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## **Finding Common Ground**

*R. (on the application of Newhaven Port and Properties Limited) v  
East Sussex County Council*  
[2015] AC 1547 (SC)

### **Key Words**

Town and village greens, Foreshore, Public rights, Statutory interpretation

### **Introduction**

The leading text on the law of commons and greens in England and Wales begins its discussion of town and village greens by stating the “idea of a village green is an immediately familiar part of an idealised image of England: a small area of open land in the middle of a village where the inhabitants can rest or play, children run around, kites are flown, and, archetypally, it is where the village cricket team holds its matches.”<sup>1</sup> Historically, a town or village green is an area of ground which the inhabitants of a certain locality have a customary right to use for recreation.<sup>2</sup> However, the idealised image of a green has been marred recently as this formerly obscure corner of English property law has become a battleground for the conflict between public and private interests in land resulting in a number of House of Lords and then Supreme Court decisions.<sup>3</sup> This case note will consider the most recent instalment of this battle: the Supreme Court decision of *R. (on the application of Newhaven Port and Properties Limited) v East Sussex County Council*.<sup>4</sup>

### **Facts**

On 18 December 2008, Newhaven Town Council applied to East Sussex County Council to register an area called West Beach (“the Beach”) as a town or village green

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<sup>1</sup> E. F. Cousins and R. Honey *Gadsden on Commons and Greens* (London: Sweet & Maxwell, 2<sup>nd</sup> edn, 2012) (“Gadsden”) para.13-01.

<sup>2</sup> Gadsden para.13-01 and C. Jessel (ed.), “Open Spaces and Countryside” *Halsbury’s Law of England* (London: Lexisnexis Butterworths, Vol. 78, 5th edn, 2010) para.535.

<sup>3</sup> See *R. v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 (HL); *R. (on the application of Beresford) v Sutherland City Council* [2004] 1 AC 889 (HL); *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (HL); *R. (on the application of Lewis) v Redcar and Cleveland Borough Council (No. 2)* [2010] 2 AC 70 (SC); *Betterment Properties (Weymouth) Ltd v Dorset County Council (No. 2)* [2014] AC 1072; *R. (on the application of Barkas) v North Yorkshire County Council* [2015] AC 195 (SC) and finally *R. (on the application of Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547 (SC).

<sup>4</sup> [2015] AC 1547 (SC).

under the Commons Act 2006. The application was made under section 15(4) of the 2006 Act, which allows registration where “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”. An application can be made under this sub-section where use of the land for sports and pastimes ceased before the commencement of section 15 but the application is made within five years of cessation. The register is conclusive regarding the status of the land and on registration, it becomes a criminal offence to damage or encroach on a green, or interrupt the use and enjoyment of a green for recreation.<sup>5</sup>

Newhaven Port and Properties Limited (“NPP”), the owner of the Beach (which is part of the operational land of Newhaven Harbour), objected to the application. Following an inquiry, barrister Ruth Stockley recommended the Beach be registered as a town or village green. The County Council’s Commons and Village Green Registration Panel then resolved to accept the application for registration. NPP applied for judicial review of this decision. Ouseley J of the Queen’s Bench Division granted the application for judicial review on the basis that it was reasonably foreseeable that registration of the Beach would conflict with the statutory functions for which it was being held by NPP as harbour authority.<sup>6</sup> The Town and County Council then appealed to the Court of Appeal which allowed the appeal, rejecting the arguments of Ouseley J regarding statutory incompatibility.<sup>7</sup> Lewison LJ dissented and would have dismissed the appeal, albeit for different reasons from those which determined the case at first instance, namely that use by the public of the Beach was not “as of right” because the public have an implied licence to use beaches for recreational purposes and also byelaws governing the harbour area gave the public permission to use the Beach.

NPP then appealed to the Supreme Court. There were three issues in dispute:

1. Whether there are common law public rights to use the foreshore for recreation and therefore the use of the Beach by the inhabitants of the locality was not “as of right”;
2. Whether the public enjoyed an implied licence arising from byelaws regulating the Beach and therefore the use by the inhabitants of the locality was not “as of right”; and
3. In any event, whether the Commons Act 2006 prevents registration of the land as a town or village green if such registration would be incompatible with some other statutory purpose for which the land was held.

This case note will focus on the first two of these grounds.<sup>8</sup>

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<sup>5</sup> Inclosure Act 1857 s.12 and Commons Act 1876 s.29.

<sup>6</sup> [2012] 3 WLR 709.

<sup>7</sup> [2013] 3 WLR 1389.

<sup>8</sup> Their Lordships allowed the appeal on the third ground regarding statutory incompatibility. Although, Lord Carnwarth (who delivered a concurring judgment) would have preferred not to reach a decision on this point as it was not necessary to dispose with the appeal. Leave to appeal on the basis that a beach cannot be a town or village green was not granted due to the reasoning in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (HL) that there is no indication in the legislation that

## Common Law Public Rights over the Foreshore

In *Newhaven*, Lords Neuberger and Hodge, with whom Lady Hale and Lord Sumption agreed, delivered the leading judgment and began by discussing public rights of recreation over the foreshore. It was explained that in the event that the public had any right by “custom and usage, statute, prescription or express or implied permission”<sup>9</sup> of the owner to use the Beach for recreation, it could not then be registered as a green because the use for the 20 year period would not be “as of right” but instead would be “by right”.<sup>10</sup>

It was remarked that the “state of the law relating to public rights over the foreshore of England and Wales is more controversial than one might have expected.”<sup>11</sup> On reflection, the uncertain state of the law in England should not come as a surprise due to the importance of the foreshore as an economic asset as well as its role in public recreation. Uncertainty in the law often results when different interests come into conflict. Indeed, in Scotland there was also prolonged controversy about the ownership of the foreshore and how to conceptualise public rights.<sup>12</sup> In *Newhaven*, although it was accepted that there are public rights over the foreshore ancillary to the rights of navigation and fishing in the sea,<sup>13</sup> the question was whether there was any right of recreation. Lords Neuberger and Hodge stated there are two possibilities for the public: firstly, that there is a common law public right to use the foreshore for bathing and associated recreational activities; secondly, that the owner of the foreshore is presumed to permit the public to use the foreshore or, in other words, there is an implied licence.

The main barrier to making a positive decision regarding the first option was *Blundell v Catterall*,<sup>14</sup> a King’s Bench decision from 1821. This case was an action of trespass by the plaintiff owner in response to the defendant taking members of the public over the foreshore in bathing machines (to preserve the modesty of the ladies who wished to swim in the sea). It was decided that there was no common law public right of bathing in the sea and passing over the foreshore for that purpose. Best J delivered a powerful dissent, however, arguing that the general nature of the shore, and its importance to the health and well-being of citizens, meant that it was subject to public rights of recreation.

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parliament intended to limit applications to “traditional” greens, see *Newhaven* [2015] AC 1547 (SC) at [18].

<sup>9</sup> [2015] AC 1547 (SC) at [23].

<sup>10</sup> This distinction has been the source of much controversy in the law of town and village greens. See, for example, R. Austen-Baker and B. Mayfield, “Uncommon Confusion: Parallel Jurisprudence in Town and Village Green Applications” [2012] 76 Conv. 55 and L. Blohm, “The ‘by right’ Doctrine and Village Green Applications – a Response” [2014] 78 Conv. 40.

<sup>11</sup> [2015] AC 1547 (SC) at [28].

<sup>12</sup> See J. Robbie, *Private Water Rights* (Edinburgh: Edinburgh Legal Education Trust, 2015) paras 3-14-3-44.

<sup>13</sup> [2015] AC 1547 (SC) at [28].

<sup>14</sup> (1821) 5 B & Ald 268.

Lord Carnwath in *Newhaven* discussed public rights over the foreshore at length in his judgment and was notably encouraging of the prospect of recognition of a general right of recreation. His Lordship stated that the finding that those using beaches without specific authorisation are trespassers “defies common sense. It flies in the face of public understanding, and the reality of their use of the beaches of this country for the last three hundred years or more.”<sup>15</sup> It was also noted by Lords Neuberger and Hodge that such a public right “may well accord with the views and expectations of many non-lawyers”.<sup>16</sup> Further, since *Blundell v Catterall* was decided Lord Carnwath noted that recreational use of the foreshore has only increased and the public have “continued to enjoy the pleasures of the beach without interference, and without anyone suggesting that they were mere trespassers. There is no record of anyone relying on the judgment in *Blundell v Catterall* to restrict such use.”<sup>17</sup>

It was observed that other nations recognise a common law public right of recreation over the foreshore. Lords Neuberger and Hodge mentioned the law of Scotland in this regard and Lord Carnwath went much further in his comparative analysis including discussing the position in New Zealand and the United States. Lord Carnwath stated the comparative perspective is interesting “on the one hand for the apparently universal recognition of the recreational use of the foreshore in practice, but on the other for the continuing uncertainty in many jurisdictions as to the legal basis for that use and the wide variety of legal methods (statutory or judicial) used to resolve it.”<sup>18</sup> In common law jurisdictions, Lord Carnwath placed the blame for this uncertainty in part at the door of *Blundell v Catterall*.

Despite acknowledgment of the public understanding and the comparative perspective of public rights over the foreshore, there was no decision in *Newhaven* on a common law public right to use the foreshore for bathing and associated recreational activities. Lords Neuberger and Hodge were uncomfortable with departing from a decision that was almost 200 years old. Further, it was noted that a finding in favour of public rights would lead to a strange dichotomy between the area between the high and low water mark – which would be subject to public rights – and the dry part of the beach – which would not.<sup>19</sup> Additionally, in *Newhaven*, counsel for NPP had not put forward the argument that there were common law public rights for recreation over the foreshore and had instead focused on implied licence. The possibility of a rebuttable presumption of a licence for public use over the foreshore, however, was also rejected, on the understandable basis that this would be contrary to the position

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<sup>15</sup> [2015] AC 1547 (SC) at [133].

<sup>16</sup> *ibid* at [49].

<sup>17</sup> *ibid* at [108].

<sup>18</sup> *ibid* at [130].

<sup>19</sup> *ibid* at [48]-[49]. In Scotland, reflecting this dichotomy, common law public rights are only available over the area between the high and low water mark of the ordinary spring tides. The Scottish Law Commission has recommended extension of recreational rights to the area of sand, gravel, stones or rock contiguous to and landward of the foreshore: Scottish Law Commission, *Report on the Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003) at paras 3.11-3.17. The common law public rights have, in any event, been supplemented by extensive rights to be on land for specified purposes, including for recreation, granted by Land Reform (Scotland) Act 2003 s.1.

for almost all other land.<sup>20</sup> Lord Carnwath, in his separate judgment, agreed with the Lords Neuberger and Hodge on this ground of the appeal.

The lack of decision on this point is disappointing. As noted by Lords Neuberger and Hodge, the “importance of conclusively deciding the nature and extent of the public’s rights over the foreshore of England and Wales is self-evident.”<sup>21</sup> It is not often that the Supreme Court will have the chance to consider this point of the common law and it is unfortunate that this opportunity was not taken in this case. Understanding the reluctance of their Lordships to make a decision regarding common law public rights can be assisted by considering the latest developments in the law of town and village greens.

Until relatively recently, legislative measures were being implemented which sought to protect town and village greens, and ease the registration process.<sup>22</sup> However, a concern developed that applications for registration were then being made to frustrate development.<sup>23</sup> As mentioned above, registration as a green makes it a criminal offence to damage a green or interrupt its use for recreation, which therefore makes development of the land impossible.<sup>24</sup> A study commissioned into determined town and village green applications by the Department for Environment, Food and Rural Affairs in 2009 revealed that just under half of the applications for registration seemed to be driven or influenced by proposals for development in local plans or submitted planning applications.<sup>25</sup> The *Penfold Review of Non-Planning Consents* in 2010 then identified town and village green applications as a significant risk to developers and suggested this was a barrier to economic growth.<sup>26</sup> Registrations were contested, resulting in “unusually vigorous legal activity”<sup>27</sup> and a number of cases reached the House of Lords and then Supreme Court.<sup>28</sup> As a result, through the Growth and Infrastructure Act 2013 and subsequent legislation,<sup>29</sup> the Commons Act 2006 was amended to prevent registration as a green after the occurrence of events such as when the land has been identified for potential development in a draft local plan and when an application for planning permission for the land is first published.<sup>30</sup>

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<sup>20</sup> [2015] AC 1547 (SC) at [48].

<sup>21</sup> *ibid* at [46].

<sup>22</sup> Such as Commons Registration Act 1965, amendments to the 1965 Act contained in the Countryside and Rights of Way Act 2000 and Commons Act 2006. For a historical introduction to town and village greens see Gadsden paras 13-01-13-23 and Lord Hoffmann’s overview in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (HL) at [3]-[28].

<sup>23</sup> Gadsden para 14-01. See also B. Bogusz “Regulating Public/Private Interests in Town and Village Greens” (2013) 5(1) *International Journal of Law in the Built Environment* 21.

<sup>24</sup> Inclosure Act 1857 s.12 and Commons Act 1876 s.29.

<sup>25</sup> Department for Environment, Food and Rural Affairs, *Study of Determined Town and Village Green Applications* (2009) para.7.10.

<sup>26</sup> A Penfold, *Review of Non-Planning Consents* (2010) paras 4.25-4.27.

<sup>27</sup> Carnwath LJ (as he was then) in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 at [55].

<sup>28</sup> See the cases listed above in fn.3.

<sup>29</sup> Commons (Town and Village Greens) (Trigger and Terminating Events) Order 2014/257 art.3 and Housing and Planning Act 2016 Sch.12 para.44.

<sup>30</sup> Commons Act 2006 s.15C and Sch.1A as inserted by Growth and Infrastructure Act 2013 s.16 and Sch.4 para.1 as amended by Commons (Town and Village Greens) (Trigger and Terminating Events) Order 2014 (SI 2014/257) art.3 and Housing and Planning Act 2016 Sch.12 para.44.

There has therefore been a movement away from the protection of recreational rights, in favour of growing infrastructure.

Connecting this context to *Newhaven*, a finding that there are common law public rights of recreation over the foreshore would mean that the foreshore would be largely exempted from applications for registration as a town or village green. This is because recreational use of the foreshore would therefore be “by right” and attributable to public rights and not “as of right”. However, recognising public rights of recreation over the foreshore would not assuage the concerns of the developers. No development could take place that would interfere with the public rights.<sup>31</sup> There is a hint at future potential conflicts when Lords Neuberger and Hodge state that recognition of public rights “may give rise to other problems for owners of the foreshore.”<sup>32</sup> The battle between public and private interests in land which has been demonstrated in the legislative reforms and case law on town and village greens would merely be opened afresh in relation to the foreshore. With potential new uses of the foreshore such as its role in offshore windfarms mentioned in *Newhaven*,<sup>33</sup> it is perhaps unsurprising that counsel for NPP did not rely on the argument in favour of public rights and that their Lordships did not take the opportunity to decide the point.

### **Implied Permission Arising from the Byelaws**

Lords Neuberger and Hodge then turned their attention to the effect of byelaws from 1931 that regulated Newhaven Harbour – of which the Beach was part. The harbour authorities were given the power to make byelaws regulating use of the harbour in the Newhaven Harbour Improvement Act 1878<sup>34</sup> in the manner required by the Harbour, Docks and Piers Clauses Act 1847. NPP were statutory successors to the harbour authorities. There were two relevant byelaws. Byelaw 68 states: “No person, without the permission of the harbour master, shall fish in the harbour; and no person shall bathe in that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse”. Byelaw 70 states: “No person shall engage in or play any sport or game so as to obstruct or impede the use of the harbour, or any part thereof, or any person thereon; nor (except in case of necessity or emergency) shall any person, without the consent of the harbour master, wilfully do any act thereon, which may cause danger of risk of danger to any other person.”<sup>35</sup>

It may be questioned what the relevance is of these prohibitory byelaws to the issue of whether the public was using the Beach for recreational purposes “as of right”. However, NPP argued that the effect of these byelaws was to grant implied permission to the public to use the Beach for recreational purposes. Lords Neuberger

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<sup>31</sup> For the position in Scotland, see Scottish Law Commission, *Discussion Paper on Law of the Foreshore and Sea Bed* (Scot Law Com DP 113, 2001) paras 3.7-3.8.

<sup>32</sup> [2015] AC 1547 (SC) at [49].

<sup>33</sup> This was a use of the Beach which was being contemplated by NPP, see *ibid* at [97].

<sup>34</sup> Newhaven Harbour Improvement Act 1878 s.58.

<sup>35</sup> The byelaws were quoted in *Newhaven* [2015] AC 1547 (SC) at [14].

and Hodge note that implications will only be justified if they are necessary or obvious<sup>36</sup> and continue by stating:

“A prohibition can be expressed in such a way as to imply a permission. For instance, it is hard to argue against the proposition that a byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead. It is at least as a matter of pure linguistic logic, possible to interpret the byelaw as solely meaning that, if (and only if) specific permission is obtained from the park authority by a person to bring a dog into the park, then the byelaw will apply. However, any reasonable reader of the byelaw would not consider that it had such a limited meaning. In other words, as with any question of interpretation, a strictly logical linguistic analysis of the words concerned cannot prevail over a contextual assessment of what they would naturally convey to an ordinary and reasonable speaker of English.”<sup>37</sup>

In a similar vein, the reasonable reader of the byelaws would assume that he or she was permitted to bathe or play a sport or game provided the restrictions imposed by the byelaws were observed. Therefore, it was decided by the Supreme Court that the byelaws granted the public a statutory right to use the beach for recreational purposes<sup>38</sup> - but this was a right that could be withdrawn by NPP if and when it wished.<sup>39</sup> As a result the public’s use of the Beach was “by right” and the land could not be registered as a town or village green.

This finding of implied permission is surprising and it is questionable whether the implication is necessary or obvious. The purpose of these particular byelaws was ostensibly to prohibit, rather than to permit, certain activities and breach of these provisions could carry criminal penalties.<sup>40</sup> Therefore, it is a possible interpretation that the behaviour not prohibited by the byelaws – swimming in the remaining section of the harbour and playing sports and games – was permitted in terms of the criminal law but was nevertheless still prohibited by the civil law. In other words, the byelaws implied there was no criminal offence of, for example, playing games in the harbour but did not grant a right to do so.

Even if the byelaws do imply that the public can use the Beach for recreational purposes as a matter of civil law, it is not clear what is the *source* of those rights. The byelaws may have been drafted by the harbour authorities on the assumption that the public have common law public rights over the Beach. Indeed, by the admission of their Lordships, many non-lawyers would expect the public to have rights to use beaches for recreational purposes.

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<sup>36</sup> *ibid* at [57].

<sup>37</sup> *ibid* at [58].

<sup>38</sup> *ibid* at [71]. Lords Neuberger and Hodge followed the reasoning of *R. (on the application of Barkas) v North Yorkshire County Council* [2015] AC 195 (SC) in this regard.

<sup>39</sup> *Newhaven* [2015] AC 1547 (SC) at [73].

<sup>40</sup> Harbours, Docks and Piers Clauses Act 1847 s.84 and *ibid* at [12].



The point that the public would expect to have public rights over the beaches is also relevant for the “contextual assessment” adopted by their Lordships. It is not clear what is involved in this contextual assessment in terms of what context is relevant and what knowledge an interpreter can be assumed to have. However, their Lordships refer to what the byelaws would “naturally convey to an ordinary and reasonable speaker of English”. It is more likely that the reasonable reader of the byelaws would consider that they had public rights that were being curtailed by these byelaws rather than an implied permission being granted. In support of their interpretation, Lords Neuberger and Hodge note that the public were using the Beach freely for recreation when the byelaws were made.<sup>41</sup> However, this fact rather supports the argument that the public’s use cannot be attributed to the purported implied permission of the byelaws but rather the public, and perhaps the harbour authorities, believed the use of the Beach for recreation was based on some other, pre-existing, ground.

An amusing aspect of the focus on the interpretation of an ordinary reasonable reader of English is that it appears that the byelaws were not displayed in the harbour, as required by section 88 of the Harbours, Docks and Piers Clauses Act 1847, meaning that no member of the public could, in fact, read them.<sup>42</sup>

Due to these various instances of incoherence, it is suggested that the byelaws should not have been interpreted so as to provide implied permission to the public to use the Beach for recreational purposes. The decision takes the Beach and areas of land regulated by similar byelaws outwith the scope of registration as a town or village green, and leaves the public’s rights to use such land dependent on the artificial interpretation of byelaws that may not be readily accessible and also liable to being withdrawn at any time.

The artificial interpretation of the byelaws makes it even more frustrating that a decision was not made on the issue of common law public rights of recreation over the foreshore. It is clear that the two grounds of the appeal are strongly linked – both being connected to whether the public was using the Beach “by right” or “as of right”. Nevertheless, their Lordships allowed NPP’s appeal on the ground that the public’s use of the Beach was attributable to the implied permission granted by the byelaws and was therefore use “by right”. As a result, the conditions of section 15(4) of the Commons Act 2006 had not been met and the land could not be registered as a town or village green.<sup>43</sup>

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<sup>41</sup> *ibid* at [61].

<sup>42</sup> *ibid* at [66].

<sup>43</sup> As mentioned in fn.8 above, their Lordships also allowed the appeal on the third ground regarding statutory incompatibility. For further development in the law since *Newhaven* on statutory incompatibility see *Lancashire County Council v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 1238 (Admin) and *R. (NHS Property Services Limited) v Surrey County Council* [2016] 4 WLR 130.

## Conclusion

The recent town and village green jurisprudence is of interest beyond just this esoteric aspect of English property law. The case law and legislative developments have demonstrated a controversial and on-going clash between public and private interests in land. A vital public interest dimension of this area of law is the access to open land for leisure activities.<sup>44</sup> Although at one point, statutory measures were being implemented to actively protect the recreational use of land, it is clear now that economic development is being prioritised over recognition of these rights.<sup>45</sup> The changing of the guard in relation to the law of town and village greens was noted in 2014 by Martin George who commented that “views in both Parliament and the judiciary have altered, and landowning developers now possess the most powerful weapons in the war on town and village greens.”<sup>46</sup>

It is suggested that this context influenced the decision in *Newhaven* and this had the result that the rare opportunity to recognise common law public rights of recreation over the foreshore was lamentably missed. Instead, a counterintuitive interpretation was given to the byelaws regulating the land in question, taking it outwith the scope of registration as a town or village green under the Commons Act 2006. Referring to the peaceful co-existence of ownership and recreational public rights, Kevin Gray has commented “[a]s is increasingly affirmed by contemporary property theorists, the stuff of modern property involves a consonance of entitlement, obligation and mutual respect” which is “characterised by accommodation and reciprocity”.<sup>47</sup> In light of the wide-ranging benefits that rights of recreation can have, it is hoped that in the future, more opportunities will once again arise to recognise and effectively protect these important public rights.

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<sup>44</sup> It is admitted that the issues involved in the town and village greens cases go beyond those considered in this case note including local democracy and environmental protection. For a discussion of some of the issues involved see B. Bogusz “Regulating Public/Private Interests in Town and Village Greens” (2013) 5(1) *International Journal of Law in the Built Environment* 21 and B. Bogusz, “Land: Balancing Competing Economic and Social Interests” in W. Barr (ed), *Modern Studies in Property Law* (Oxford: Hart Publishing, Vol. 8, 2015).

<sup>45</sup> The amendments to Commons Act 2006 s.15C and Sch.1A noted in fn.30 are the clearest examples of this change in prioritisation.

<sup>46</sup> M. George, “The Time of Town and Village Greens” (2014) *King’s Law Journal* 325 at p.332 in relation to *Betterment Properties (Weymouth) Ltd v Dorset County Council (No. 2)* [2014] AC 1072.

<sup>47</sup> K. Gray, “Recreational Property” in S. Bright (ed.), *Modern Studies in Property Law* (Oxford: Hart Publishing, Vol. 6, 2011) p.37.