So even if the Predominance Test applied it would not affect the outcome. See paragraphs 41-56 of his Skeleton Argument. I reject that argument because it entails a definition of "neighbourhood" which is extremely vague. While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries had to be "legally significant". See paragraph 27 of his judgment in *Oxfordshire* (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality (as the Inspector's own determination about DRN and HTRN shows) but, as Sullivan J stated in *R (Cheltenham Builders) Ltd v South Gloucestershire Council* [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application. See Model Entry 18. And that can be amended to take account of the adoption of an Inspector's

recommendation to base the registration upon a different neighbourhood than that claimed. See Regulation 7 (2). Moreover, the Inspector in this case did not reach his conclusions based on this argument but rather on the basis that the Predominance Test simply did not apply.

THE SUBSEQUENT RIGHTS ISSUE

80. It is common ground that registration of land as a TVG confers rights to use it for recreational purposes on the inhabitants of the qualifying locality or neighbourhood. No such rights are conferred on other users. In practice, of course, a landowner is most unlikely to seek to eject those without rights because he will not know who they are without specific enquiry. But one of the ironies of this case is that strictly, Mr Deluce is not entitled to use the Meadow for recreational purposes since he does not come from HTRN.

81. In the latter part of paragraph 380 of the Report the Inspector said that it was probable that the Meadow was also used by the inhabitants of other "neighbourhoods" but that this did not damage the application since what was needed was user by a significant number of the inhabitants of "any neighbourhood". But he went on to say that once registered "recreational rights will enure for the benefit of the inhabitants of any neighbourhood who can establish that a significant number of them have used the land in a qualifying manner and for the qualifying time. The register does not define the neighbourhood or locality."

82. It is common ground that this last statement is wrong in law. There was and is no mechanism by which further qualifying neighbourhoods or localities can be added on as it were. And in fact under the regime established by the 2006 Act the neighbourhood or locality is now stated on the register.

83. But in my judgment this error of law did not go anywhere. Mr George QC suggested that it meant that the Inspector thought that those outside HTRN (eg in the rest of DRN) would not be unduly harmed by his recommendation of registration based on HTRN alone because they might qualify and be added on later. But first, he found at that stage that DRN did <u>not</u> qualify and second, it would be speculative as to whether other neighbourhoods would qualify. Moreover there is no challenge to his refusal to qualify DRN as noted above. Nor do I see this erroneous statement as contributing to his finding that the Predominance Test did not apply. And in any event, as a matter of law, he was right about that.

84. Mr George QC also submitted that the last part of paragraph 380 might have caused the Planning and Regulation Committee of the Council to take a more favourable view of his advice as it appeared to hold out at least a prospect that other users might be able to establish rights later on so that without this statement the Committee might have decided the other way. I reject that suggestion as wholly speculative and if one takes this detailed and careful report as a whole I cannot see that the statement at the end of paragraph 380 played any material part in it. Nor is it referred to in the County Solicitor's report.

FURTHER GROUNDS OF CHALLENGE

85. Mr Whitmey has put forward additional grounds of challenge to those advanced by the Authority, which does not support these further points. Mrs Booth asked that they be considered. They may be taken quite shortly.

86. First, Mr Whitmey contends that the Inspector erred in holding that all that was required was a qualifying user of at least 20 years immediately before the application. Before the Inspector, he contended that what was actually required was user sufficient to have given rise to customary rights. The Inspector rejected this argument at paragraph 46 of the Report and again in paragraphs 17 – 19 of the Further Report. On this application, Mr Whitmey has contended that the words in s22 (1A) referring to user "for not less than 20 years" actually mean "for a period equivalent to living memory and in any event not less than 20 years." In my judgment there is no basis whatsoever for such a construction and so there was no error of law on the part of the Inspector in rejecting it.

87. First, and most importantly, the words of s22 (1A) simply do not support it. Not less than 20 years means what it says. Anything less than 20 years will not do. But a period of 20 years or more will. That was the view taken by the House of Lords in *Oxfordshire* (supra) (see paras. 31, 34, 41-44 and 60), *Sunningwell* (supra) (see pp347C-G, 348C-D and 353F-354A) and *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at paras. 2 and 40. The Supreme Court in *Lewis* [2010] UKSC 11 at para. 67 took the same approach. If Mr Whitmey was right all these cases were wrongly decided or at the very least would have clearly proceeded on an assumption that was fundamentally wrong. I do not accept this and the Inspector would have been bound by their approach in any event, as would I. Since the words of the statute are perfectly clear there should be no resort to Parliamentary materials but in fact Mr Whitmey's reliance upon them was misplaced. See the clear references to "a period of at least twenty years" in paragraph 403 of the Royal Commission Report, the evidence of the National Association of Parish Councils in paragraphs 21 and 4376 at pages 104-105 of his bundle and column 420 of the debates which refers to the period being "twenty years" at p107 of his bundle. The Guidance for Applicants for a TVG, also relied upon by Mr Whitmey is equally unhelpful as it refers to user for "not less than 20 years".

88. Mr Whitmey then said that if all that was required was a minimum of 20 years the draftsman would have used the same language as that contained in s 31 (1) of the Highways Act 1980 namely user by the public "as of right and without interruption for a full period of 20 years.." But the expression there means the same thing as "not less than 20 years" although using slightly different words. There is no reason why the draftsman should have felt himself bound to use the same exact form of words when the words he chose were perfectly clear. In a similar vein Mr Whitmey points to s16 (1) of the 1965 Act which makes reference to s1 of the Prescription Act 1832 which in turn refers to user for "the full period of thirty [or later, sixty] years." The mere fact of that reference hardly means that the draftsman of the 1965 Act would have to have chosen that formula if all that had to be shown was 20 years' user for a TVG. More generally, Mr Whitmey argued that because important rights attach to land designated as a TVG and there are criminal sanctions for interference with them, this shows that something more than merely 20 years was required. He made detailed submissions to me about how a village green was one of two "sub-sets" of land used by the public, this being the more advantageous in terms of user. It is not necessary for me to deal with those submissions. It suffices to say that the relative importance of a TVG does not mean that the words of s22 (1A) should be ascribed a meaning they cannot possibly bear.

89. I should add that in *Lewis* (supra) paragraphs 171 and 172 of the report of the Inspector (Mr Chapman) are recorded in paras. 9 and 10 of the judgment of Lord Walker. Here the Inspector made findings as to user "as far back as living memory goes". That might be thought to indicate that at least in that class (c) case, the Inspector applied something other

than a "not less than 20 years" test. In fact, having now been provided by Mr Whitmey with a copy of Mr Chapman's entire report dated 14 March 2006 it is clear that this is not so. Paragraphs 171 and 172 deal simply with his findings of fact. At paragraph 16 he refers to the Applicant's case that there was more than 20 years' recreational user and at paragraphs 180, 181 and 187 he referred to the statutory test of not less than 20 years. At paragraph 212 he gave his conclusion under the rubric "....on which for not less than 20 years..." saying that he found that the land had been used for recreation for far more than 20 years but it was enough to say at least from 1970. So the fact that he found very long user here, and even used the expression "living memory", does not mean that he applied a test other than "not less than 20 years" in the sense in which I have described it above. So what was said by the Inspector in *Lewis* does not assist Mr Whitmey on his first point.

90. Second, Mr Whitmey contended that "lawful" sports and pastimes meant that if such user was trespassory, it would not qualify under s22 (1A). The Inspector rightly rejected this at paragraph 47 of the Report. The adjective here was meant to exclude sports and pastimes which were themselves unlawful or "illegal" because they amounted to criminal offences, which today might include joy-riding in or on stolen vehicles or recreational use of proscribed drugs. Reference was also made to para. 67 of the judgment of Lord Hope in *Lewis* (supra) in which he said that the "lawful" requirement excluded sports or pastimes which would cause injury or damage to the owner's property, by reference to *Fitch v Fitch* (1797) 2 Esp. 543. In that case, the defendants had trampled down the plaintiff's grass, thrown the hay about and mixed gravel with it so as to render it of no value. Strictly, the observations of Lord Hope here are *obiter* but in any event the injury caused in *Fitch* (supra) would amount to the offence of criminal damage, and even if "lawful" was intended to exclude tortious damage as well, Mr Whitmey's key point before the Inspector was that trespassory user was to be excluded. But if he was right about that, this would prevent any claim for class (c) rights since all such claimed prescriptive users are by definition trespassory. So no application for a TVG could succeed. That could hardly have been the intention of Parliament for obvious reasons.

91. Third, Mr Whitmey says that the Authority was not required to do more than it did in relation to recreational user in 1989 because of calls on its financial resources. But it was never contended by the Authority that it could not have afforded to pay for different or further notices and it was not suggested that it needed to have gone to the expense of fencing off FP 80. The erection of notices in the appropriate prohibitory language at appropriate places would not have been beyond its (considerable) means, to the extent that means is relevant here. In oral argument before me Mr Whitmey put this ground in a different way. He said that much of the evidence adduced to show recreational user over the 20 year period related to dog-walking and exercising. But, he said, that included the fouling of the Meadow by dogs which caused or was likely to have caused financial loss to the Authority. Because of this, the dog-related recreational use of the Meadow relied upon should simply be excluded altogether when the Inspector considered whether there was the required user. There is no basis in law for that contention. Nor does it matter that under the Dogs (Fouling of Land) Act 1996 a local authority can designate land such that failure by an owner to remove dog faeces is a criminal offence. There is no evidence that the Meadow was so designated and even if it were it hardly follows that all the dog owners were committing this criminal offence and in any event the provision of a sanction for inappropriate dog-user hardly disqualifies dog-user from counting as recreational user under s22 (1A). The observations made at paras. 36 and 85 of the judgment of the Supreme Court in *Lewis*

(supra) also tend to negate Mr Whitmey's argument here. Finally, the extent of dog-fouling, and its effect, was not something pursued by Mr Whitmey at the Inquiry whether by way of cross-examination of witnesses or otherwise.

92. Finally, Mr Whitmey contends that the Authority, being a public body, is not bound by s22 (1A) because its "fiduciary" obligations to the public are somehow inconsistent with it. If there was anything in this point, it is surprising that the Authority did not take it. In truth there is no such exemption for the Authority. The facility to apply for registration of a TVG applies to all land including Crown land. In practice many owners of such land are public authorities with an array of obligations to the public. That does not render them immune to such applications. The reference to s31 (8) of the Highways Act 1980 is irrelevant. This deals with the incapacity of a public authority to dedicate a highway and in any event there is no question of "dedication" in respect of class (c) TVG rights.

CONCLUSION

93. Accordingly, this application for judicial review must be dismissed.