

**LOCALITY AND NEIGHBOURHOOD:
OXON AND BUCKS MENTAL HEALTH NHS TRUST AND LEEDS**

Charles Mynors

“The Word became flesh and blood and moved into the neighborhood.”

- John Ch 1 (The Message version (US))

“A planet is a body that orbits the Sun, is large enough for its own gravity to make it round, and has cleared its neighbourhood of smaller objects.”

- Definition from International Astronomical Union

Introduction

Definition of “town or village green”

The definition of a town or village green, in section 22 of the Commons Registration Act 1965 Act as originally enacted, was as follows:

“land

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

The lettering in square brackets is added in line with general practice.

The third of these three categories was amended by the Countryside and Rights of Way Act 2000) from 30 January 2001, so as to read (in effect) as follows:

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

On 6 April 2007, this was replaced by section 15 of the Commons Act 2006, which in effect provided that land could be registered as a town or village green where –

“a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.”

It will be seen that this is identical to the definition in section 22 of the 1965 Act, as amended in 2000. Subsections (2), (3) and (4) of section 15 provide for different tests in relation to different factual positions that may arise at the end of the 20-year period, but the quoted provision is common to all three.

The significance of “locality” and “neighbourhood”

It is clear that the crucial question in determining whether or not land should be registered as a town or village green is what factually occurred on the application land over the relevant 20-year period, and on what legal basis. And one of the important elements in that is to determine by whom the land was being used.

This reflects the origin of the law of town or village greens in the law of custom; and a custom is a *local* law that entitles certain people from a defined group to indulge in particular activities. This was explained by Sir George Jessel MR in *Hammerton v Honey*, as follows:

“If you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced but that everybody else in the world who chose danced and played cricket, you have got beyond your custom.”¹

The 1965 Act accordingly required that, to be eligible for registration, land must have been used by

“the inhabitants of any locality”.

¹ (1876) 24 WR 603, at p 604.

And since 2001, the 1965 Act (as amended in 2000) and the 2006 Act both required that the land must have been used by

“a significant number of the inhabitants

[i] of any locality, or

[ii] of any neighbourhood within a locality.”

This raises a number of issues:

- What is a “locality”?
- What is a “neighbourhood”?
- What is “a significant number”?
- What is the position in relation to any use of the land by those other than the inhabitants of the locality or neighbourhood?

Locality

It has long been accepted by the Courts that a “locality” for the purposes of this legislation must be an area of land known to the law. Thus in *R (Steed) v Suffolk County Council*, Carnwath J held that

*“locality” should connote something more than a place or geographical area.*²

And in *Ministry of Defence v Wiltshire CC*, decided the same month, Harman J held that:

*“It [is] impossible for a village green to be created by the exercise of rights save on behalf of some recognisable unit of this country – and when I say recognisable I mean recognisable by the law. Such units have in the past been occasionally boroughs, frequently parishes, both ecclesiastical and civil, and occasionally manors, all of which are entities known to the law, and where there is a defined body of persons capable of exercising the rights or granting the right.”*³

It would seem that possible localities for this purpose would thus include the area of a district borough council, a civil or ecclesiastical parish, and possibly a ward for national or local government elections.

² (1996) 75 P&CR 102.

³ [1995] 4 All ER 931.

Lord Denning MR in *New Windsor Corporation v Mellor* stated that it would be sufficient to show that the locality was certain, and that it could include three parishes.⁴ However, this was not accepted by Lord Hoffmann in *Oxfordshire CC v Oxford CC*, who held that locality must – in this context at least – be a single locality.⁵

It may also include an area that was (possibly many years ago) a locality, as thus defined, but is no longer one – thus, in the recent case of *Leeds Group PLC v Leeds City Council*, the inspector was prepared to accept as a qualifying locality an area that had been recognised as such from the early 18th century until it was swallowed up into a larger local government area in 1937; and the Court agreed that such a place would not have lost its right to a town or village green because of the events of 1937.

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So far, so good. However, the Lords in *Oxfordshire* also established that the effect of land being registered as a town or village green is to confer rights on the inhabitants of the area in question to indulge in lawful sports and pastimes. But rights cannot be vested in an indeterminate group; and it is thus important to know precisely the locality whose inhabitants are being thus privileged – not least from the point of view of the landowner, who needs to know who is entitled to use his or her land. The difficulty is that the boundaries of localities (particularly electoral wards) are frequently amended – sometimes to a trivial extent, but sometimes radically. It would thus seem to be necessary to show that the boundaries of the locality being relied upon have been fixed throughout the relevant 20-year period.

It may incidentally be noted in passing that, curiously, Parliament did not provide (in either the 1965 or the Regulations under the Act) any means for the landowner, or any one else, discovering with certainty who is entitled to use the land. This is to some extent being rectified now; it is accordingly considered below in the context of “neighbourhood”.

⁴ [1975] Ch 380, at p 387.

⁵ [2006] 2 ACT 674, HL, at para 27.

⁶ [2010] EWHC 810 (Ch); 21 April 2010, at para 89.

Predominant use

In practice, of course, land will be used by many people – including those from outside the local area. What, then, is the position if, say, 95 of every 100 users of the land are from the locality, and the other 5 per cent are from elsewhere – either from an adjacent locality or from further afield? This was considered, in the context of the pre-2001 law, by Lord Hoffmann in *R (Sunningwell Parish Council) v Oxfordshire County Council*. He held as follows:

“Class c requires merely proof of user by “the inhabitants of any locality.” It does not say user only by the inhabitants of the locality, but I am willing to assume, without deciding, that the user should be similar to that which would have established a custom.

In my opinion, however, the findings of fact are sufficient to satisfy this test. It is true that people from outside the village regularly used the footpath. It formed part of a network of Oxfordshire Circular Walks. But there was little evidence of anyone other than villagers using the glebe for games or pastimes. Mr. Chapman does record one witness as saying that he had seen strangers enjoying informal recreation there. He summed up the position as follows:

‘The evidence of the [parish council’s] witnesses and of the members of the public who gave evidence was that informal recreation on the glebe as a whole (as opposed to use of the public footpath) was predominantly, although not exclusively, by inhabitants of the village. This made sense because there is nothing about the glebe to attract people from outside the village. The [board] accepted that the village was capable of being a ‘locality’...’

I think it is sufficient that the land is used predominantly by inhabitants of the village.”⁷

The test under the old law was thus that for land to be eligible for registration, it was necessary for the applicant to prove that it had been used for 20 years for lawful sports and pastimes, and that those had used it were “predominantly” from the locality.

The amendments in the 2000 Act***The genesis of the amendments***

Following the decision in *Sunningwell*, but before anyone had had much of a chance to consider this area of law at all thoroughly, the topic of town and village greens was considered briefly by

⁷ [2000] 1 AC 335 at pp 357-358.

Parliament in the course of the debates on what became the Countryside and Rights of Way Act 2000. There seems to have been a general desire to make it easier for land to be registered as a green.

In particular, the Government was concerned to remove the requirement for users to be “predominantly” from the locality. The position was recently summarised as follows, in the judgment of HHJ Waksman, QC, in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council*:

“The background can be found in the speech of Baroness Miller on 16 October 2000 at column 864 in support of an amendment to the effect that class (c) rights would apply to land ‘on which the inhabitants of any locality or residential area have indulged in lawful sports and pastimes as of right for any period of not less than twenty years ending after 31st July 1990 whether or not other persons have used the land for like purposes.’ Baroness Miller referred to a ‘loophole’ which may have destroyed (ie prevented registration of) about 50 TVGs. It was said to have arisen because to qualify as a TVG most people using it must live nearby. So if too many people from outside use it they dilute the right of local people to register it. That seems to me to be a layperson’s reference to the Predominance Test. Baroness Miller also said that the map must show that there is a recognisable community living close to the land but that this can be difficult to achieve in semi-urban areas. Lord Whitty for the Government said that he would look kindly on this proposal and had reflected on the amendment insofar as it affected the significance of user by outsiders and the circumscribing of a satisfactory community to justify a TVG claim. But he said there may be some difficulty as to precisely how this is done.”⁸

That led to the introduction of a Government amendment by Baroness Farrington of Ribbleton. In the course debate in the House of Lords she commented as follows:

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

Secondly, the amendment addresses the problem of applications being accepted only where it can be demonstrated that users come from a discrete area, such as a village or parish. That is not easy in large built-up areas. The amendment introduces the concept of neighbourhood, and provides that users should come either from a locality or from a neighbourhood within a locality.”

⁸ [2010] EWHC 530 (Admin); 23 March 2010.

The 1965 Act was accordingly amended by the 2000 Act, so as to replace use by “the inhabitants of any locality”, as the crucial test, with used by “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality.” This makes two changes:

- it introduces the concept of “a significant number” of local inhabitants; and
- it introduces the idea of a “neighbourhood”, as an alternative to a “locality”.

“Significant number”

The first point was first considered by Sullivan J, in *R (McAlpine Homes) v Staffordshire County Council*. He held that:

“... what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.”⁹

It was more recently considered in the *Mental Health NHS Trust* case. Crucially, HHJ Waksman QC held as follows:

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

the new concept of “neighbourhood within a locality”, and required no more than a “significant” number of local users. Whatever precisely that expression means (which happily is one of the few issues not before us), it can only have the effect of weakening still further the links with the traditional tests of customary law.’¹⁰

His conclusion was thus as follows:

⁹ [2002] 2 PLR 1, at para 71.

¹⁰ Para 69.

On that footing, I reject the notion that the Predominance Test has been carried forward into section 22 [of the 1965 Act, following amendment by the 2000 Act]. That provision is clear in its terms and provided that a significant number of the inhabitants of the locality or neighbourhood are among the users it matters not that many or even most come from elsewhere.

The Judge went on to support that view by reference to the Parliamentary material noted above – having satisfied himself that the tests in *Pepper v Hart* were satisfied – and concluded that

“this could not be clearer. The Predominance Test was being removed.”¹¹

The position following the the *Mental Health NHS Trust* case is thus clear. All that has to be shown is that the land was used by a “significant” number of users from at least one neighbourhood. The fact that there may have been some, or indeed many, other users from elsewhere is irrelevant.

Neighbourhood

That leaves the question of what precisely is a “neighbourhood”? This was first considered by Lord Hoffmann in *Oxfordshire*:

“Any neighbourhood within a locality” is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries.

He went on to consider whether a neighbourhood needs to be within a single locality, or whether it could be within two.

I should say at this point that I cannot agree with Sullivan J in R (Cheltenham Builders Ltd) v South Gloucestershire DC that the neighbourhood must be wholly within a single locality.¹² That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word “locality” when it first appears in subsection (1A) must mean a single locality is no reason why the context of “neighbourhood within a locality” should not lead to the conclusion that it means “within a locality or localities”.¹³

That argument having been rejected by Sullivan J but subsequently supported by the Lord Hoffmann in *Oxfordshire*, it is now clear that a neighbourhood need not be within one locality – it could be

¹¹ Para 76.

¹² [2003] 4 PLR 95

¹³ at para 27.

within two (or more). But almost any neighbourhood will be within two localities (if necessary, counties); the words “within a locality” are therefore almost entirely otiose, other than to indicate that a neighbourhood is generally a smaller area than a locality.

But that begs the question of whether a neighbourhood does have to be identified and precisely defined. And what is a “neighbourhood” – and how does it relate to a “locality”?

The definition of “neighbourhood” in other legislation

Other than in relation to town or village greens, the courts have considered the meaning of “neighbourhood” and “locality” in relation to a variety of different areas of law. They indicate that those words need to be considered in their statutory context. Examples include:

- restrictive covenants (restriction deemed obsolete by reason of change in character of neighbourhood, under s 84(1) of the Law of Property Act 1925);¹⁴
- housing benefit (rent officer to consider rents in the same neighbourhood as the dwelling in question, under the Rent Officers (Housing Benefit Functions) Order 1977, before and after amendment by 2001 SI No 3561);¹⁵ and
- provision of pharmaceutical services (need to ensure adequacy of services within neighbourhood, under NHS (Pharmaceutical Services) (Scotland) Regulations 1995).¹⁶

The striking feature of all these various statutory schemes is the boundary of the “neighbourhood” is never required to be precisely defined. “The boundaries of the neighbourhood may, in certain cases, be incapable of precise definition”.¹⁷

In the light of that background, one possible interpretation of the phrase “the inhabitants of ... any neighbourhood within a locality” would be simply “local people”, or “local inhabitants”, the latter

¹⁴ see for example *Re Ling’s Application* (1957) 7 P&CR 233; *Re Davis’s Application* (1957) 7 P&CR 1; *Re Davies’s Application* (1973) 25 P&CR 115).

¹⁵ *R (Saadat) v The Rent Service* [2002] HLR 32; *R (Heffernan) v Rent Service* [2008] 1 WLR 1702, HL.

¹⁶ *Sainsbury’s Supermarkets Ltd v National Appeal Panel* 2003 SLT 688.

¹⁷ *Sainsbury’s Supermarkets*.

phrase as sometimes used by the courts as a convenient shorthand. This approach might seem to be supported by the extract above from the speech of Baroness Farrington, as it avoids the problem of applications being accepted only where it can be demonstrated that users come from a discrete area, such as a village or parish. As she says, “that is not easy in large built-up areas”, for the reasons outlined above. It retains the loose link with the pre-1965 law on customary rights, by providing that use must be by local people, not by the world at large; but it obviates the need to point to or invent what is in many cases a wholly artificial area, with arbitrarily defined boundaries. However, that interpretation was rejected by HHJ Waksman in the *Mental Health NHS Trust* case.

The definition of neighbourhood in the 1965 and 2006 Acts

As for the definition of “neighbourhood” in the 1965 and 2006 Acts, almost the only directly relevant dictum until recently was that of Sullivan J in *Cheltenham Builders*:

“85. It is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under ‘locality’, I do not accept the defendant’s submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word ‘neighbourhood’ would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so.”

That passage was not the subject of any comment in *Oxfordshire*. It was considered by the inspector in the *Leeds* case; he commented as follows:

“It seems to me that the ‘cohesiveness’ point cannot in reality mean much more, in an urban context, than that a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which had been ‘cobbled together’ just for the purposes of making a town or village green claim.”¹⁸

Here too, his approach (in what was described as a “comprehensive and detailed report”) was supported by the court. And it preferred the approach of defining two smaller neighbourhoods, each readily recognisable, rather than arbitrarily joining them together to make a single neighbourhood that would have little cohesiveness.

¹⁸ Para 36.

One neighbourhood or two?

Historically, a village green will often have been at the heart of a village, surrounded by it on all sides. But in many cases the position will now be much less clear-cut. That is particularly so in the case of urban areas, where some small enclaves may be readily classifiable as neighbourhoods, but large areas of housing or other built development may have grown up over many decades such that communities, as perceived by those who live there, may now be very imprecise. Thus two communities (or “neighbourhoods”) may overlap; a larger somewhat diffuse community may contain within its boundaries several smaller communities; but there may be many areas, or individual houses or streets, that fall within several communities or neighbourhoods, or fall between and thus outside all of them.

The *Leeds* case thus concerned a situation that is often met with in practice, where an open space lies between a number of neighbourhoods (however defined). The Court accepted the view of the inspector that

“there must be numerous examples within built up areas where the very existence of an open space would tend create the impression of distinct neighbourhoods. In his view it would be an absurdity and a manifest distortion of Parliament’s intentions to hold that a TVG can only be registered in such circumstances where it can be shown that all or the predominant bulk of the users came from the neighbourhood on one side of the open space and not the other.”¹⁹

The judge thus agreed with the conclusions of HHJ Waksman in the *Mental Health NHS Trust* case, and concluded that:

“The Act now only requires a “significant number” of the inhabitants of “any neighbourhood within a locality” to have indulged in the activities. There is nothing in the wording limiting the neighbourhood to “one neighbourhood” and there is no logical reason why there cannot be two or more neighbourhoods. ...

In my view, therefore, the existence of two or more qualifying neighbourhoods within a locality or localities is not fatal to an application to register a limb (ii) Class C TVG.”²⁰

This implicitly relies on section 6(c) of the Interpretation Act 1978, by virtue of which words in the singular include the singular, unless the contrary intention appears. There is no reason to suggest a

¹⁹ Para 37,

²⁰ Paras 96, 97.

contrary intention – a neighbourhood is by definition a smaller area than a locality; so if Parliament was content to allow land to be registered in relation to a larger area (a locality) or a smaller area (a single neighbourhood), there seems to be no reason why it should not be registered in relation to a pair of neighbourhoods.

Conclusion

In conclusion, what has to be ascertained is simply whether there is at least one neighbourhood in which there are a significant number of people who have used the land in question in a qualifying manner. There is no requirement that they have to be evenly spread throughout that area; nor that they shall have constituted the bulk of those who used the land. That should make registration significantly easier.

The difficulty of ascertaining the qualifying neighbourhood

Finally, it has already been noted that Parliament did not provide (in either the 1965 or the Regulations under that Act) any means for the landowner, or any one else, discovering with certainty who is entitled to use the land.

In practice, new village greens are registered following an application that does not have to specify either the locality or the neighbourhood relied upon – as Sullivan J put it in *R (Laing Homes) v Buckinghamshire CC*:

*“Given the importance of the locality in the statutory scheme it might have been desirable to require an applicant to provide information about the locality served by the village green in the prescribed form, but Form 30 [the application form] does not require the provision of such information.”*²¹

He then confirmed that the determination of the relevant locality or neighbourhood is a matter for the registration authority:

“The purpose of giving notification of an application to the owner and occupier and to the public (see regulation 5 of the Regulations, above) is to elicit further evidence and information, in addition to that contained in the application. Form 30 is not to be treated as though it is a pleading in private litigation. A right under s. 22(1) is being claimed on behalf of a section of

²¹ [2003] 3 PLR 60 (at para 137)

the public. The Registration Authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence."²²

This makes it clear that, whilst an applicant should make a reasonable stab at selecting the neighbourhood or (exceptionally) the locality whose inhabitants may be entitled to indulge in lawful sports and pastimes on the land in question, the authority must then make up its own mind, having considered the evidence.

Hitherto, once land was accepted for registration, there was – perhaps surprisingly – no requirement for any record to be retained of the area (whether locality or neighbourhood) by reference to which the land was found to qualify. Even where an inspector held an inquiry, and considered much evidence as to the residence of those using a piece of land, there was no requirement for him or her to record in detail the area from which all or most of the users come. And it will be extremely difficult if not altogether impossible to discover what localities were considered to be the basis for the registration of greens in the initial wave of registrations following the coming into force of the 1965 Act – now some forty years ago.

This means that in practice it is impossible for a landowner to know who is allowed to indulge in lawful sports and pastimes on his or her land – a position that will remain in respect of land already registered. And the existence of a right to use a town or village green for lawful sports and pastimes, as found to exist by the House of Lords in *Oxfordshire*, does not have to be notified to those who newly benefit from it, nor is it a land charge; so there is no way for present or future residents to know that they are entitled to use it.

Happily, this will be rectified in relation to future registrations. The Commons Registration (England) Regulations 2008 require that the entry in the register of a new town or village green will specify the locality or neighbourhood referred to in the application; see Model Entry 18. Following consideration of an application, that entry may then be amended to take account of the adoption of any decision (possibly based on an inspector's recommendation following an inquiry) to base the

²² at para 143.



Francis Taylor Building

registration on a a neighbourhood different from that initially claimed (see regulation 7(2)). That requirement at present applies only in the pilot areas; but it would be good practice in any case, and no doubt will be applied universally once the 2006 Act comes fully into force.

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