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# Locality, Environment and Law: The case of town and village greens

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**Abstract:** In this paper we explore one type of commons - town and village greens - which are an important feature of the rural and, increasingly, the urban, English landscape. Greens are an ancient form of commons, but they are increasingly recognised as having contemporary significance, particularly because of their potential to act as a reservoir for natural resources and their enjoyment. They are, in other words, emerging out of a 'feudal box'. We focus on the fact that town and village greens are recognised in law by their association with a group of people defined by their physical proximity to the land which is to be registered. Although this does not in itself constitute a community, the law requires for the registration of land as a town or village green a certain degree of organisation and self-selection and this has in the past fostered both a sense of subjective belief in 'belonging', as well as exclusion (the rights of local people being potentially 'diluted' by the use of the land by those from outside the locality). As well as helping to produce and recognise community and community identity, then, commons may simultaneously produce the conditions for disassociation and exclusion. In this context, we consider how law defines and upholds notions of locality, and also the ways in which an increasingly powerful environmental discourse might be seen to challenge the primacy given to locality as a way of defining and creating greens and, more generally, the practical effects of this on how decisions are made about preserving these spaces as 'common'. We consider the scope of the public trust doctrine as providing an example of how law is capable of accommodating ideas of shared nature and natural resources, in this case providing a form of public ownership over natural resources. Whilst our analysis is rooted firmly in the law relating to town and village greens in England and Wales, this body of law displays certain important features more broadly applicable to a range of other types of common land, and raises more general issues about how law supports certain interests in land, often to the exclusion of others.

**Keywords:** *n/a*

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## INTRODUCTION

The role of law in reinforcing the local and parochial is often overshadowed by the globalising force of current legal practice (mirrored, increasingly, by the work of legal academics), but a strong example of the tendency of law to 'localise' social conditions is the law relating to commons. To take one sort of commons,<sup>1</sup> land, including (increasingly) 'brownfield' sites, glebes, dells, and beaches, may fall within the definition of 'town or village green' if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right.<sup>2</sup> The interest in such a clear appeal to localism in law is reinforced by the feature that whilst commons represent a pre-capitalist form of occupancy, they simultaneously present modern, even radical, aspects and aspirations, such as commonality, bioregionalism and collective (if not universal) rights of use and access to land. They are 'at the same time, both traditional and avant garde' (Short and Winter, 1999: 615). This temporal disjuncture is particularly seen in the law on greens since the central legal provision providing for the registration of land as a green creates prescriptive rights to land, but in a modern statutory form.

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<sup>1</sup> The relationship between town and village greens and commons is complex, with greens not always easily falling within the category of 'commons'. Some greens are subject to rights of common, in which case the recreational use, and ecological condition, of greens are subservient to the rights of the owner of the land and the commoners (Gadsden 1988: 379). See also Shoard's (1997: 338) definition of various types of commons. In this paper we include town and village greens within the category of land described as commons, even though they might not fall within the specific legal definitions set out in the Commons Registration Act 2006 (the Commons Registration Act 1965 made commons and town and village greens mutually exclusive for the first time - this has been maintained). Nevertheless, we consider that the recent broadening of the meaning of the term common (see Jane Holder and Tatiana Flessas, 'Emerging Commons', this issue), means that town and village greens are capable of being included within this understanding.

<sup>2</sup> Section 15 Commons Act 2006 (replacing s. 22 Commons Registration Act 1965, which was amended by s. 98 Countryside and Rights of Way (CROW) Act 2000)).

The legal requirement of locality and neighbourhood in defining and protecting common land as a town or village green gives practical meaning to the idea of 'legal localization', or 'forms of regulation that are morally meaningful to the regulated because rooted in local conditions of existence' (Cotterrell, 1998, 369). An important aspect of this is the influence of an environmental protection agenda on the locality requirement because environmental problems and 'solutions' are frequently presented in terms of local responsibility and action (Wilder, 1997), often coupled with ideas of innate, indigenous knowledge and responsibility, and creating some scope for the assimilation of the legal definition of commons and aspects of environmental thought. This potential for assimilation comes also from the inherent ecological quality of some 'commons', a characteristic appropriated and extrapolated by key members of the environmental protection movement as representative of the 'Global Commons' and threats to these (Twining, 2006).

The legal recognition of town and village greens as a type of common land upon which customary rights and pastimes have been exercised by 'inhabitants of any locality or of any neighbourhood within a locality' is clearly in line with elements of radical ecological thought which favour localism, and emphasise place, situation and bioregional organisation and activity (Hannum, 1997). There is, however, some ambiguity in the reliance and appeal to the local for ecological reasons. Primarily, rights of common, when founded upon the property ownership of adjoining land, are inherently exclusionary. In the particular case of the registration of land as a town or village green, the reliance upon the locality claim has in the

past operated as a considerable hurdle because the use of the land by 'outsiders' has previously acted so as to dilute the claims of the local community.

Taking these issues as a starting point, we address how law defines and maintains common land by imposing a locality condition, and how modern environmental thought, with its focus upon holism and the connections between people, land and the wider environment, works to challenge the narrow (in spatial and temporal terms), and property-based, pretext upon which law operates in this area. In recognition of more broadly defined environmental interests and values we also suggest the relevance of the public trust doctrine which vests ownership of natural resources in the public (in an abstract sense), not the state. The idea is not so much to advance the use of the public trust doctrine, but rather to consider how law is capable of accommodating ideas of shared nature and natural resources.

In this context of the registration of land as a town or village green, we critically consider the law's dependence upon the narrow claim of local use as the main currency by which this type of commons is recognised and protected. In relation to this, we ask whether Daniel Farber's (1996) argument in favour of 'stretching the margins of the geographic nexus' in the case of standing for legal action might be similarly applied to defining land as common, necessarily drawing upon a model that sees ecology as a seamless web, rendering location almost irrelevant. This idea has important practical implications for the manner in which areas of land are defined and protected as town or village greens. From an environmental perspective, the primary function of greens stops being so much a location for sport and recreation for a few (the local community) - the definition drawn from the

ancient uses of greens - and instead becomes a more significant, 'public', space, forming part of a greater environmental whole, and with the ecological condition of greens having importance in terms of a notion of land as fundamentally 'common' (and thus reaching far beyond the locality). Viewed in this way, the locality condition, particularly when this has exercised a degree of exclusivity, is not only out of synch with modern environmental thought, but also suggests the need for a more public, land-use based, determination of whether these areas of land, located commonly at the centre of villages but also between urban developments, should properly be reserved as open spaces and protected from developmental strains. In addressing this argument, we draw out three conceptual frames which have a strong bearing upon how law currently deals with claims that common land should be protected as a town or village green: 'legal practice/protest'; 'development/conservation'; and 'locality/exclusivity', the last of which is illustrated by the attempted registration of a beach as a green in Whitstable, Kent, in which the claims of the local community were potentially 'weakened' by the use of the beach by 'outsiders'. Following from this, we question whether the definition and protection of common land should continue to be primarily dependent upon local use or interest and conclude that, when viewed from an environmental perspective, the allocation of land as a town or village green is a public decision which should be opened up for broad consultation, rather than being reliant upon those in the immediate locality fulfilling a narrow, legal test which displays some of the characteristics of private property rules. We first set out the hybrid nature of greens in law, particularly in the sense that they combine aspects of both public and private law. The difficulty of categorising the legal nature of town and village greens possibly helps to explain the 'capture' of this area of law by specialist legal

practitioners and the (possibly related) continuing complexity and uncertainty of the state of the law in this area.

## **THE HYBRID NATURE OF GREENS**

Greens do not fall easily into existing (public and private) categories of property law. Greens are neither unowned nor 'public' land - as with commons more generally, they belonging to someone (although a significant amount have no registered owner). Greens are primarily created by the activities of those within the locality, or neighbourhood within the locality, over time. Their registration carries with it features of an easement - the enjoyment of rights over another's land. But, as with public rights of way, this is an unconventional type of property right since its main method of creation is by the actions of communities rather than individuals, and the mechanism for registration is by application to a county council under statutory provisions. The registration of land as a green does not transfer property to the community or give it exclusive possession - the land remains in private ownership, whether by a private individual or public body - but the effect is to curtail severely the rights of the landowner so that, in effect, existing activities may continue but little more than this. In a sense, possession of land is shared between the owner and the community, with neither being able to oust the other over their respective pre-existing interests (*Oxfordshire County Council v Oxford City Council* (2006)): the law relating to greens produces a public right to land, but in a private form.

The hybrid nature of greens also arises from the way in which they come into being. In line with the idea that designation as a green involves a measure of clashing private rights rather than public law control, the instigation of the right to register land is by individual citizens, campaigning groups, or representative bodies such as parish councils.<sup>3</sup> There is invariably a public inquiry, and challenges to the registration of land as a green is made by way of judicial review, both of which suggest a strong public law element in the acquisition of the public right to use greens without the threat of their future development. But the legal test for the registration of greens, requiring a connection between the land and its use by a significant number of the local community, also demonstrates features of property law (we see this combining of public and private law features in the Whitstable beach inquiry - discussed further below - in which the potential frustration of the application to register the beach as a green by the use of the land by 'outsiders' showed a veering towards a private property-oriented approach, fostering an idea of exclusive ownership).

The hybrid nature of greens is further revealed by the nature and significance of their boundaries. In English legal culture the boundary is a symbolic and practical marker of the bounds of private property, separating the owner from the non-owner (Blomley, 2004: 3-7). With town and village greens, the boundary is similarly all important, but as a means of determining their legal status as greens, rather than marking their physical limits (the town or village green will invariably make up just one part of the physical space of the locality). The requirement that the land in question has been used for lawful sports or pastimes by the locality or

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<sup>3</sup> There is, for example, no duty on any local authority to survey their area and designate, and because county councils are the registration authority they must adopt a position of neutrality and do not generally give assistance to applicants (ADAS 2006: 50).



neighbourhood within the locality for not less than twenty years establishes a spatial boundary (combined with a temporal condition) but this is one based on collective use and activity. The law therefore acknowledges the collective nature of town and village greens but, as with other examples drawn from the law relating to commons, this is 'carefully hedged' (Blomley 2004: 3) by the language and tools of private property, particularly the need to establish the boundary of the 'locality' which forms the subject of the registration. By this, and other ways, it is argued, the ubiquity of private property is maintained (Blomley, 2004: 3).

Such a combining of public and private features in common land is not unusual. For example, Blomley finds it difficult to locate communal gardens in urban areas in either the public or private domains - they are at once public spaces, predicated upon localised communities, democratisation and interaction, but also the site of many functions conventionally equated to the private sphere (nurturing, nourishing the land) (2004:9). With greens, recognition of their environmental significance, in particular, makes a more public and planned approach to their use and conservation seem more appropriate, at least when compared to the current approach which is complex, uncertain, and tends to be mediated (and preserved) by legal practitioners to a high degree (as we discuss further below as a matter of 'legal practice/protest'). The registration of town and village greens might, then, be the subject of public debate about the use of particular pieces of land in a positive sense, rather than arising from the defensive establishment of greens by communities in an attempt to defeat unwanted development. This is to recognise that 'the decision as to whether or not land is to be a town/village green is a decision about the land use needs of a community. It is - conceptually - a planning

decision’, to which the prescriptive acquisition of rights is ‘wholly alien’ (Editorial, *PELB*, 2001).

## LEGAL PRACTICE/PROTEST

Above we considered that town and village greens span formal legal categories and that this hybrid formulation contributes to the complex nature of the law in this area. Three cases on greens have reached the House of Lords in recent years<sup>4</sup> suggesting that the residue of uncertainties about attributing land with the status of a green was not dealt with by the amendment and streamlining of the Commons Registration Act 1965 by the Countryside and Rights of Way Act 2000. The legal territory of registering land as a town or village green is now dominated by a small group of legal practitioners who have developed a specialist expertise and, whilst having an interest in the disputes arising in this area, also head up law reform working groups. One such group, consisting mainly of barristers working in the specialist field of town and village greens and other types of commons, reported on the detailed content of regulations to be made under the Countryside and Rights of Way Act 2000 (so that registration of land as a green could not be used to stall development after a ‘reasonable’ amount of time had passed).<sup>5</sup> This making of regulations under the 2000 Act<sup>6</sup> was designed to remedy the problem of proving ‘twenty years’ continued use of the land in cases in which the use of the land is suddenly challenged and local people are excluded, thereby creating a significant

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<sup>4</sup> *R v Oxfordshire County Council, ex parte Sunningwell* [2000], *R(Beresford) v Sunderland City Council* [2003] and *Oxfordshire County Council v Oxford City Council* [2006]. In each case, the House of Lords overturned the Court of Appeal.

<sup>5</sup> We should add that one of the authors was a member of this group and sought to persuade them against overly restrictive formulations of the regulations, for the benefit of groups seeking to challenge development proposals by registering land as a town or village green.

<sup>6</sup> S. 98(1B) CROW Act 2000.

interruption in use which is capable of preventing them from showing use up the date of their application to register the land as a town or village green, and making it difficult to bring together in time all the necessary evidence of use over a 20-year period. Although the stated objective of the group's recommendations was 'to do procedural justice to the competing interests as far as possible' (Society for Advanced Legal Studies, 2002:para. 3.5), the overriding concern of the majority of the working group's members seemed to be to ensure that objections to development in the guise of attempts to register land as a town or village green be 'flushed out' at an early stage in the interests of timely and efficient economic development of such land and to enable 'landowners/developers to deal with and apportion risk on this issue' (SALS, 2002: paras 3.6 and 3.7). The main method suggested by the majority of the group (but not taken up in the Commons Act 2006) was a notice provision to trigger action on the part of potentially 'aggrieved locals' even before any proposal to develop land comes to light; the effect of an unchallenged notice would be to bar any future application to register land as a new green. The group proposed that the terms of the notice, to be set out in primary or secondary legislation, include a statement that 'the land described and shown on [a] map is not a town or village green' and that 'The owner(s) is/are willing for the time being to permit use of this land for recreation [subject to certain conditions] (thereby obviating the possibility of prescriptive use), or, more directly, '[T]his is private land. Keep out' (para. 3.8). The notice would be compulsorily registrable in the Commons Register until it was decided whether the land was registrable as a green. The group recommended that the period within which the notice procedure should take place be no more than three months, which was far tighter than that of two to five years originally flagged up by the government, and a

shorter period than, in practice, gathering the information necessary to prove use a green may actually take (ADAS 2006: 58). The context in which these recommendations was made was undeniably pro-development, as shown in the following passage detailing how applications to register land as greens are so often triggered by development proposals. As in other areas, the reference to 'the public interest' is weighted heavily in favour of developmental interests (Holder, 2004), albeit that these might be public in nature:

In many instances, applications for registration are triggered by development proposals or the commencement of development on land. Since planning permission will have been granted in the vast majority of instances, the development will have been judged, at least in the planning context, to be in the public interest. Commercial and personal financial decisions will have been made on the strength of the permission. In many cases, developers have spent time and money on achieving planning permission, perhaps including the promotion of a site through a lengthy development plan process, and finding nothing adverse on the [Commons] Register, bought the site and commenced work. The local planning authority may be relying on the site as one of its development plan allocations to meet its housing or employment needs (SALS 2002: para. 2.1).

This legal territory is also claimed by the other side - protesters - who seek to deploy the law on greens, invariably as a means to protect from development the nature conservation value and 'traditional' uses of the land (ADAS 2006: iv).

## **DEVELOPMENT/CONSERVATION**

The tendency of groups seeking to register land as a town or village green as a way of blocking proposed development has resulted in commons becoming physical sites within which disputes about development and conservation take place. Registration can act as a powerful barrier to development because, although there are some grey areas about the practical effects, it is an offence to encroach

onto a green or deposit certain things on greens.<sup>7</sup> This gives local inhabitants a substantive means of preventing development, rather than just procedural rights to comment on development proposals and for these representations to be considered as material in the planning process, as at present. Registration of land as a village green therefore gives local communities the chance to assert substantive rights denied to them by the planning system in England and Wales, particularly given the current, and much-bemoaned, lack of third party rights of appeal against a *grant* of planning permission.<sup>8</sup>

Such disputes about the establishment of new greens are also an effect of the reduction of uncertain protection generally accorded to common land by a legal system driven more generally by the protection of private rights and in particular by the advancing of developmental interests in the planning system. The main difficulty is that the legal definition and protection of common lands (including, in this context, greens) is premised upon rights to *take from* or use the land, rather than preserving any conservation value held by the commons, as noted by Shoard (1997, 337): 'Essentially, common land provided a means for large numbers of people to share in the natural benefits flowing from land which they did not own'. This is the main reason why the ancient law and custom attaching to commons and their use is ill-adapted to modern environmental protection policy (Rodgers, 1999: 255).

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<sup>7</sup> S. 12 Inclosure Act 1857, s. 29 Commons Act 1876. See *Oxfordshire County Council v Oxford City Council* (2006) (Lord Scott dissenting in part on this point).

<sup>8</sup> A statutory right of appeal exists only in the case of a refusal of planning permission, which better serves developers' interests (s. 78 Town and Country Planning Act 1990).

A shift in favour of recognising and protecting the conservation value of greens is now taking place. The importance of commons in general as a distinctly environmental (as well as national) reference point has been taken up, even by the House of Lords - in a case about common land it was noted that 'what happens on the commons [is] a matter of general public concern. They are the last reserve of uncommitted land in England and Wales. They are an important national resource'.<sup>9</sup> Such expressions of concern might be seen as one aspect of a broader recognition of the sweeping privatisation (or enclosure) and 'cloning' of public space - shopping malls, high streets, and universities (M'Gonigle: 2006), and as a counter to this, the central role of public open spaces such as greens in bringing about an urban renaissance (House of Commons Select Committee on Environment, Transport and the Regions: 2001, especially para. 12; ODPM: 2002) and in contributing to other desired objectives such as improving public health and wellbeing (Royal Commission on Environmental Pollution: 2007). From this perspective, the 'defensive', or strategic, use of rights of common (as counsel put it in one case, 'walking dogs to defeat housebuilding'<sup>10</sup>) may be environmentally beneficial, having the potential to stave off more harmful development, such as the 'regeneration' or 'gentrification' of stretches of beach,<sup>11</sup> or the building of houses on a brownfield site, described as a 'priceless haven for wildlife',<sup>12</sup> and provides a good example of environmental protection potentially stemming from the custodial function of private rights (Wightman 1998: 883).

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<sup>9</sup> *Bettison v Langton* [2001] para. 15 (Lord Nicholls).

<sup>10</sup> *Alfred McAlpine Homes Ltd v Staffordshire County Council* [2002] EWHC 76 (Admin).

<sup>11</sup> As in the case of customary rights to carry out seacoaling, see J. Tulloch, 'Boys from the Black Stuff', *The Guardian*, 9.4.01.

<sup>12</sup> 'Losing the Plot', *The Guardian*, 20.6.01.

## LOCALITY/EXCLUSIVITY

The 'local' nature of town or village greens for the purpose of section 15 of the Commons Act 2006 accords with a longstanding emphasis in the environmental literature on local and neighbourhood action, as necessarily feeding into, and stimulating, broader grassroots and political protective action. There is in particular an argument that local communities are closer to nature and more knowledgeable about their local environments and are therefore best placed to understand and appreciate the importance of local ecological features and environmental interests. This finds legal expression in principle 22 of the Rio Declaration ('Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'<sup>13</sup>) and permeates the entire purpose and structure of Agenda 21, also a product of the 1992 United Nations Conference in Rio de Janeiro, which sets out a programme for local environmental democracy and action. But a further reason is that 'nature' is itself seen as constitutive of local communities and identity. As Harvey writes, '[D]ecentralisation and community empowerment, coupled with a certain degree of bioregionalism, is then seen as the only effective solution to an alienated relation to nature and alienation in social relationships' (1997, 181). Those advocating bioregionalism seek in particular to identify localities with bounded natural areas, based on physical, geographical and biological characteristics, and emphasise

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<sup>13</sup> Declaration of the UN Conference on Environment and Development, 31 ILM 874 (1992).

local self-sufficiency and co-dependency with natural resources (Sale, 1997). Such an approach is beginning to have practical effects, for example Natural England (the main landscape and conservation body in England) has mapped the countryside into 'natural areas' in an attempt to operate on the basis of their intrinsic ecological qualities and characteristics rather than according to existing administrative land units (Selman and Wragg, 1999: 654).

There is, however, a strong tendency for local knowledge and values to be idealised by the green movement and mainstream political parties alike and for simplistic naturalistic fallacies to be accepted, with sometimes very damaging consequences. Wilder (1997), for example, refers to the post colonial enslavement of 'indigenous peoples' because of the 'respect for nature' they show in their customs, beliefs, and treatment of the land. A similar story is told by Theodossopoulos (2000) in the quite different context of indigenous protest against environmental conservation in a Greek island community. Shiva (1989) draws attention to a related 'enslavement' of women, deemed to be 'closer' and therefore more responsible for the state of their immediate environment, and the 'environmental education' of their children. On a lighter note, we also see localism being used to restrict access to the 'surfing commons' in California, and thus governing 'possession' of the waves (Blomley, 2004: 18). In summary, appeals to locality give an appearance of inclusiveness and commonality, but an element of exclusivity might also be involved, as we discuss further below.

The strong emphasis on locality in law has been consistently advanced by the courts in this area, in particular by their holding that privately owned land may be



subject to a custom for the inhabitants of a parish or other locality to enjoy rights to enter the land for recreational purposes (Gadsden, 1988: Ch. 13). Section 15 of the Commons Act 2006 retains this as a 'locality' or 'neighbourhood' test (that 'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports or pastimes as of right'), in the case of certain town and village greens.<sup>14</sup> This creates a strong legal relationship between commons and locality in which the status of this form of commons is dependent upon the existence of a 'community', or at least those in the 'locality', or neighbourhood within a locality, and the long-term use of the land by its inhabitants. This test inevitably requires the courts to engage in a boundary drawing exercise, similar to that conducted in cases concerning customary rights, and which likewise involves questions of exclusion, identity and belonging (Clarke, 2004).

Such an exercise is a long-standing one. *Fitch v. Rawling* (1795) established that for customary rights to exist (playing lawful games, sports and pastimes), the beneficiaries must be restricted to a particular local area, usually the parish, rather than the public at large. Similarly, in *Edwards v. Jenkins* (1896) a custom claimed for inhabitants of three parishes was considered invalid because these could not be regarded as one district. The courts later adopted a less restrictive concept of locality, recognising that settlements might embrace more than one parish. *Edwards v. Jenkins*, for example, was disapproved by Lord Denning in *New Windsor Corporation v. Mellor* (1975), with Brightman LJ considering in that case that one locality might provide facilities for surrounding localities. This liberalising

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<sup>14</sup> So-called 'class c' or prescriptive rights greens.

trend was abruptly halted in *R v. Suffolk County Council ex parte Steed* (1996) in which it was held that the use of land 'as of right' meant that there had to be a belief on the part of the local inhabitants in their right not just to use the land, but also a belief that this was confined to them, to the exclusion of all other people.

The effect of this judgment was that virtually every subsequent application to register a green was turned down, at least until the House of Lords revisited this question of exclusive enjoyment of rights in its decision in *Sunningwell* (1999). This case concerned an application by a parish council to register a glebe as a village green in an attempt to prevent the landowner, the Church of England, from building two 'executive homes' upon it. Those arguing for the green sought, successfully, to show that they had enjoyed lawful sports and pastimes - kite flying, dog walking, tobogganing and bramble picking - on the glebe for at least twenty years. The Inspector, following closely the authority in *Steed*, recommended *not* registering the glebe as a village green solely because, though witnesses said that they believed that they had a right to use it, they did not say that they believed that such a right was confined to the inhabitants of their village. The Inspector treated a *subjective* belief in the exclusionary nature of the locality test in section 22 of the 1965 Act (now section 15 of the Commons Act 2006) as a prerequisite for the registration of the land as common. However, the House of Lords directed the County Council to register the open space as a village green. Giving the only judgment, Lord Hoffman considered that to require a belief in the exclusivity of rights would be contrary to the nature of prescriptive rights: a user which is apparently of right cannot be discounted merely because the users were subjectively indifferent as to whether a right existed.

The effect of *Sunningwell* was to objectify the meaning of 'locality', indicating that the higher courts had moved beyond requiring a subjective belief in belonging, in favour of a more pragmatic test of identifying the inhabitants of a particular locality, as well as those persons not included. But, the judgment in *Sunningwell* left unclear a key issue of the balancing of the use of the land by local inhabitants and others. All that was said by the Lords was that predominant usage by inhabitants of the village would be 'sufficient'. With the changes to the law under the Countryside and Rights of Way Act 2000, however, that use must be by a '*significant number*' of the inhabitants of the locality or neighbourhood, a particularly vague phrase which fails to make clear whether this is a standard which relates only to the locality or neighbourhood, or is relative to all use of the land (an issue at stake in the Whitstable Beach Inquiry, discussed below).

The locality condition amounts to a requirement to establish precise geographical and legal boundaries and is clearly central to how law and legal actors act in relation to greens. It particularly suggests a way in which spatial difference is formally recognised in some way by legal rules (Jackson and Wightman, 2002), and provides an example of a different approach to the geography of law than the more typical search for power-based spatial specificity of formally general rules (Blomley, 2002; Economides, 1996). One example of the former approach is of course the 'locality rule' in private nuisance, under which the same activity may not be held to amount to an amenity nuisance depending on the location of the activity (the classic contrasting of activities in Bermondsey and Belgrave Square in *Sturges v Bridgman* (1879)). Wightman and McGillivray (1997) consider this rule to

be problematic insofar as it is supposed to reflect the courts working with pre-defined boundaries, but might be better seen as reflecting the courts' general acceptance, or otherwise, of certain kinds of behaviour. Similar findings emerge from Delaney's analysis of legal decisions about the legality of restrictive covenants in the United States, the covenants being designed to exclude black residents from white neighbourhoods, which necessarily involves the judges in construing urban space, and thereby positions them as active participants in the construction of ethnic spatial segregation (Delaney, 1993). In the case of the registration of town and village greens, the legal concept of locality advanced tends not to fit with the reality of many aspects of life - commuting to work, the decline of the village or corner shop, pub or church, and the centralisation of many facilities such as schools, and health centres, the dispersal of families, and, above all, increased mobility, which underlies many of these trends (SALS, 2002, para 2.6). Nevertheless the strength of the legal requirement to establish use of land by local inhabitants involves protesters and legal practitioners engaging in an often artificial and anachronistic construction of locality and community, with sometimes exclusionary elements.

### ***DILUTION OF CLAIM: WHITSTABLE BEACH AND THE 'DOWN FROM LONDONERS'***

A number of the inhabitants of Whitstable in Kent were forced to stake out their community or 'locality' when they sought to register a stretch of beach as a village green. Their attempt to do so was in response to the perceived risks of 'enclosure' of the beach, in the form of its economic development (the likely extension of an

existing restaurant on the beach front, and the development and use of beach huts as accommodation for visitors to the restaurant) from its present owners, the entrepreneurial proprietors of the Whitstable Oyster Fishery Company. When trying, in the course of a non-statutory public inquiry, to demonstrate a nexus between local inhabitants and the beach, there was the distinct possibility that their claim would be frustrated by the use of the beach by so-called 'Down from Londoners', the 'outsiders' in this story. Following the inspector's recommendations, in 2002 the County Council rejected the application to register the beach as a town or village green under section 22 Commons Registration Act 1965 (now superseded by section 15 Commons Act 2006). What follows is based on our own attendance at the inquiry, and documentation made available at the inquiry and the Inspector's report and recommendations. The proceedings were adversarial, with at times a great deal of animosity expressed between the parties, and were governed by a select group of planning barristers, fully conversant with the complexities of this area of law, and who conducted an, at times, fierce cross-questioning of the applicant's (Whitstable Preservation Society's) witnesses.<sup>15</sup>

In terms of locality, the central issues at the inquiry were first, 'is there an identifiable locality or neighbourhood within a locality whose actions found the right to register the beach as a town or village green?' and second, 'what is a "significant" number of inhabitants of the locality or neighbourhood within a locality'. On the first issue, the objectors (the current owner and potential

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<sup>15</sup> Ann Wilks, Whitstable Preservation Society, and veteran campaigner for establishing beach footpaths and village greens (she tried to register the beach as a green in 1968) was cross-examined for six hours, whilst residents booed and hissed the Council's barrister. For an account, see Ros Coward, 'Get off my Sand' *The Guardian*, 8.10.02. That public inquiries, where there is invariably a large power imbalance between applicant and objector, can be 'daunting to witnesses', in some cases affecting the outcome of the application, is a general feature of this area (ADAS 2006: iv).

developer of the beach) made much of the difficulties of establishing the boundaries of any locality or neighbourhood in relation to the use of the particular stretch of the beach, and of establishing a sufficient nexus between the locality or neighbourhood and the prospective green. The applicant's use of the ward (the local government boundary) in which the area of beach at issue was located was challenged as arbitrary or convenient. Although an area 'known to the law'<sup>16</sup>, when the applicants' witnesses were invited by the objectors to identify themselves with the ward, they could not establish that the ward was a sufficiently defined locality or neighbourhood. The principal objectors went to great lengths to show that none of the traditional activities that might be associated with a locality or neighbourhood - churches, schools, voluntary associations and so on - took their participants solely from that area. The argument was therefore that the locality or neighbourhood should enjoy some 'innate identity' or 'community', but that it did not.

The principal judicial authority for either of these tests for establishing a locality is found in *Steed*: ('[W]hatever its precise limits, it [the locality] should connote something more than a place or geographical area - rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right'<sup>17</sup>). Such an understanding of locality (as well as the newly introduced concept of 'neighbourhood within a locality') does not, as noted above, fit with the reality of many aspects of modern life. There is some relaxation of the test in Government guidance, in force at the time of the Whitstable inquiry but not referred there, which notes that 'locality, or neighbourhood within a locality' does

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<sup>16</sup> *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931, 937C

<sup>17</sup> Per Carnwath J in *Steed* (1996), agreed with by the Court of Appeal. Decision overruled, but without affecting this part of the judgment.

not necessarily have to equate to an administrative area 'but rather to a suitable area which the land in question might reasonably be expected to serve as a green' (DETR 2001, para 80). This relaxes the 'known to the law' test, but appears to maintain a community nexus. An alternative, and at present admittedly unlikely, approach might be to draw upon the public trust doctrine, as a means by which genuinely communal land rights (i.e. those flowing from the (imagined) claims of an abstract 'public', rather than a definable 'locality or neighbourhood within a locality') might be recognised, albeit in a private law form, as we discuss further below.

### **Local v Non-local use**

On the second issue, the objectors argued that the usage of the beach must be 'predominantly' by those in the locality or by those in the neighbourhood within the locality, and that, given the numbers of visitors to Whitstable, this could not be established on the facts (extensive statistics were presented by the Preservation Society in an attempt to establish the 'favourable' level of use by local inhabitants as compared with visitors). Regardless of the actual numbers concerned, there is little to support this approach in law. In *Sunningwell*, for example, Lord Hoffmann did not lay down a test that local usage must, at a minimum, predominate, just that predominant usage by inhabitants of the village would be 'sufficient' in such cases. Given the brevity of his judgment on this point, it is difficult to see that this establishes binding authority. At best, therefore, predominant local usage could be a sufficient condition, but arguably it is not established in law as a baseline requirement and some lower standard could, in principle, be adopted. The more interesting question in this case is whether use by others could extinguish the

applicant's claim. On this point, the law at the time seemed to resort to a more property-based conception of entitlement, so that even if there is a basis for the claim through collective use of the land over time, this might be lost, or diluted, by the use of the land by others. It had been suggested, for example, that such 'mixed' users should lead to the rejection of applications to register land as greens (Thomas, 2000).

As with the issue of boundaries, discussed above, the language and concepts of private property, particularly ideas of exclusive and non-mutual use, pervaded even the registration of land as a green. In this way, the centrality of the private property model had the effect of rendering other modalities of ownership invisible, and, indeed of shaping the manner in which other legitimate claims and interests in land were presented and argued against, even those relating to commons and common usage of land (Omar, 1998: 342, cited by Blomley, 2004: 18).

On the specific issue about the dilution of claim through use of land by those from outside the locality, or neighbourhood within the locality, this is also the subject of guidance that, in cases of registering land as a town or village green, the 'use by people not from the locality will therefore be irrelevant' (DETR, 2001: para. 80). Notably, neither this guidance, which was in force at the time of the Whitstable inquiry, nor the Government statement made during the passage of the CROW Act 2000 to similar effect,<sup>18</sup> were referred to in the Inspector's report. Given the remarks above about the general nature of the registration process, the specialist

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<sup>18</sup> Baroness Farringdon of Ribbleton (for the Government): 'The amendment [to s. 98 CROW Bill]...makes it clear that qualifying use must be by a significant number of people from a particular locality or neighbourhood. That removes the need for applicants to demonstrate that use is predominantly by people from the locality and means that use by people from outside the locality will no longer have to be taken into account by the registration authorities. It will be sufficient for a sufficient number of local people to use the site as of right for lawful recreation and pastimes', Hansard, 16.11. 2000, col. 514.



bar in this area and the imbalance of power in this particular case, it is difficult to imagine that this interpretive guidance was not known to those resisting the application.<sup>19</sup> However, the broader theoretical point remains - the language and concepts of private property in this respect have, until very recently at least, proven capable of shaping the perception and operation of law relating to commons.

### **The language of the claim**

Private property concepts were invoked not just by the objectors: in the course of the inquiry the applicant Society also appealed to ideas of ownership, albeit a type of collective ownership, not formally recognised by law, but nevertheless drawing upon legal form. Much can be made of the use of concepts of ownership in the language used in protests and campaigns such as that undertaken by the Whitstable Preservation Society, even though these seem to turn on the context in which they are used. But this caution apart, a strong sense of collective ownership was borne out in many of the witnesses' responses and related correspondence. No-one correctly identified the Oyster Fishery Company as the owner of the beach<sup>20</sup> and most responses claimed a public right to the beach, either in such terms, or by identifying the council as the owner, while a few thought the beach to be unowned. A sample of responses is as follows:

'The people of the town...it is public property open to all'

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<sup>19</sup> The registration claim was, however, also rejected on the ground that the user was not 'as of right' throughout the 20 year period, the Inspector finding that the Oyster Company had declared any use to be with permission as from 1983.

<sup>20</sup> The private ownership of the beach (i.e. the foreshore) is as a result of an Act of Parliament of 1793, establishing the Whitstable Oyster Fishery Company and giving it powers over the beach, and subsequently purchase by the Company of the beach in 1856 (title being registered at the Land Registry in the 1990s). The majority of the foreshore in England and Wales is owned by the Crown Estate.

'The Council - us!'

'We own the public beach...it belongs to the public...we own the free beach'

'Crown land'

'The people of Whitstable, through [the Council]'

'Not aware there *is* an owner'

'It is a public asset...I recognise no owner'

[on being asked what you would do if told by the owner of the beach that you had no right to be there] 'I would have told them to go to hell! I pay my taxes'

As the Preservation Society concluded, '[M]any use the same piece of beach for most of the time, often referring to "our beach"'.<sup>21</sup> This type of collective ownership claim by communities is a familiar one. Blomley, for example, recalls that protesters in the Downtown Eastside of Vancouver communicated strongly similar property-like claims by their language and actions (this issue, \*\*\*). He understands such collective property claims to be produced through shared histories and stories of common use and habitation, and, most importantly, through 'counterstories' of evictions, displacement and gentrification. Blomley makes clear that this localized property claim was distinctly *not* made in the name of an abstract 'public', but was instead predicated on membership in a local community (Blomley, 2004: 51-53). The collective claims of Whitstable Preservation Society, in seeking to register the beach as a green, similarly rested on long term activity and shared use of the area. The references to collective ownership made by local inhabitants, and collected as support for the application, also reveal a leaning towards a collective interest in the beach as a commons - as land 'owned publicly'. Taking this as a lead, we next

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<sup>21</sup> Letter from the Whitstable Preservation Society to Kent County Council, June 2000.

consider whether a localised property claim in the name of an abstract 'public' might better reflect the increasing significance of town and village greens as reservoirs for nature, in the main by considering the possible value of the public trust doctrine.

## **BEYOND LOCALITY**

The attempt to register the beach at Whitstable as a town or village green highlighted (in law, before the DETR guidance of 2001, and in practice, even after this) many difficulties, including marking out the boundaries of the locality, and establishing that a sufficient number of inhabitants of the locality or neighbourhood within the locality use this land, as opposed to 'outsiders'. But a different order of conceptual and practical questions about the registration of common land in this manner is raised by adopting an environmental perspective. Primarily the legal test for registering land as a town or village green is revealed as narrow, and incapable of capturing broader interests; this being dependent upon the existence and activities of those in a particular space (the inhabitants of a locality, or neighbourhood within a locality) and time (the present, and immediate (20 year past), creating both spatial and temporal exclusivity. Upon such arguments about the inability of law to encompass a broader range of interests and values rests a large body of work from environmental lawyers and theorists about 'future generationalism' (Barry, 1999; Partridge, 1981; Farber, 2003), distributive justice (Lazurus, 1993), and how to secure through law the demands of 'sustainable development' as a prevailing policy of environmental governance, and more generally (Richardson and Wood, 2006).

In this context, there are several arguments in favour of transcending locality, or stretching the margins of the geographical nexus between land and locality. The first is the changing physical and functional nature of greens themselves. Whereas once these areas were commonly located at the centre of an easily defined conurbation, typically the village, they are increasingly created at the boundary of urban areas, where built up areas do not quite meet and where there is no central open space in which 'community' life takes place; examples are the recreation ground in Washington, Tyne and Wear, created using excavated soil from the development of a shopping centre, and which became the subject of dispute in *R(Beresford) v Sunderland County Council* (2004), and the Trap Grounds in *Oxfordshire County Council v Oxford City Council* (2006).

Socio-legal theorists have equally exposed the restrictive nature of a geographical or spatial conception of locality, looking instead at possibly broader understandings. Cotterrell's sociological critique of theories of a unity of legal authority and his subsequent examination of legal pluralism, for example, involves him in identifying an expansion in legal and other communities (Cotterrell, 1998). This forms part of a much wider project 'to develop theories of both legal transnationalism in its various, often contradictory forms and legal localization' (389). In trying to do this, Cotterrell draws upon De Sousa Santos' depiction of a foci of contemporary aspirations for law as being 'rights to roots', or the sense of moral security and belonging in contexts that are personally significant. These contexts, though, are less and less rooted in specific geographical localities (De Sousa Santos, 1995: Ch. 4, and 262, cited by Cotterrell, 1998, 389). Instead, they

are increasingly diverse and abstract, rooted in communities which are removed from a physical locality, and may be conceptualised as 'webs of understanding' about the nature of social relations. As Cotterrell sums up (1998, 389-390):

Community in this sense is a mental construct ...It provides people with a means of orienting themselves. It gives them their sense of identity. Hence community can be a matter of shared beliefs or values, but also of common projects or aims, or common traditions, history or language, or of shared or convergent emotional attachments. For individuals it is all or any of these in intricate, shifting combinations.

...

The concept of community, if it is to be meaningful in contemporary conditions, is thus complex. It has nothing in common with the old pre-modern imagery of *Gemeinschaft*, suggesting static, enclosed, and exclusive communities.

Interestingly, Cotterrell's comprehensive list of what can make up modern 'community' does not include shared environments. This, though, is central to Farber's thesis of 'stretching the geographic nexus'. Primarily, Farber questions the geographic connection required to give an individual a legitimate interest in an environmental problem in a given locale, based as it is upon traditional notions of territoriality. He identifies instead a nascent tendency of some legal regimes, and environmental law in particular, to draw upon and recognise ideas of mutual interdependence - within law, and between law and other disciplines. Farber sees that the existence of transboundary communities, and the migration and exponential nature of environmental problems, inevitably creates a drive away from localism and any idea of environmental autarky (1996, 1271). Underlying all this, he argues, 'is the recognition that environmental harms are not purely local, but instead are very much the business of "outsiders", remarking '[A]lthough far from dead, localism has lost much of its authority in the environmental sphere' (1271-2). Much of this analysis is dependent upon the basic idea of globalism that 'what happens in one place affects everyone everywhere, and no particular geographic

nexus should be required as a basis for legal action' (1272), although he is equally careful not to deny that, whilst transboundary environmental effects are common, local impacts are usually stronger. Farber concludes that both globalism and localism are fundamentally incomplete, each containing a partial normative vision that deemphasises the values promoted by the other (1273). He therefore proposes an (ambitious) evolutionary legal framework, which would involve courts and tribunals at all levels and in various jurisdictions in delineating the geographic limits and level of environmental intervention. In sum, Farber's work highlights that environmental discourse raises complex understandings about belonging and responsibility which might be recognised, but are not yet easily expressed, in law.

The idea of a public trust, in which common resources such as water are considered to be held in trust by the state for the use and enjoyment of the general public, rather than private interests, appears to give legal form to some of these arguments in favour of law moving beyond a rigid, geographical, conception of locality and community. Although originally applied to protect navigation routes and fisheries (and therefore particularly applicable to seashores and wet sand beaches), this common law doctrine is now an established part of natural resources law in the United States and other jurisdictions (it has been recognised, for example, by the Indian Supreme Court (Razzaque, 2001), and has proved capable of expanding public access to land and stalling development (Sax, 1970, Rose, 1994). The doctrine, described as an easement that members of the public hold in common (Huffington, 2003), encourages a forceful recognition that the public at large, despite its unorganised state, seems to have property-like rights in the land held in trust for it, which may be asserted against the state's own

representatives (Sax, 1970: 556-557). In practice the public trust concept can be used (as the basis of statutes or in the course of litigation) to constrain activities which significantly shift public values into private uses or uses which benefit some limited group, so, for example, a proposal which appears to be little more than a 'giveaway' of valuable public facilities to certain private interests would not be permitted unless the nature of the development is truly public (Sax, 1970: 538, 540).

Sax's major contribution (as well as the dramatization of important issues of environmental governance (Rose, 2003)) was to suggest the expansion of the doctrine from its traditional coverage of 'the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence', to its application 'in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands', in other words, a wide spectrum of resource interests which have the quality of diffuse public uses (Sax, 1970: 556-7). Such analysis suggests the possibility (now realised) of legal recognition of a broader public interest, belonging, or sense of responsibility, owed to the infinite territory of nature, rather than one arising from primarily local, and community, use.

Although there are no recent examples of public trust arguments having been litigated in an English context in land management and access disputes, since the 1970s the public trust has been recognised in many US states as an important limiting device on the actions not just of the states but, to some degree, also on

those who privately own land such as beaches. US academic opinion is sharply divided on the merits of the doctrine as against public regulation, and the degree of power it gives the state courts in determining both its scope and application (Klass, 2006, 699-700). Nevertheless, there are examples where the courts have transcended a narrow spatial nexus and prevented barriers to access, e.g. to beaches, imposed on those from outside the immediate locale (Klass, 2006: 707-713). The public trust doctrine is not the only mechanism that has been used to do so – constitutional free speech rights have also been argued successfully (*Leydon v Town of Greenwich* (2001)) – but where it has been accepted it has gone beyond a narrow private-property rights analysis, and applied in the context of the Whitstable case study (which is not without difficulty, as it would require a recognition that the registered owner's title was held subject to a beneficial interest in the public at large) might provide a means of advancing both the interests of those within and without the immediate locality, recognising that property rights are means to what is socially desired and not ends in themselves (Rose, 1986).

## **CONCLUSIONS**

The law (including the courts) currently defines land as common, on the basis of a narrow geographical conception of locality. Using locality as the basis for legally defining space as common involves judgements about exclusion or inclusion, and serves to draw concepts of private property into what are arguably public decisions about the use of land and its value for recreation and conservation. This provokes a comparison with critical 'law and geography' approaches to the environmental justice debate in which, generally, 'locality' is problematised (as in 'locally



undesirable land uses') (Been, 1993); instead, in the case of greens, in seeking to register and set aside from development certain spaces for local use, the locality is the protected space, but here protection is often based upon, and also serves to advance or present as general, an outmoded and unrealistic conception of social life, leisure and practices.

In conclusion, a currently active environmental discourse about the necessary linkages to be made between local and global action, and the redrawing of meanings of 'community' removed from any geographical reality or boundary, might move law to respond to many locales and communities - not just those which have a physical or geographical presence. The emergence and existence of broader social and ecological networks, even stretching to a conception of global commons, as a common heritage or province of humankind, might particularly influence developments in legal thinking about shared nature and natural resources in a more meaningful way than current legal definitions and practices allow. As Stone notes, the question of the global commons 'demonstrates the persistent significance of the locale and also the reasons for localism's decline' (1996, 1284). The case of town and village greens, particularly taking account of their potential as a reservoir for nature conservation, suggests that ideas of locality in law deserve careful handling.

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