In the matter of the Commons Act 2006 and
in the matter of land at Weston-on-the-Green, Oxfordshire

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Advice

1. INTRODUCTION

The Application

1.1 This Advice relates to an application made under section 15(2) of the Commons Act 2006 to Oxfordshire County Council ("the Council"), in its capacity as commons registration authority under that Act, for the registration of certain land at North Lane, Weston-on-the-Green ("the Application Land", or simply "the Land") as a new town or village green ("TVG"). The Application was made by Norman Boardman, Simon John Davis and Susan Daenke ("the Applicants").

1.2 The Council is also the highway authority under the Highways Act 1980 for the area including the Application Land; in practice, its functions in that capacity are carried out by its Highways and Transport Department. In this Advice I refer to the Council as either the Registration Authority or the Highway Authority, as appropriate. For the avoidance of doubt, I am advising the Registration Authority; I do not know whether the Highway Authority is taking separate legal or other advice.

1.3 The application was received by the Registration Authority on 28 June 2010. The Authority in due course accepted it as having been "duly made", although it pointed out to the Applicant that some of the Application Land seemed to have been recorded as being public highway, so that it may not have been used "as of right".

The Application Land

1.4 I have not visited the Application Land. However, I have been supplied with a number of plans, and photographs taken by those instructing me and by others.

1.5 The Application Land, as shown on the plan accompanying the Application, is broadly rectangular in shape. It consists, in simple terms, of a duck pond, to the north of a metalled road (North Lane) from which it is separated by a grass verge. The northern boundary of the Land (AB on the plan) consists of a stone wall, dividing the pond from a field to the north ("the Field"). The southern boundary (CD) consists of a low timber fence along the line where the northern boundary of the carriageway abuts the southern boundary of the grass verge.

1.6 The eastern boundary (BC) appears straightforward on the plan, in that it is the

southern extension of the boundary between the Field and the property to the east of the field, known as Sunnyside. I am told that it is less straightforward to determine this line on site, but presumably the western extent of the land owned with Sunnyside must be known – or at any rate can be determined.

1.7 The western boundary (DA) is also not entirely straightforward, in that there is a clump of shrubbery at this point. However, it would seem that the north-western corner of the Application Land is probably at or near the eastern end of the gate leading into the Field. And the line DA can then be plotted parallel to BC. To the west of the boundary DA is a short stretch of tarmac extending from North Lane to the gate.

The ownership of the Application Land

1.8 The form accompanying the Application, in section 8 (name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the Application Land), states simply "none". And no-one has come forward with any suggestion of who might be the current owner of any of the Land.

1.9 The Applicants draw attention to a caution registered by the Weston-on-the-Green Parish Council on 6 December 1993 (under section 53 of the Land Registration Act 1925) under title no ON163309, to the effect that the pond has to the limits of living memory been a village amenity. I have also been supplied with a copy of the plan supplied by the Land Registry in response to a search made by the Registration Authority in respect of the Application Land, which confirmed that that no title to any of the land has been registered, but drew attention to the caution registered by the Parish Council. The part of the Land to which the caution applies is shaded pink on the Land Registry plan, and broadly speaking includes the pond itself and some land to the north-east and north-west, but not the grass verge to the south nor the shrubbery to the west. I refer below to that part of the Application Land as "the Pink Land".

Objections to the Application

1.10 An objection to the Application has been received from the Highway Authority. It notes that part of the Application Land is shown on the "Highway Records Map", shaded golden brown – that is, an unclassified road that is a highway maintained at public expense. I therefore refer below to that part of the Application Land as "the Brown Land". The Brown Land and the Pink Land do not overlap, and together make up the whole of the Application Land. The Highway Authority raises no objection to the registration of the Pink Land as a town or village green, but states that the use of the Brown Land for lawful sports and pastimes would have been not "as of right" but by virtue of its status as a highway – since any use of highway land for any reasonable purpose that does not amount to a public or private nuisance or obstruct the right of members of the public to pass and re-pass. In that regard, the Highway Authority draws attention to the decision of the House of Lords in *DPP v Jones*.[1]

[1] [1992] 2 AC 240.

1.11 Statements have been submitted by agents and architects acting on behalf of Mrs Strachey, the owner of the Field, supporting the Application in principle, but pointing out that it will be necessary to keep some of the Land free from vegetation or other obstructions, in order to maintain a visibility splay required by the local planning authority in connection with a proposal (which has been given planning permission) to develop Mrs Strachey's land. Those statements contain copies of a helpful plan, showing the precise topography of the Application Land and the immediately surrounding land.

Preliminary view of the Registration Authority

1.12 It appears to be agreed that the Pink Land is definitely not part of a highway, and the Registration Authority has therefore taken the preliminary view that that part of the Land would meet the test for registration in accordance with section 15(2) of the 2006 Act, and can be registered accordingly.

1.13 However, the position as to the Brown Land is less clear. Its status as highway land has been disputed by the Applicants. The Registration Authority has to date taken the view that it has no jurisdiction to decide on the legal status of the Application Land under highways legislation. It has accordingly asked the Highways Authority to resolve that matter separately as a preliminary issue, and considers itself bound by the determination of the Highway Authority. If the Brown Land is part of the highway, the Registration Authority considers it questionable whether the user adduced by the submitted documents qualifies under the 2006 Act so as to justify registration of the land.

My instructions

1.14 I am therefore asked to advise the Registration Authority:

- whether the Application can properly be rejected in respect of the Brown Land, on the basis of the papers so far available (including the representations of the parties);
- whether there are any further factual or legal issues which the parties should be invited to address; and
- generally.

1.15 I consider first the relevant law, before applying it to the facts of this particular case. In particular, I consider in turn:

1 the requirements for land to be registered under the Commons Act 2006;

2 the significance of land being classified as a highway;

3 the relevance of highway status to eligibility for registration under the 2006 Act; and

4 the relevance of highways status to consideration of use "as of right" for "lawful" pastimes and sports.

1.16 Against that background, I then consider the evidence that has been adduced in this case.

2. THE RELEVANT LAW

Commons Act registration requirements

2.1 Section 15 of the 2006 Act came into force on 6 April 2007. It is essentially in two parts.

Applications for registration of land based on use as of right

2.2 So far as is material, the substance of subsections (1) to (7) is as follows:

> **"15 Registration of greens**
>
> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.
>
> (3) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the time of the application but after the commencement of this section; and
>
> (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).
>
> (4) This subsection applies (subject to subsection (5)) where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the commencement of this section; and
>
> (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).
>
> …

> (7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied–
>
> ...
>
> (b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land 'as of right'."

Subsection (5) concerns land with the benefit of planning permission, which I assume is irrelevant in this case. By virtue of section 61(1) of the 2006 Act, the word "land" includes "land covered by water".

2.3 On receipt of an application under subsection (1), a registration authority has to decide whether any of subsections (2), (3) or (4) apply. Section 24(4) provides that an application made under section 15 of the Act shall, but for any provision made by or under that Part of the Act, be granted. That means that if the applicability of any of those three subsections is proved by the evidence which has been submitted – that is, that the land has been used in a qualifying manner "as of right" for the relevant 20-year period – the registration authority must grant the application, regardless of which of them has been relied on by the applicant.

2.4 In *Oxfordshire CC v Oxfordshire City Council*, it was held that a registration authority had a *power* to allow amendments to an application made under the Commons Registration Act 1965 [the predecessor to the Commons Act 2006] and to grant an application if satisfied on the evidence that all or part of the land qualified as a green, but that it had no investigative *duty* to discover evidence.[2] Following the coming into force of the 2006 Act, there is clearly now a duty to grant an application if the evidence supports registration, but the authority is still not charged with a duty to investigate the matter itself. But it may be thought desirable to get to the bottom of the matter by further inquiry. Natural justice would normally require that where an authority thinks that an application should fail or succeed on a ground *not* raised by the applicant, it should canvas this both with the applicant and with objectors, to give them a chance to respond.

Applicant for registration of land made by the owner

2.5 Subsections (8) to (10) deal with an application made by the "owner" (as there defined) with the consent of leaseholders or chargees of the land, where the owner wishes to dedicate his or her own land as a green. They provide as follows:

> "(8) The owner of any land may apply to the commons registration authority to register the land as a town or village green.
>
> (9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.
>
> (10) In subsection (9) –

[2] [2006] Ch 43 at [101]-[111]; [2006] UKHL 25, [2006] 2 AC 674 at [61]-[62], [111], [124], [144].

'relevant charge' means–

(a) in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002;

(b) in relation to land which is not so registered –

(i) a charge registered under the Land Charges Act 1972; or

(ii) a legal mortgage, within the meaning of the Law of Property Act 1925, which is not registered under the Land Charges Act 1972;

'relevant leaseholder' means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted."

Section 61(3)(a) provides that "references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate".

The significance of land being classified as a highway

2.6 To determine whether land is a highway, and to see the significance in law of activities that may have been carried out on such land in the context of an application for its registration as a green, the starting point is to consider briefly the significance of classification as a highway in the context of activity by members of the public, and the various relevant powers and duties of highway authorities relating to highways, before looking briefly at why some highways are streets maintainable at public expense.

The significance of public activity on a highway: the decision in DPP v Jones

2.7 The significance of land being designated as a highway, in the present context, can perhaps best be considered by reference to the case of *DPP v Jones*, referred to by the Highway Authority in the present case. This is the leading authority on the sorts of activities that are permitted pursuant to the public right to use the highway.

2.8 *DPP v Jones* concerned a prosecution of J for committing an offence of "trespassory assembly". The question that the House of Lords had to decide was whether a peaceful protest on the verge of a highway of itself was necessarily a "trespassory" assembly. The offence was committed by breaching an order made by a chief police officer under section 14A of the Public Order Act 1986.

2.9 Section 14A(5) of that Act stated:

"An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which –

(a) is held on land to which the public has no right of access or only a limited right of access, and

> (b) takes place in prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

What is clear is that both the language used by the 1986 Act ("trespassory") and the definition of the circumstances in which an order could be made criminalising assemblies by the public (where they exceeded the limits of any rights of access or the owner's permission) indicated that only assemblies which were already a civil wrong were to be penalised as criminal offences.

2.10 In the House of Lords there was no dispute between the parties that the public had a right of "passage and re-passage" over a highway (that is, to travel from A to B). It was disputed whether there was a right to do anything else other than such things as were incidental to passage (such as changing a tyre or stopping for refreshments), or could extend to activities like holding protests.

2.11 Lord Irvine of Lairg delivered the leading judgment, in which he ruled as follows:

> "...the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and re-pass ...
>
> Further, there can be no basis for distinguishing highways on publicly owned land and privately owned land. The nature of the public's right of use of the highway cannot depend upon whether the owner of the subsoil is a private landowner or a public authority. Any fear, however, that the rights of private landowners might be prejudiced by the right as defined are unfounded. The law of trespass will continue to protect private landowners against unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies upon these highways."

2.12 Lord Irvine then pointed out that the test for the criminal offence of wilfully obstructing the highway was whether there was a deliberate obstruction that was unreasonable, and continued:

> "I find it satisfactory that there is a symmetry in the law between the activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway"

Thus, for Lord Irvine at least, the law was clear. Any reasonable activity which did not unreasonably obstruct the highway or otherwise constitute a public or private nuisance was permitted by the public's right of access over the highway and was not trespassory. Any activity which was unreasonable would be a criminal offence, and would also be actionable by private landowners in the civil courts.

2.13 Lord Clyde seems to have agreed that there were two requirements for any activity on the highway to fall within the public's right of access: it had to be reasonable, and it must not interfere unreasonably with the primary use for passage. His conception of the latter requirement was that the activity must be 'subsidiary to' rather than 'predominant' over the right of passage. His reasoning was as follows:

> "... The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the

> nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway."

2.14 Lord Hutton gave three reasons for concurring with Lords Clyde and Irvine in the disposal of the case. One was that "the law as to trespass on the highway should be in conformity with the law relating to proceedings for wilful obstruction of the highway under section 137". Another was that the 'right of the public to use the highway ... should be extended' where 'not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage'. He said:

> "I am of opinion that the holding of a public assembly on a highway can constitute a reasonable user of the highway and accordingly will not constitute a trespass and I would allow the appeal."

2.15 Lord Hope dissented from the majority opinion. However, he said of section 14A:

> "It brings into the arena of the criminal law the rights, if any, which the public have as against the occupier of the land in private law. It does so by enabling the police to take action against those taking part in an assembly if the occupier of the land would be entitled to treat the assembly as trespassing on his land. But the police may exercise their powers independently of the occupier, whose knowledge of or consent to the action which they are taking is not required. It is sufficient that an order under section 14A is in force for the time being and that the assembly is within the area to which it applies."

2.16 From these speeches in the House of Lords, it is clear that their Lordships agreed that they were deciding the scope of what counted as civil trespass on the highway, in order to determine whether an offence had been committed under section 14A of the 1986 Act. Two of the three members of the majority expressly stated that they wanted to bring the criminal and civil law into harmony, with regard to section 137 of the 1980 Act. All three adopted the view that they were determining the scope of a public right to use the highway arising out of its status as a highway. And all three considered that the activities of the public on the highway must not interfere unreasonably with the primary and paramount right of passage, and that whether or not they did so would be a question of fact and degree having regard to their nature, extent and duration.

2.17 The majority also ruled that where there was not an unreasonable impediment to passage along the highway, and no public or private nuisance was otherwise caused, any activity would be within the pubic right to use the highway. Such activities would not be done "as of right" but "by right".

2.18 If an unreasonable impediment to passage were deliberately or negligently caused, the criminal offences of wilful obstruction or public nuisance would have been committed and the activity would not be a 'lawful' pastime. Likewise, if the surface of the highway were damaged or shrubs planted without the consent of the highway authority, an offence would be committed under one of the specific statutory offences

mentioned below.[3] It would be a rare case where use of the land was sufficiently unreasonable as to exceed the public right to use the highway, and yet did not fall within any of the Highways Act offences or cause a public nuisance. This might happen, for instance, where the activity concerned did not unreasonably affect users of the highway so as to amount to a public nuisance, but did unreasonably affect a particular adjoining property so as to amount to a private nuisance.

The powers and duties of a highway authority in respect of highway land

2.19 Once land has become a highway, the highway authority has a variety of powers and duties with respect to it – largely to be found in the Highways Act 1980.

2.20 Under section 41(1), the highway authority is under a duty to maintain the highways that are maintainable at public expense. The duty is to keep it "in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition".[4]

2.21 Section 130 further provides:

> "(1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.'
>
> (2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.
>
> (3) Without prejudice to subsections (1) and (2) above, it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—
>
> (a) the highways for which they are the highway authority, and
>
> [...]
>
> (4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority."

2.22 Section 62 empowers the authority to carry out any "works of improvement" other than those enumerated, which are expressly provided for in subsequent provisions. A

[3] The courts will presumably require the accused to have some *mens rea*, but it seems likely that simply doing the act intentionally (without being aware of the highway status of the land) would be sufficient to establish guilt. Ignorance of the need to obtain permission from the highway authority was held to be no defence to the section 131 offence of damaging the highway in *Greenwich LBC v Millcroft Construction Ltd* (1986) 150 JP 645, and the suggestion that the accused needed to be aware that he did not have lawful authority to wilfully obstruct the highway was rejected in *Arrowsmith v Jenkins* [1963] 2 QB 561 in relation to the coresponding offence under the Highways Act 1959. It might be that a 'reasonableness' criterion would be implied, but unlike mere obstructions or games it is hard to imagine that intentionally damaging the highway (which is criminal damage in any event) or planting plants in the highway would be things that ordinary and reasonable road users would ever do.

[4] *Goodes v East Sussex CC* [2000] 1 WLR 1356.

number of such provisions are contained in the Act.[5] By way of example, the following may particularly be noted:

- section 80 gives authorities a power to fence the highway, but this must not be exercised so as to obstruct a public right of way;[6]
- section 96 provides as follows:

  "(1) Subject to the provisions of this section, a highway authority may, in a highway maintainable at the public expense by them, plant trees and shrubs and lay out grass verges, and may erect and maintain guards or fences and otherwise do anything expedient for the maintenance or protection of trees, shrubs and grass verges planted or laid out, whether or not by them, in such a highway'

  (2) A highway authority may alter or remove any grass verge laid out, whether or not by them, in a highway maintainable at the public expense by them and any guard, fence or other thing provided, whether or not by them, for the maintenance or protection of any tree, shrub or verge in such a highway. …

  (6) No tree, shrub, grass verge, guard or fence shall be planted, laid out or erected under this section, or, if planted, laid out or erected under this section, allowed to remain, in such a situation as to hinder the reasonable use of the highway by any person entitled to use it, or so as to be a nuisance or injurious to the owner or occupier of premises adjacent to the highway. …

  (10) References in this section to trees or shrubs are to be construed as including references to plants of any description."

- sections 130A to D enable members of the public to require them to remove 'significant' unauthorised obstructions on the highway – that is, obstructions that are more than *de minimis* having regard to their size, nature and location;[7]
- section 143 enables the authority to remove structures erected on the highway; and
- Part VIIA empowers authorities to provide recreational facilities and facilities to improve the amenity of footways or highways that are not open to all traffic, which may prevent access of the public to part of the highway but not so as to prevent traffic other than vehicular traffic from passing along it.

2.23 The public have a right to pass and re-pass over every part of the highway,[8] including parts that are not made up as a road.[9]

[5] See in particular sections 66, 71, 75, 76 and 77, 80, 82 to 84, 96, 142, 100, 102, 130A to 130D.

[6] Which is forbidden by s.80(3)(b) HA 1980.

[7] *Herrick v Kidner* [2010] P.T.S.R. 1804.

[8] *Hubbard v Pitt* [1976] QB 142 at 152 per Forbes J.

[9] *Harvey v Truro RDC* [1903] 2 Ch 638

2.24 However, the High Court has recently emphasised, in the context of the occupation by protestors of land the City of London,

> "neither under the statutory regime in the Highways Acts nor at common law has there ever been a right to occupy, control or take possession of highway land from the highway authority."[10]

2.25 In addition, there are also a whole series of specific offences that may be committed on a highway.[11] The principal ones are damaging the surface of the highway, wilful obstruction of the highway, erecting a building or fence or planting a hedge, planting trees or shrubs without a licence, depositing anything interrupting any user of the highway, playing at football or any other games to the annoyance of a user of the highway, and lighting fires or fireworks so as to interrupt, endanger or injure a user of the highway without lawful.

2.26 Lastly, it will be a criminal offence of public nuisance to interfere with or endanger the life, health, comfort or convenience of a class of Her Majesty's subjects by omission or by an act not warranted by law.[12]

2.27 It is arguable that many of the offences under the 1980 Act – and indeed the offence of public nuisance – might be subject to the defence that the activity concerned had been authorised by the highway authority, since in particular most of the statutory provisions contain the proviso "without lawful authority or excuse".[13] In *Bakewell Management Ltd v Brandwood*[14] it was held that an easement across a common could be acquired by prescription despite it being a criminal offence to drive on a common "without lawful authority or excuse". It was held that since a grant of an easement would have counted as a "lawful authority", and acquisition of easements by prescription depended on a presumption that a grant had been made, there was no reason why the fact that the tortious conduct was also criminal should preclude acquisition of the easement.[15] However, statutory village greens are not deemed to arise from a presumed grant of rights by the landowner.

2.28 Moreover, in *Bakewell* their Lordships also considered that landowners had no power to authorise acts affecting the public interest as well as their own private interest, such as public nuisances.[16] It has also long been considered that one cannot acquire a right to commit a public nuisance by prescription,[17] and that a statutory authority has no

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[10] *City of London Corpn v Samede* [2012] EWHC 34 (QB) at [123] per Lindblom J.

[11] See ss 131, 131A, 137, 138, 141, 148, 161.

[12] *R v Rimmington* [2005] UKHL 63 [2005] 3 WLR 982 at [36] per Lord Bingham.

[13] The statutory offences of damage to the highway (s.131) 'wilful obstruction' (s.137), erection of building or fence or planting of a hedge (s.138), deposition of items (s.148) and lighting of fires or fireworks (s.161(2)) are all expressed to be committed "without lawful authority or excuse".

[14] [2004] UKHL 14; [2004] 2 AC 519

[15] Ibid., at [46]-[47] per Lord Scott.

[16] Ibid., at [24], [41], [42] per Lord Scott; [53], [55], [56] per Lord Walker; [1] per Lord Bingham.

[17] *Fowler v Sanders* (1617) Croke, Jac. 446 (leaving piles of logs in the highway); *R v Cross* (1812) 3 Campbell 224, 227 per Lord Ellenborough (practice of stationing stage-coaches for unreasonable length of time); *Hubbard v Pitt* [1976] QB 142 at 155 per Forbes J

power to authorise a nuisance unless this be expressly conferred by statute.[18] It would be inconsistent with its duty under section 130 of the Highways AC 1980 for a Highway Authority to permit any activity that interfered with the public right to use the highway other than by means of the proper statutory procedure.

2.29 Overall, therefore, the statutory scheme is to the effect that there may be "roadside waste" that is not currently used, and trees, shrubs, and grass by the sides of the road, without this being in any sense incompatible with highway status, so long as the highway accommodates the reasonably convenient passage of its ordinary traffic at all times of year. Recreational activities other than passage may lawfully take place on the highway provided that they are subsidiary to and do not unreasonably impede rights of passage,[19] and indeed these are most likely to take place on areas not laid out as a road.[20] The highway authority must prevent encroachment on the highway and must secure the reasonably safe and unobstructed passage of people on the highway, but otherwise its duty to secure enjoyment of the highway may include enhancing the amenity value of verges.

2.30 There does not appear to be any reported case where the offence of playing games to the annoyance of a user of the highway has been prosecuted. It is probable that the courts would require the playing of the games to have been *unreasonable*, by analogy with the offence of wilful obstruction which has been held only to apply to unreasonable obstructions;[21] and to require that the person playing them knew or ought to have known that annoyance would be caused, by analogy with the law of public nuisance.[22]

The test for maintainability at public expense

2.31 Most highways are liable to be maintained at public expense; but not all.

2.32 Highways in existence before 31 August 1835 were presumed (as a matter of evidence) to be maintainable by the inhabitants at large of the parish, unless they could prove that some other person was responsible.[23] Section 23 of the Highways Act 1835 provided that highways dedicated after that date were only maintainable by the public at large if a statutory adoption procedure was followed. The onus of proof was held to remain with the inhabitants to prove that they could avail themselves of the benefit of section 23.[24] The 1862 Highways Act empowered justices in the Court of Quarter

[18] *Vernon v Vestry of St James* (1880) 16 Ch D. 449, CA at 466 (highway authority had no power to permit installation of urinals which caused a public nuisance by smell).
[19] *DPP v Jones* [1999] 2 AC 240, HL. See further below.
[20] *Herrick v Kidner* [2010] P.T.S.R. 1804 at 1821-22.
[21] *Hirst v Chief Constable of West Yorkshire* (1987) 85 Cr. App. R. 143
[22] See *Rimmington*, cited above.
[23] *R v Inhabitants of Hatfield* (1820) 4 Barnewall and Alderson 75. Private individuals or corporations might have been liable pursuant to statute, or have had a prescriptive customary or tenurial obligation to repair the highway.
[24] *Attorney-General v Watford RDC* [1912] 1 Ch 417 at 433 per Park J.

Sessions to combine parishes into highway districts with highway boards, which assumed the road maintenance responsibilities of the parishes.[25]

2.33 The Local Government Act 1894 transferred the responsibilities of those boards to rural and urban district councils; and the Local Government Act 1929 transferred them in turn to county councils. The liability of the inhabitants at large was abolished by the Highways Act 1959, and transferred to statutory highway authorities. Those authorities are currently fixed with responsibility under sections 36 and 41(1) of the 1980 Act.

The list of streets maintainable at public expense

2.34 Every highway authority is required, under section 36(6) of the 1980 Act, to produce a list of the streets within its area that are highways maintainable at the public expense. Section 329(1) of that Act defines "street" as having the same meaning as in the New Roads and Street Works Act 1991; and section 48 of the 1991 Act states (so far as relevant) provides that a "street" means the whole or any part of any highway, road, lane, footway, or any land laid out as a way, whether it is for the time being formed as a way or not – irrespective of whether it is a thoroughfare.

2.35 If a lane is included in the "list of streets" maintained under section 36, it is therefore presumably because, at the time it was included, the highway authority considered that –

[i] it was "laid out as a way", or formed a "road, lane, or footway", and

[ii] it was a highway, and

[iii] it was maintainable at public expense.

2.36 The statutory requirement to compile and maintain a list of streets does not extend to including a map, nor a record of the width of each street. However, where the officers of an authority have chosen to record the streets on a map, one would expect that they would have taken reasonable care when doing so. Since the authority would be liable to repair any roads that were maintainable at public expense, it would be unlikely to add to its burden unless officers thought it more likely than not that the land in question *was* a highway maintainable at public expense. Thus, where a road is shown on a map compiled to discharge the section 36(6) duty, that will normally be good evidence – in the absence of positive evidence pointing in the other direction – that the road is a public highway maintainable at public expense.

2.37 The list of streets maintainable at public expenses is, incidentally, distinct from the definitive map (maintained under the relevant provisions of the Wildlife and Countryside Act 1981) of public paths, restricted byways and byways open to all traffic – which is not likely to show roads that are thought to be highways used mainly for vehicular traffic.

[25] 25&26 Vict., cap.61, s.17.

Potential conflict between classification as a highway and registration as a green

Conflicting statutory powers: the Newhaven *case*

2.38 In *R (Newhaven Port and Properties Ltd) v East Sussex CC*, Ouseley J ruled that where a port authority held land for the statutory purposes of the operation of the port, it was not possible to register the land as a village green since it was reasonably foreseeable that use as a green would conflict with the port authority's statutory functions. He ruled:

> "**Newhaven Port cannot permit the use of this land as of right for recreational purposes because it is reasonably foreseeable that that would conflict with its statutory functions**. It has no power to give an actual or implied consent to this use and, appearances to the contrary, cannot be taken to have done so. There are other ways of putting it**: rights cannot arise by 20 years' user to the likely detriment of the statutory functions pursuant to which the landowner owns the land in the public interest**. One group of the public cannot acquire rights against the general public interest measured by the existence of statutory powers which are reasonably foreseeably inconsistent with the rights they assert.
>
> For that reason, no rights have been lawfully acquired or no use of the land carried on without a necessarily implied permission. The land cannot be registered as a village green."[26] [My emphasis].

2.39 In the *Newhaven* case, Ouseley J was arguably wrong to treat the registration of village green rights as a question of the capacity or powers of the Port Authority, since section 15(1)-(4) of the Commons Act 2006 does not require the inference of any grant of a right to use land as a green.[27] However, his alternative ground was based on the argument that the Commons Act 2006 was not intended to impliedly repeal, or render inexercisable, any powers conferred on statutory bodies.

2.40 Ouseley J's decision was based on the House of Lords case of *British Transport Commission v Westmorland County Council*,[28] which he considered to be binding upon him. The issue in that case was whether the British Transport Commission (which owned the railway lines in question) had the statutory power or capacity to grant public rights of way across its lines by means of footbridges. A bridge had been in existence since 1845, and been used by the public for over 20 years and the question was whether that long user required the courts to presume that the Commission had dedicated a right of way over the footbridge. The House of Lords ruled that the Commission *did* have the power to do so in that case, but that it had no power to grant rights which were incompatible with its statutory objects. Whether or not any given right was incompatible with its objects was a question of fact, to be answered by considering "reasonable probabilities of risks that can be reasonably foreseen" (per

[26] [2012] EWHC 647 (Admin) at [147]-[148]; [2012] 3 WLR 709 at 743.
[27] This is quite clear from *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335 at 347 and 353 per Lord Hoffmann; and *Oxfordshire CC v Oxford City Council* [2004] EWHC 12 (Ch) [2004] Ch 253 at [18] per Lightman J.
[28] [1958] AC 126

Viscount Simonds), whether it was "reasonably foreseeable" (per Lord Radcliffe) that incompatibility might arise; or the "probable future requirements of the Company" (per Lord Cohen).

2.41 An alternative and independent argument was also submitted in the *British Transport Commission* case:

> 'It was to the effect that in the circumstances of the present case the dedication of a right of way over the overbridge in question would amount to a repeal of the appellants' statutory power to discontinue the bridge and would thus be ultra vires...'

Their Lordships thought that the question was one of capacity or vires of the Commission to grant the right of way, so they did not directly need to rule on the question of the compatibility of highway status with the Act that conferred powers on the Commission. Any observations on it are accordingly *obiter dicta* and not binding. Viscount Simonds was in any event the only Law Lord to ponder the implications of that separate argument. Nevertheless, his views are of persuasive authority. He considered as follows:

> '...it is not accurate to say that, if a statutory body puts it[self] out of its power to act in an authorized manner in a particular case, that amounts to a repeal pro tanto of the Act of Parliament. This appears to me to be involved in the larger conclusion that I have already reached that land acquired for a particular statutory purpose may yet be used for another purpose which is not incompatible with it. The argument here, too, could be that user for another purpose precludes user for the statutory purpose and therefore pro tanto amounts to a repeal of the Act. But such an argument is rejected because the statutory purpose is not defeated so long as the secondary user is compatible with it. A fortiori where the question is not of the main purpose of the undertaking but of the exercise of a power [to remove a footbridge], the question is whether... such an act as will preclude its exercise, is consistent with the statutory purpose for which the land was acquired.'[29]

His Lordship's view was that it was necessary to take the same approach whether or not the question was one of conflicting powers or of *vires* of the corporation: to consider whether on the facts there was incompatibility.

2.42 The question of conflicting statutory schemes for the management of land arose in *Western Power Distribution Investments Ltd v Cardiff CC*,[30] which was another decision of Ouseley J. In that case, the question was whether land held under section 164 of the Public Health Act 1875 as a 'public walk or pleasure-ground' could lawfully also be designated as a local nature reserve pursuant to section 15 of the National Parks and Access to the Countryside Act 1949. The former had to be open to the public whose access could be regulated by bye-laws made for purposes ancillary to facilitating their enjoyment for recreational use. The latter had to be managed for nature conservation and while they could also be managed for recreation, the nature conservation interest had to prevail. Ouseley J effectively applied the *British Transport Commission* test of reasonable probability:

[29] Ibid., at 145.
[30] [2011] EWHC 300 (Admin).

> "The 1875 Act permits no restriction except for its own purposes, and the 1949 Act permits no compromise of the interest of nature conservation in the interests of recreation. The plan would therefore only be lawful if neither interest had to be compromised. …
>
> If conflict between the two designations could be and was intended to be managed in such a way that the apparent conflict was resolved in practice conformably with both duties, the designation would not be unlawful. …
>
> The existence of conflict has to be tested by comparing the actual use made and reasonably likely to be made of the public walks and pleasure grounds with the nature of the conservation interest to be preserved and studied, and by examining the impact on the recreational use of avoiding any compromise of the nature conservation.'[31]

2.43 The case of *Western Power Distribution* was different to the *Newhaven* case in that there what was contemplated was a discretionary power to designate land as a nature reserve, whereas section 15 of the Commons Act 2006 imposes a statutory duty to register land as a TVG where its criteria are met. However, in the *Newhaven* case Ouseley J considered and rejected that basis for distinguishing his previous decision.

2.44 It is right to look carefully both at the legal implications of registration and at the potential for conflict with the statutory scheme under which the Application Land is held – that of the Highways Act 1980. It is necessary to consider whether Parliament can have intended the consequences of registration in circumstances such as those obtaining in the present case.

Conflict between recreation and highway status

2.45 It follows from the above that there is no necessary conflict between use of a highway verge for recreation and its highway status. Any activities by local inhabitants which unreasonably interfered with passage along the highway or the rights of users of the highway would be a criminal offence, but reasonable pastimes would be able to continue.

2.46 It might seem to be arguable that the rights of local people arising as a result of land being registered as a green would amount to "lawful authority" which would authorise future interference with the highway that might otherwise amount to criminal conduct. However, in *R (Lewis) v Redcar DC*[32] the Supreme Court ruled that registration of ordinary private land as a green on the basis of established recreational use protected the continuation of such use, as well as any other pursuits that would not interfere to any greater extent with the landowner's enjoyment of the land, but did not permit any increased interference with that use.

[31] [2011] EWHC 300 (Admin) at [66]-[69].

[32] [2010] UKSC 11; [2010] 2 AC 70, at [48] per Lord Walker, [71]-[72], [74-[76] per Lord Hope, [100]-[101], [105] per Lord Brown.

2.47 By analogy, were a highway verge to become a village green, this would not permit inhabitants to interfere more seriously with the use of the highway than they do at present.

2.48 Furthermore, statutes do not authorise the creation of nuisances except by express words or necessary implication,[33] and there is nothing to indicate that the Commons Act 2006 confers any immunity on recreational activities on a village green that amounted to nuisances injurious to use of the highway. There is no doubt that the owner of the subsoil over which a highway passes is not entitled to interfere unreasonably with or obstruct the public right of way, and there is no obvious reason why those who merely have recreational rights in the land but no powers of ownership should be in any better position. And the local district council has an explicit power, under section 1(1) of the Commons Act 1899, to make bye-laws "for the prevention of nuisances and the preservation of order on the common".

2.49 Concern about the creation of nuisances of itself does not therefore render highway land incapable of registration.

2.50 Nevertheless, on the facts of any particular case there might be a conflict in future. For instance, where a carriageway needed to be widened to accommodate an increase in vehicular traffic, or the speed limit was likely to be raised, it might be fraught with danger to allow people to recreate amongst the motor traffic at all.

2.51 On the authority of the *Newhaven* case, the question is whether in a particular case it is reasonably foreseeable that there will be a conflict between the indulgence by local people in lawful sports and pastimes and the exercise by the highway authority of its statutory powers and duties. Depending upon the view of the facts that a registration authority takes, if it finds that all tests for registration under the Commons Act, section 15 are met but that the land subject to an application is a highway maintainable at public expense, it may then be appropriate to invite submissions about the degree of likelihood of any conflict.

Vesting of highways: ownership and potential for registration

2.52 Finally, under this heading, as noted above, section 263(1) of the 1980 Act provides that "every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway". In *R (Smith) v Land Registry (Peterborough Office)*[34] the Court of Appeal held that "roadside waste" was part of the highway, and that the consequence of section 263 was that the title to the verges of highways maintainable at public expense could not become vested in squatters by adverse possession.

2.53 Where a highway is not "maintainable at public expense", then the land over which it passes, including the surface of the highway, will be privately owned. Ordinarily it is

[33] *Allen v Gulf Oil Refining* [1981] AC 1001.
[34] [2010] EWCA Civ 200, [2011] QB 413.

possible to acquire title to land overlain by a right of way by "adverse possession", subject to that right of way.

2.54 The highway status of land that is subject to an application for registration under the 2006 Act – and in particular whether it is maintainable at public expense – is therefore relevant to the issue of its ownership.

2.55 And an application for registration under section 15(8) could only succeed in respect of a highway maintainable at public expense if it were made by the highway authority.

Conclusion

2.56 The status of land in respect of highway law is relevant to the issue of the ownership of the Land, since a public highway maintainable at public expense, together with the materials and scrapings of it, is vested in the highway authority (Highways Act 1980, s 263) – even though the subsoil may still be privately owned. Further, if the soil of the land in question is indeed owned by a highway authority, then this might arguably preclude registration under the Commons Act as being inconsistent with the statutory purpose for which the land is held.

2.57 Secondly, some recreational activities may be conducted pursuant to the right of the public to use the highway. Indulgence in those activities by local people may therefore be argued to be "by right", and not "as of right", and thus not go towards the land in question being eligible for registration as a green. On the other hand other recreational activities, if carried out on highway land, may unreasonably interfere with the right of the public to pass and re-pass. Indulgence in such activities may therefore be argued to be unlawful, and thus not go towards the land being registered.

2.58 Thirdly, some activities taking place on a highway, not "by right", may nevertheless be by permission, and thus not eligible to found an application under section 15(1) for registration as a green.

2.59 On the other hand, examination of the *Newhaven* decision, and related case law, means that there need be no concern in principle as to conflict between two statutory powers, but that there will be a need in a particular case to examine the potential for conflict in the future.

2.60 This means that a registration authority must consider whether or not land that is the subject of an application for registration as a green is a highway, as a necessary step in determining whether or not the criteria contained in section 15 of the Act have been met.

Use as of right for lawful pastimes and sports

2.61 Where applicants are not the owners of the land that is the subject of an application for registration, it can only be registered if it has been used "as of right" for pastimes and sports that are "lawful".

Use as of right

2.62 Taking first use "'as of right", the Court of Appeal has recently ruled (in *R (Barkas*) *v North Yorkshire CC*[35]) that use of land by local people, if it is to justify registration as a green, must have been such that it was not simply authorised by an existing public or private right.[36] This is of course in addition to the normal requirement that the use was neither contested nor by force, nor clandestine, nor by the permission of the owner.[37]

2.63 Thus, where applicants for registration have acquired possession of the land that is the subject of their application, they are entitled to register it under section 15(8) of the 2006 Act. However, other people using the land with their permission could not have used the land "as of right".

2.64 But where land is a public highway, then members of the public using it in a way that is not unlawful do so not "as of right" but "by right" – and that is not enough to the land being registered.

Lawful use

2.65 As for "lawful" use, user will be both "as of right" and "lawful" where it is trespassory or otherwise tortious, but does not involve commission of a criminal offence.[38]

2.66 *Prima facie* any member of the public who strays onto the relevant land, or leaves items there without the permission of the person in possession of it, commits a trespass.[39] It is a defence to an accusation of trespass if the intruder can show that it was necessary to protect life or property in an emergency,[40] or if the intruder has lawful authority to be there. That lawful authority might for instance be a public right of way resulting from the land being a highway.

2.67 However, if the land in question is part of the highway, the carrying out of any of a number of activities that would otherwise be lawful will constitute a criminal offence, by virtue of the provisions of the Highways Act considered already.

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[35] [2012] EWCA Civ 1373.

[36] cf *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 per Lord Bingham at [3] and [9], Lord Hutton at [11], Lord Scott at [29]-[30], Lord Rodger at [62], Lord Walker at [72], [87] and [88].

[37] *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356 at [24]-[29].

[38] *R (Oxfordshire and Buckinghamshire Mental Health NHS Trust) v Oxfordshire CC* [2010] EWHC 530 (Admin) at [90] per Waksman J.

[39] This clear principle was applied in *Morris v Beardmore* [1981] AC 446, HL at 455 per Lord Diplock; *Patel v Smith* [1987] 1 WLR 853, CA at 862 per Neill LJ; *Field Common Ltd v Elmbridge BC* [2009] 1 P. & C.R. 1 at [31] per Warren J; *League against Cruel Sports v Scott* [1986] QB 240 at 247-248 per Park J; *Manchester Airport v Dutton* [2000] QB 133, CA.

[40] *Monsanto v Tilly* [2000] Env. L.R. 313, CA; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242.

3. THE STATUS OF THE APPLICATION LAND IN HIGHWAY LAW

Introduction

3.1 It follows from the preceding analysis that it is crucial for the Registration Authority first to establish:

- whether some or all of the Application Land (and in particular the Brown Land) is a highway; and
- if it is a highway whether it be maintainable at public expense.

The evidence relating to the highway status of North Lane and the extent of the highway

3.2 The land comprised in North Lane and the surrounding area was, according to the Applicants, owned by the Bertie family as part of the Weston Manor Estate from 1656 to 1918.

3.3 The papers suggest that North Lane is a cul-de-sac at the end of which a school was sited in 1853, which remained open until 1984. It is not stated whether the school was private or open to the public.

3.4 The Highway Authority relies on a "handover list" from Bicester Rural District Council, dated 1929. Unfortunately that is simply a list, and refers to "Weston Village Roads: 1.50 miles," without indicating precisely which roads are being referred to.

3.5 The Applicants place reliance on the fact that the storm drains for North Lane switch from running along the north of the Lane to running along the south of the Lane along the Application Land as showing that the Application Land was not in the ownership of the Highway Authority.

3.6 The Highways Department rely on evidence that the Council cut the grass annually on the verges at least in 2008. The grass-cutting schedules are believed to have been drawn up originally in 1996. They also rely on notes purportedly made on a site inspection in 1983 by one of their officers. These comprise a sheet dated 10/6/83 and headed "Oxfordshire County Council Roads and Drainage Section", and an accompanying map annotated by hand. Point 11 on the map is marked on the Application Land. It corresponds to the following note:

'*E.P. M.Hs Builders rubble., Young Trees*

T.P. 'Stakes'-new Pond Grass'

I would guess that E.P. means "electricity pylon", T.P. means 'telegraph pole', and 'MH' means "manhole".

3.7 I have been provided with copies of the following maps, listed in chronological order:

Late 18th century — Map, showing a linear feature at the site of North Lane, with a faint half-moon shape to the north of the buildings on the other side of North Lane to the Application Land. This is said by the Applicants to be the pond.

There are other faint rounded shapes drawn elsewhere on the map and without a knowledge of the current geography it is difficult to interpret what these might show.

November 1848 — Tithe Map, showing North Lane coloured yellow, with a blue semicircle approximately in the location of the Application Land (smaller than that land and a different shape to today's pond), and a white uncoloured area between the two. The white and yellow areas (it is unclear but possibly the pond too) are in Plot 147, which was not assessed for payment in the accompanying Tithe Apportionment, where it is described as "village road and green", the owner is said to be "Bertie the Honorable Peregrine", and under 'occupiers' it says "in hand".[41] The Tithe Map shows a dashed line running from the western end of North Lane, in a south-south-westerly direction through the field shown as Plot 133. I have not seen a full colour copy of the whole of the Map, so it is not clear where this line ends up. The blue semi-circle is linked by an "S" mark to the remainder of the Lane.

1875 — OS Map showing a dotted line along the north of North Lane, then white space, then a semicircular feature (smaller than today's pond) next to Sunnyside – again, linked by an "S" mark to the remainder of the Lane.

1899 — OS Map showing a dotted line along North Lane to the north, above which the land is shown with a markings indicating marshland, and above this hatched area there is a semicircular feature marked as an outline next to Sunnyside (smaller than today's pond), linked by an "S" mark to the remainder of the Lane.

1910 — Finance Act Map. The map itself states , "*Surveyed in 1874 Revised in 1898"*. It shows a single dotted line along North Lane, north of the words 'North Lane'. It shows, above this, a semi-circular shape in the corner of the Application Land, smaller than today's pond, next to Sunnyside. The totality of the land between the field north of the Application Land and the houses to the south of North Lane is shown uncoloured (as Plot 130). It also shows a double dotted line marked *"F.P."* running through the field ending approximately where the gate to the field now is. It shows the School at the western end of the Lane, with another footpath running through the school land. Plot 111 is shown coloured orange but was assessed as not having to pay tax, being "Open Waste Ground". No such statement is apparently made in respect of North Lane verges. The Highways Dept have stated that some private roads were shown uncoloured on the Finance Act map for Weston.

1922 — OS Map showing a dotted line along the north of North Lane, then white space, then a semicircular feature (smaller than today's pond) next to Sunnyside, in a virtually identical manner to the 1875 map.

late 1940s — Highway Record Map. This shows the whole of North Lane north of the

[41] So I am told; I have not been provided with the Apportionment list but have a typed transcript.

or early 1950s	line of houses along the south up to the field to the north of the Application Land coloured brown, apart from a very small, almost triangular area in the north-east corner of the Application Land.
1983 ?	Photocopy map attached to survey notes from 1983, and stating on it "CHERWELL DISTRICT PLOUGHLEY No3 E D SP5319". From the final code, I deduce that it shows part of an Ordnance Survey grid square. By hand, someone has written: "1978 Edition". This shows North Lane as bounded by parallel dotted lines for most of its length. It shows "Weston-on-the-Green C P School" at the end of the Lane. It is a poor photocopy and the lettering of the words 'North Lane' and the 'i' in 'Sunnyside' have not copied. However, there is apparently no semicircular marking in the north-east corner of the Application Land. By contrast, two other ponds are clearly drawn and marked as such on the map.
2010	OS Map showing today's pond as a freeform outline surrounding the word "pond", above North Lane (which is demarcated by parallel dotted lines both to the north and south and corresponding to the present tarmac surface), with white space between the northern dotted line and the shape marked 'pond';
2010 ?	Highway Record Map (undated but apparently the same as the 2010 OS Map) showing North Lane apart from a half-oval shape smaller than the Application Land next to Sunnyside coloured "golden brown" (i.e. as an unclassified road). The coloured part includes the area corresponding to tarmac and also verges.
2011	OS Map stating "Plot Date 4/8/2011". This shows today's pond above North Lane (which is demarcated by parallel dotted lines both to the north and south and corresponding to the present tarmac surface), with white space between the northern dotted line and the shape marked pond.
Unknown	Map (unknown provenance, resembles modern Ordnance Survey) showing a hatched area about the same size as today's Application Land, to the west of Sunnyside and north of North Lane, with typed word "pond".

Discussion

Is the North Lane a public highway, and if so when did it become one?

3.8 There is apparently no evidence that North Lane was ever expressly dedicated as a highway, so it can only have become a highway through prescription/long user. This latter task entails the courts engaging in a legal fiction to explain the use as a highway,

imputing to the landowner an imaginary lost grant of express dedication at the start of the period of use.[42]

3.9 Leaving aside the question of the *extent* of any highway, it would appear that North Lane has been used and treated as a highway in recent times, at least for the 20 years needed to found any prescriptive right to use it.

3.10 There have at all material times been a significant number of homes on the Lane. The late-eighteenth century map appears to show at least a dozen of them, and the 1848 tithe map seems to show about 16 to 18 separate plots along the Lane. If it be correct that the Lane was owned by the Weston Manor Estate, then either these houses would have had to have acquired express easements or licences to travel down it to get to Northampton Lane, or have acquired prescriptive easements, or alternatively the Lane may have already become a highway. There currently is no evidence before the Registration Authority of express licences or easements along North Lane having been granted in the past.

3.11 The Court of Appeal has recently ruled that where access rights along a lane could be explained either by one presumed grant of a universal right of way (through dedication of the whole way as a highway) or multiple grants of rights of way, the simplest hypothesis of a single dedication was to be adopted.[43] This reasoning would also apply to the instant case, such that in the absence of evidence to the contrary the natural inference is that all the houses extant in the late eighteenth-century were constructed along a highway, rather than that easements were granted separately to each property-owner.

3.12 Furthermore, the Court of Appeal considered in that case that:

> 'It is quite implausible to suggest that the landowners over whose soil the way ran would have checked passing vehicles to see whether they belonged on the one hand to frontagers along the way or to persons using the way at the invitation, express or implied, of those frontagers; or on the other hand to members of the public...'[44]

3.13 Applying this reasoning, if some or all of the original inhabitants of the Lane had acquired private rights of way, it might in practice be expected that members of the public would also use the Lane without being challenged, and so public rights of way would be acquired. On the face of it too, the eighteenth-century map shows the Lane as being quite wide in relation to the houses situated along it – wide enough to take vehicular traffic. While it is difficult to be sure, on the balance of probabilities there is likely to have been a highway in existence before the enactment of the Highways Act 1835.

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[42] Section 31(1) HA 1980 reads: 'Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it'.

[43] *Fortune v Wiltshire County Council* [2012] EWCA Civ 334 at [121]-[123]. That case concerned a lane in multiple ownerships, where it would be improbable that each owner had separately granted a right of way over their own land. However, the logic applies also where there is a single owner of a road.

[44] Ibid., at [125]. Since this is a short cul-de-sac, whereas the lane in the *Fortune* case was a through-road, the scenario is somewhat less implausible in this case but still improbable.

3.14 It must be said that the 1848 Tithe Apportionment refers to landowners of other plots which depict yellow-marked roads as being "Turnpike Roads" or "Parish Roads", but plot 147 with which we are concerned was said to be owned by 'Bertie the Honourable Peregrine'. It is reasonable to identify him with the Bertie family who owned the whole estate, and the failure to call it a parish road tends to suggest that the road was a private one or was not the parish's responsibility. On the other hand, it was marked yellow and was clearly a road of some kind. The same reasoning as to the likelihood of a presumed dedication of a right of way applies as set out above, even apart from the fact that it seems from the earlier map that the Lane was likely to have existed in the late eighteenth century.

3.15 Any highway deemed to have been dedicated after 20 years' prescription that was extant in 1848 would have to have been dedicated in 1828 or earlier, so it would not qualify under s.23 of the 1835 Act. In 1848 ownership of publicly maintainable roads was not statutorily vested in a public authority, and so the fact that a road was recorded as being in private ownership need not mean that it was not maintainable at public expense.

3.16 In addition, North Lane was described in 1848 as a 'village road and green'. The adjective 'village' suggests that the road was one which all villagers had a right to traverse. Furthermore, if there was a customary green somewhere on the Lane, it would have been accessible by right by the inhabitants of the locality and the obvious inference is that they would have accessed it via the Lane. If there was a green on the Lane, it could at that time only have been either created by statute or a customary green. Customary greens had to be proved to have existed since time immemorial.[45] This would mean that the green had to have existed well before 1835, with the public accessing it from North Lane. There is no assessment to tithe, which would be consistent with the Lane being a highway as well as being waste land of some kind.

3.17 The 1848 Tithe Map also shows a dashed line, which could well represent a footpath. It is not clear from the papers where this went, and whether it could be inferred that it was a public footpath. However, if so then this would be further relevant evidence that North Lane was already a highway, since all highways have to be linked to an existing network of highways.[46] The same reasoning applies to the footpaths marked on the OS Maps of 1875 to 1922.

3.18 The school did not come into existence until 1853. I have no information before me as to the scale of the school, nor as to whether there were any express easements granted to the owners of its site. A school would not be likely to have been established on a site that was not accessible by public highway, unless an express easement was granted to it. If the school were large and there was no highway, then an express easement would probably have been necessary even if the site had enjoyed a prescriptive easement previously - since the use of the land and the nature of the traffic would have been substantially different to those obtaining previously.[47] If there

[45] *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 A.C. 335 at 353 per Lord Hoffmann.
[46] *Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 1976 (Admin).
[47] See *McAdams Homes v Robinson* [2004] EWCA Civ 214.

is no record of such an easement, then the inference must be that the Lane was already a highway at that time.

3.19 Conversely, if there *was* an easement along the lane, then it would be strong evidence that there was no highway.

3.20 In the absence of a map, the handover list is not direct evidence that North Lane was maintained by the Rural District Council prior to that date, and therefore by the County Council immediately afterwards – but it tends to indicate that, given that the Lane has clearly been treated as maintainable by the inhabitants at large of the parish since before 1929, given the existence of the handover list. All other things being equal, inhabitants of the village are likely to have been better able to remember back to whether the Lane was a highway in 1835 at that time than they are today. The Rural District Council is unlikely to have assumed a burden to maintain the Lane if it considered that there was a good case that the highway was not maintainable by its ratepayers.

3.21 Accordingly, on the evidence available so far, the presumption that the highway existed prior to September 1835 so as to be maintainable at public expense has not been rebutted.

3.22 The Registration Authority is not required to actively investigate the question of the age of North Lane and whether any other properties on North Lane enjoy pre-1835 easements over the Lane itself. The Applicants have been legally represented. Their representatives have been alive to the question whether North Lane is maintainable at public expense for nearly two years, and have disputed this without putting forward any positive evidence to the contrary.[48] In those circumstances while the Authority is certainly entitled to research or call for further historical evidence to get to the bottom of the matter, it would not be unfair to proceed to determine the application on the papers currently before it.

Extent of North Lane

3.23 It remains crucial to consider the extent of North Lane to determine whether the Application Land forms part of the highway.

3.24 The evidence of the historic maps running right up to the 1940s-1950s seems to me to be clear and consistent. They show a small feature with its own outline in the north-eastern corner of the Application Land. We know that such a feature was coloured blue on the Tithe Map, and the logical inference is that this was a body of standing water. They also consistently show the pond as having been smaller than it is today, and indeed as having shrunk in size since 1848. This is consistent with what we know about how today's pond was made: it was dug out with heavy machinery, vegetation was removed, and its banks were raised up. This operation would have increased its capacity. Furthermore, it is clear that the current pond required de-silting less than

[48] Letter of 15 October 2010, sections 2 to 9; Letter of 28 January 2011 at paragraph 24.

two decades after it was dug out. The inference must be that left to its own devices the pond would largely be filled in with sediment.

3.25 The poorly-photocopied map of 1983 appears to show no pond at all. I do not place great weight on this map because of its indistinctness. It seems unlikely that a pond which had survived to some extent between c.1800 and 1950 would have entirely disappeared. However, the original TVG application forms refers to "the establishment of the pond", and a number of witnesses refer to the pond having been 'overgrown', while Mrs J E Boardman refers to the site as a "muddy area". I should think it is likely that the pond had shrunk in size somewhat from its apogee in 1848.

3.26 Many of the statements are to the effect that the entirety of the Application Land was a pond. However, that is not credible, as it is inherently unlikely that an untended pond would form a neat quadrilateral shape, or that the highway authority would have constructed a road surface immediately next to a pond – which would have created a hazard for vehicular traffic and would have undermined its base. The same goes for the suggestion that the pond extended right up to the stone wall. Without being able to inspect the width and foundations of this structure it is impossible to say for sure, but it seems unlikely that one would construct a wall directly adjacent to a pond, as any erosion would be likely to undermine its stability.

3.27 It is not likely that the whole area would have been wetter and boggier than it is presently, at least in the winter. This is because the dredged silt will have raised the land around the pond since 1986. It is perfectly possible that water did flood the road surface from time to time in extreme weather conditions.

Could the pond and surrounding Application Land have been part of the highway?

3.28 As a matter of evidence, it may be fair to presume that where there are hedges or walls along a lane, these were intended to demarcate the boundary between the public lane and the private properties beyond, depending upon the regularity of the line of hedges, the level of the road, the nature of the district and the width of the margins.[49] However, in this case the straight field boundary is in keeping with those of other fields around the village which do not border highways, and North Lane is not itself straight, so that it is impossible to say whether the lane or the field boundary came first. I do not think it safe to infer that the hedge and dry stone wall were necessarily put in against the highway.

3.29 Periodic flooding of land is not of itself inconsistent with highway status. Section 103 of the Highways act 1980 presupposes that such highways exist.

3.30 Although a highway may be swept away by erosion and permanently destroyed,[50] where the land forming a highway was covered by debris after a serious landslide,

[49] See *Goodmayes Estates Ltd v Frst National Commercial Bank Ltd* [2004] EWHC 1859 (Ch) per Richard Sheldon QC at [8]-[10].

[50] *R(Gloucestershire CC) v Secretary of State for Transport, the Environment and the Regions* (2001) 82 P. & C.R. 15, and the authorities cited there at [22] and [33].

Blackburn J in the Divisional Court held that the highway continued to exist and must be repaired:[51]

> 'Whether a highway has been destroyed or not, is a question of more or less, and it is a matter of common sense that where the road has been swept away and occupied by the sea, you cannot call on the parish to repair it, or in the case of a sea wall, where the public have acquired a right to walk on the top of the wall, the parish could not be obliged to rebuild the wall if it were washed away by the sea. On the other hand, **it would be equally impossible to say that, when, in consequence of a landslip or one of those floods which frequently occur in certain districts, the surface of a metalled road is filled up or covered over, the parish is relieved from liability**. The same observations apply to the case where a quantity of gravel or débris is thrown from above on a highway, and the line of the old road remains as before.
>
> **Here we have the facts that the highway ran along the slope of a hill, that a landslip occurred, and that part of the highway was driven into the valley below, and its place supplied by earth, stones, and other rubbish. It appears that at one point this rubbish is twenty-five feet above the level of the old road, and that there is no trace of this old road, but that the line of it is known and admitted. Now, can we draw the inference that the old road has been wholly destroyed? I think, upon the facts which I have stated, I could hardly do so**; but then we have the report of the surveyor that it is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and that the cost of doing so would be 341l. ...the operations which are described as necessary do not seem to me to involve any enormous difficulty. Therefore, in drawing my inferences of fact, I think it cannot be said that the road was annihilated, and that it was impossible, in a commercial sense, to repair it'. [My emphasis].

3.31 In our case, it is unclear how deep the Pond was in winter except that it cannot have been deeper than was comfortable for cows to walk into and across. It is not suggested that the cows swam across. It may be possible from a site view to gain an idea of the gradient of the land and the likely depth of the pond. It was possible for a young Michael East, about nine years old, to walk to school via North Lane even when it was flooded in c.1960. In summer, the evidence seems to be that it could dry up altogether. Thus in my view the existence of a pond is not necessarily inconsistent with the entirety of the Application Land being a highway.

3.32 Conversely, it seems unlikely that people would have deliberately chosen to use a boggy, flood-prone area as a highway. If the water was more than knee-deep, passage would be uncomfortable. Anything above ankle-depth would probably have ruled out vehicular use. It is also notable that that the pond was historically in the corner of the Application Land, out of the direct line of travel.

3.33 The Tithe Map shows only a central strip of North Lane as being coloured in yellow. This is consistent either with the uncoloured Application Land being a green area (plot 91 is depicted similarly and described as "part of village street and Green"), or a minor road (plot no.141 was described as a road but shown uncoloured), or potentially both (i.e. highway verge). I think it most likely that the yellow colour represents a type of

[51] *R v Inhabitants of Greenhow* (1875-76) L.R. 1 Q.B.D. 703 at 707-708.

road surface. If – as the Map seems to show – in 1848 and earlier there were green verges along both sides of North Lane that were open to the public, both verges could have been walked on by travellers.

3.34 While there were fewer properties to the north of the Lane than to the south, there was a pond on the Application Land which could have been attractive as a means of watering animals using the highway, and for children and adults walking along it. It seems more likely than not that both northern and southern verges would accordingly have been walked upon by passers-by, and would have become incorporated into the highway through long user. The buildings at Plots 159 (Sunnyside), 153, 160, 167, part of 162, 149, 151 and part of 162 seem only to have access onto uncoloured parts of Plot 147 but not onto yellow-coloured land. There are two alternative explanations. Either the uncoloured land was not highway land – in which case all these plots must have acquired easements to get onto the yellow land – or it was highway land. The simplest explanation would be that all of Plot 147 was public highway.

3.35 Moving forward in time to the 1875 and 1899 OS Maps, the picture is different and not entirely congruent with that analysis. There would appear to be vegetated areas remaining in North Lane (for instance, above the word 'NORTH' and under the 'A' in 'LANE'). However, if uncoloured areas represented grass in the Tithe Map of 1848 it is striking that the southern part of North Lane, especially that to the south of the Application Land, is not shown as being vegetated in the late nineteenth-century. That tends to suggest simply that the uncoloured areas were highway land, which – if they ever had been vegetated – the overseers of highways or Highway Board were free to convert to a hard surface. The contradictory feature is that what had previously been part of Plot 147 near the junction with Northampton Road had been encroached upon by Plot 162 and enclosed. This action would be inconsistent with that particular piece of land *either* being part of the highway *or* being a village green over which villagers had a right of recreation.

3.36 The 1910 Finance Act Map shows the Application Land as being uncoloured, *including* the pond. All landowners would have had an interest in claiming that their land was highway land to evade tax, but equally surveys were done for the Finance Act 1910 by independent valuers who would have had every incentive to check the status of the land.[52] While only vehicular public highways were supposed to be left uncoloured and I am told that some private roads were also shown uncoloured in Weston, this treatment of the Application Land is consistent with it being thought to have been highway verge. By contrast, it treats Plot 111 (corresponding to the front of Plot 160 on the Tithe Map) as 'open waste ground' distinct from the road. This differentiation between the two is understandable, since there was publicly available documentary evidence in the form of the 1848 Map proving that Plot 111 was privately owned and was not part of the historic highway. However, it would have appeared that the pond and northern verge were each part of the public highway inasmuch there were clear

[52] Misleading them was punishable by up to six months' imprisonment with hard labour (Finance Act 1910, s 94).

boundary features separating it from the field to the north and Sunnyside to the east, but no such demarcation from the rest of the Lane.

3.37 The Highway Record Maps should in my view be given considerable weight, since successive statutory highway authorities are most unlikely to have assumed the burden of maintaining the northern verge of North Lane if it had not formed part of the highway. These show that the Application Land except the pond (as it existed in the past) was thought to be highway land. Certainly, the presence of utilities in the verge suggests that it has lately been thought to be highway land. I do not consider in the abstract, without having inspected the site, that the location of storm drains on the other side of the carriageway need be referable to the ownership of the land. If the land to the north of the Lane were already liable to be waterlogged and to flood over the Lane surface in winter, locating storm drains on that side might be less effective at draining away surface water than locating them on the other side.

3.38 Overall, on the evidence so far available, it is more likely than not that the verge component of the Application Land (including all of the Brown Land) was part of the highway, but that the original pond was not. The extent of the highway accordingly is likely to take in much but perhaps not all of the present-day pond, plus the north-eastern corner of the Application Land (the Pink Land).

Can part of the pond and the corner of the Application Land by itself be a TVG?

3.39 If the test of use 'as of right' had to be proved, it would be doubtful whether use of a pond could be proved merely by watching it from its banks. However, where the banks were also used for recreation, I think the pond might properly be included in the registered green as forming part of the wider area of land. Where ducks were put onto the pond and fed there, I think it would be reasonable to treat that as sufficient to meet the test of 'use', in the same way that playing with a dog, flying a kite or engaging in falconry from one spot might entail the human doing little walking but using a greater area of land than that on which they were standing in order to partake in their pastime.

Conclusion

3.40 On the fairly sparse evidence so far provided, it seems to me to be more likely than not that most of the Application Land – possibly including some of the pond – is a highway, and moreover that a highway that is maintainable at public expense.

4. OVERALL CONCLUSION

The ownership of the Application Land

4.1 The application for registration in this case has been made under subsection 15(1), on the basis that the ownership of the whole of the Application Land is unknown. The statutory declarations accompanying the Application rather suggest that the occupation of the Land by the Applicants may have had the character of "possession". The consequences of this will differ as between the Pink Land (the pond and the land to the north) and the Brown Land (the remainder of the Application Land).

The Application as it relates to the Pink Land

4.2 Happily, the issue of the ownership does not need to be resolved in relation to the Pink Land.

4.3 The claim is that the Pink Land has been used for 20 years by local people for lawful sports and pastimes as of right – that is, without secrecy, without force and without permission. There is no doubt that that it has been used by local people for 20 years – apparently since 1986. And it has been used for lawful sports and pastimes – principally bird watching, or associated activities – without force and without secrecy.

4.4 If the test of use "as of right" had to be proved, it would be doubtful whether use of a pond could be proved merely by watching it from its banks. However, where the banks has also been used for recreation, the pond might properly be included in the registered green as forming part of the wider area of land. Where ducks were put onto the pond and fed there, it would be reasonable to treat that as sufficient to meet the test of "use", in the same way that playing with a dog, flying a kite or engaging in falconry from one spot might entail the people doing little walking but using a greater area of land than that on which they were standing in order to partake in their pastime.

4.5 And the recreational use of the Pink Land has been without permission from anyone. That may be because the Pink Land is in fact now owned by one or more of the Applicants, as a result of adverse possession. Or it may be because someone else owns the Land (as the successor in title to the Estate that once owned it), but has failed to register the Land. But there is no evidence that anyone has given formal permission for the use of the Land by the villagers.

4.6 If in fact the Applicants are the owners, it could be argued that they have for many years implicitly permitted the villagers to use the Land; but in that case they could have made an application under subsection 15(8), and it would have succeeded. But no objection has been made by anyone to the registration of the Pink Land as a green, on whatever basis; and it does not seem that it would serve any useful purpose to invite the Applicants to substantiate their ownership and then to re-apply under subsection (8).

4.7 The Highway Authority disclaims any suggestion that the Pink Land is part of the highway.[53] Nor has anyone else suggested that it is. It may be that the precise extent of the Pink Land does not accord with the historic extent of the highway land (as indicated above), but again – in view of the position taken by the Highway Authority and the present factual position on the ground – it would serve no useful purpose to consider registering anything other than the whole of the Pink Land. The issues that arise in relation to the status of the Application Land under highway law, explored above, thus need not arise in relation to the Pink Land.

4.8 And neither the Highway Authority nor anyone else is raising any objection to the registration of that land as a town or village green.

4.9 Finally, the fact that the land is largely covered by water does not seem to be a problem (see section 61(1)).

Recommendation

4.10 I therefore recommend that the Pink Land be registered as a green without further ado. If necessary, the boundary between the Pink Land and the Brown Land will have to be determined on site by agreement between all concerned – or, in the absence of such agreement, unilaterally by the Registration Authority.

The Application as it relates to the Brown Land

The objection by the Highway Authority

4.11 The position in relation to the Brown Land is less straightforward. As noted above, the Highway Authority has objected to the registration as a green of that part of the Application Land, on the basis that it is a highway (although, as noted above, it does not object to the registration of the remainder).

Decision on the highway status of the Brown Land

4.12 I have already noted that it is necessary for a registration authority faced with an application for the registration as a green of land that is claimed to be a highway to establish whether indeed it is highway land in law, and whether if it comes within a statutory provision requiring it to be maintainable at public expense.

4.13 The objection by the Highway Authority is based principally on the fact that North Lane is shown on the "Highway Records Map" maintained by the Council as highway authority, as being a highway maintainable at public expense – although it is not included in the definitive map maintained by the Council as surveying authority under the 1981 Act.

[53] Annex C to its letter dated August 2011, p. 12.

4.14 The Highway Records Map referred to by the Highway Authority in this case is the series of maps, together covering the whole of Oxfordshire, which are produced by the Authority in pursuance of its duty (under section 36(6) of the 1980 Act) to produce a list of the streets within its area that are highways maintainable at the public expense.

4.15 As correctly pointed out by the Applicants, that is not on its face conclusive evidence as to whether all or part of the Application Land is a highway of any kind, or as to whether it is publicly maintainable, or as to its width.

4.16 However, the Registration Authority should have regard to the Highway Records Map, as being relevant but inconclusive evidence as to the truth of its contents, and accord it the weight that is thought appropriate. In particular, it should not unquestioningly accept the Highways Authority's view that the Brown Land is a public highway, and may if it sees fit take a different view from that of Highway Authority.

4.17 That is no different from the situation that not uncommonly arises where a council that is a registration authority under the 2006 Act has to decide whether or not to accede to submissions made on behalf of the same council acting as landowner or education authority to the effect that a particular parcel of land is not eligible for registration as a green. Clearly, in those circumstances, if the registration authority decides not to accede to those submissions, it must explain clearly the reasons for its decision.

4.18 In this case, I have concluded above – based not just on the Highway Records Map but also on the other available evidence, taken as a whole – that it is more likely than not that most of the Brown Land is a highway, and moreover a highway that is maintainable at public expense.

Conflict between recreational use of the Application Land and its status as highway land

4.19 In the light of the judgment of Ouseley J in the *Newhaven* case, it is necessary to consider whether, if the Brown Land was and is indeed a highway, there would be any conflict with its use as such and the use of the Land by local people for sports and pastimes.

4.20 On the material that I have seen, I am not persuaded that there is any reasonable likelihood that there would be such a conflict. The road is a mainly residential cul-de-sac with not more than about 20 houses on it. There is unlikely to be a large volume of vehicular traffic passing the Application Land, and nor is traffic likely to be fast-moving. It does not appear to ever have been necessary to extend the carriageway onto the Application Land in 200 years, and there are no frontages immediately behind the Application Land. However, it may be that the fences and shrubs would need to be removed to facilitate passage along the highway.

Use of the land for lawful sports and pastimes

4.21 There is no suggestion that the Applicants and other villagers have acted surreptitiously in their use of any of the Application Land, nor that their use of it was contested before they submitted their application for its registration as a green. The question is therefore solely whether the use of the Land was "lawful" and not "by permission".

4.22 In the instant case, the use of the Application Land relied upon by the Applicants includes the erection of a duck house, the carrying out of heavy excavation works, the deposit of silt on the banks of the pond, unauthorised planting, and the erection of a fence. It seems to me that if the land on which these activities occurred was indeed a highway, then all are likely to have been proscribed by one of the penal provisions of the Highways Act, and so to have been unlawful at the time.

4.23 In addition, the permanent occupation, enclosure and obstruction of part of the highway, albeit only one side of its verge, would have amounted to unreasonable use of the highway, and so to have amounted to wilful obstruction of the highway and a public nuisance. As noted above, there is no right to occupy, control or take possession of highway land.[54] Nor would it be a defence to a claim of public nuisance that the activity obstructing the highway provides another sort of public benefit.[55]

4.24 Accordingly, I think that the carrying out of physical works to the land would have been outwith the scope of the public rights to use the highway – and would therefore not have been "by right". But they could not have been "*lawful* sports or pastimes".

4.25 The other activities relied upon include keeping and feeding ducks; picnics; quiet contemplation; meeting others; walks with and without children and dogs; watching the wildlife; community celebrations and parties; mowing the grass and trimming the shrubs; and sitting on the bench. Gardening-related activities might not be lawful since, depending upon the state of mind of those carrying them out, they might have constituted criminal damage since the plants did not belong to the gardeners. On the other hand, all the other activities are likely to have been within the scope of the public's rights to use the highway as they are unlikely to have been such as to unreasonably obstruct passage along the highway or otherwise unreasonably inconvenience or injure the public.

4.26 Consequently, to the extent that the Application Land was and is a highway, it is likely that all the activities that took place there are likely either to have fallen within the right to use the highway or to have been unreasonable user of the highway amounting to criminal behaviour.

Recommendation

4.27 I therefore conclude that the Brown Land should not be registered as a green, on the basis that – on the balance of probability – it is a highway maintainable at public

[54] *City of London Corpn v Samede* [2012] EWHC 34 (QB) at [123] per Lindblom J.
[55] *Vernon v Vestry of St James* (1880) 16 Ch D. 449 at 471 per Lush LJ.

expense; and that the use of that land y local people for sports and pastimes is either unlawful or is by right.

5. PROCEDURE

5.1 On the basis of the above analysis and recommendations, I see no need for an oral hearing.

5.2 However, I should be happy to advise further if that would be of assistance.

Charles Mynors

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19 December 2012

PN10

In the matter of the Commons Act 2006
And in the matter of land at Weston-on-the-Green, Oxfordshire

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