

Land: Balancing competing economic and social interests

Barbara Bogusz*

I. Introduction

The recognition of land as an economic resource has never been in doubt, but land regulation and usage should not be confined to a functional examination through the narrow prism of economic benefit. Land use policy also embraces wider social ideals which both statute and courts have recognised, for example, through the protection afforded to town and village greens (TVGs).¹ In the case of TVGs, they have been protected primarily for customary or, more recently, for ecological/environmental purposes rather than for some explicit economic justification.² Yet the assertion that land used primarily for social purposes is devoid of *any* economic value is an oversimplification which may be challenged and, economic value and social benefit should not be considered as mutually exclusive ideals. Though the economic value of land designated for social usage may be a secondary consideration by contrast with land intended for strictly commercial or developmental purposes, it may be implied from the policy objectives of the Growth and Infrastructure Act 2013 (GIA 2013), as well as regulatory and judicial principles, that land utilised for social purposes may also derive economic benefits to a local community.³ For example, recreational access for the benefit of all users to England's coast line through the creation of a national coastal path provides ancillary of an economic nature through tourism to the local community the paths serve.⁴

The social construct of land, such as that recognised through the law of easements, freehold covenants and TVGs, by which the activities of property owners are restricted can be said to have derivative socio-economic benefits to third parties. Put bluntly, easements and covenants help to protect and maintain the character of a neighbourhood and may be said to promote its social utility. More controversially TVGs, whose social justification at the expense of economic development has been used speculatively, have recently been the subject of increased litigation in which the primary aim has been the maintenance of the environmental characteristics of a neighbourhood and bring into focus sharply the tension that exists when the public seeks to influence the use of private land.⁵ Thus the clamour to protect TVG's may be said to be rooted in a culture of 'NIMBYism' where conservation of the heritage or character of a neighbourhood by restricting commercial development has,

* Lecturer in Law, School of Law, University of Leicester. The author would like to gratefully acknowledge and thank the anonymous reviewer for the comments and observations about this article.

¹ See for example, Commons Act 2006 and *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 (HL) and *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 AC 70 (SC).

² *R v Oxfordshire C C, Ex p. Sunningwell Parish Council* [2000] 1 AC 335 (HL).

³ This is evident in relation to large scale projects such as the Olympic Park and Legacy project which capitalise on the promotion of the social and cultural aspects of sporting events as well as the economic regeneration of East London.

⁴ John Vidal, 'Nick Clegg pledges to complete England's coastal path by 2020' *Guardian* (London, 3 September 2014) theguardian.com/environment/2014/sep/03/nick-clegg-england-coastal-path.

⁵ For example, in *Oxfordshire C C v Oxford C C* (n 1) the House of Lords allowed the registration of Trap Grounds in North Oxford which included an area submerged in reeds and scrubland to be protected as a TVG. More recent examples include fields once owned by the Curtis family in *Betterment Properties (Weymouth) Ltd v Dorset C C* [2012] EWCA Civ 250; [2012] 2 P & C R 3 (CA), and a beach in *R (on the application of Newhaven Port and Properties Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWCA Civ 673, [2014] QB 282 (CA). See further, B Bogusz, 'Regulating public/private interests in town and village greens' (2013) *International Journal of Law in the Built Environment* 21.

ironically, potentially a simultaneous effect of preserving the economic value of land within the locality. TVGs provide a prime example of how communities or neighbourhoods perceive social and economic land use, and how the neighbourhood or community can act as drivers to determine the status of land through, in particular, customary use.

Modern land use policy reflects a more transformative approach to land whereby the social dimension is considered and given more prominence alongside economic policy objectives. This is particularly the case where the State engages in legacy projects and in the creation of recreational assets, but has also occurred in providing collective participation for local communities and neighbourhoods in determining and shaping their local amenities thereby spawning a new form of local democracy. The underlying rationale for the GIA 2013 is one of fostering economic growth and increasing competitiveness at a global level, and as part of fulfilling this aspiration is through building developments in compliance with the National Planning Policy Framework (NPPF).⁶ One consequence of this is that this raises the prospect of tensions between competing public and private interests. This paper will examine whether more recent legislation, for example, the Growth and Infrastructure Act 2013 together with recent the government's planning policy to ascertain whether there is a coherent framework for a regulatory strategy through which two potentially competing aims of land usage may be secured. In particular, this paper will consider the policy implications of the current regulatory framework and whether it provides a mechanism through which to reconcile the competing social and economic interests which vie with each other within land use policy.

II. Balancing Potential Competing Interests In Land

Conflicting interests over the use of land is an inherent tension within economic and urban development. Within this context, striking a regulatory balance between exploiting land as a finite economic resource whilst simultaneously recognising the wider social value of land is a complex conundrum. The collision between planning law and policy, environmental considerations and social uses of land, as seen in disputes involving TVGs, has created a tension within the public which the legislator has, thus far, proved unable to reconcile satisfactorily and meet the concerns of these competing interests. English law and policy relating to the regulation of land is often characterised by the presence of winners and losers, and arguably does not provide a coherent regulatory framework within which these competing interests are sufficiently protected.

Historically, the communal and social institutions fostered prior to the enclosure of land in England made way for a change in land usage. In this context, following enclosure, not only was land arguably being used more efficiently in comparison to the communal open field system, but it was the shift away from the field system to that of individual property ownership of land which undoubtedly changed the perception of land usage.⁷ The movement towards enclosure of land in many parts of England was limited to an extent from the mid to late 1800s onwards where land was secured, not simply for purposes of enclosure but also for the protection of commons and significantly for public use and enjoyment.⁸ The latter encompassed not only the social recreational dimension to land but also took into account

⁶ Department for Communities and Local Government, *National Planning Policy Framework* (London: DCLG, 2012) (NPPF).

⁷ J Yelling, *Common Field and enclosure in England 1450-1850* (London, Macmillan Press, 1977) 7.

⁸ Lord Eversley, *Commons, Forests and Footpaths* (London, Cassell, 1910) 324-325.

free public access to common land.⁹ It was this philanthropic concern which considerably slowed down the progress of enclosure,¹⁰ and also had a broader economic impact upon the construction of national infrastructure, for example new railways, whose construction regularly threatened the picturesque landscape. In a policy concession to these social objectives such developments were curtailed or compromises made to prevent intrusion of the railways on to common land.¹¹

It is the mutation from the rural landscape to increasing urbanisation which has necessitated the recognition of a multifaceted understanding of land usage where access and preservation are equally important values. Preservation would enshroud not only the rights associated with common land, but also the recreational customary rights that are associated with TVGs, which are more recently manifesting themselves as environmental concerns. Public access over land from the 19th century was not restricted to customary rights, the wider social, economic and environment benefits of public parks and open spaces as a public amenity were also realised.¹² Parks were created through various means such as acquisition by funding initiatives from people in a local area¹³ and gifts,¹⁴ and through statute.¹⁵

In the post war era of reconstruction and rebuilding Britain, conservation of the countryside, the promotion of recreational areas as well the protection of areas of amenity were embraced and safeguarded by the State against both private and public developments through the enactment of legislation such as the National Parks and Access to the Countryside Act 1949 (NPACA 1949). This policy may have seemed somewhat incongruous by taking into account open spaces and their protection for recreational purposes in the light of the post-war pressures for urban and town planning, housing and restoring basic amenities which were priorities of the Atlee Government in the post WWII era. As the decades passed and urban living became the reality the social value of access to land for purposes of recreation and enjoyment was never in doubt. The NPACA 1949 was itself proclaimed as the 'people's charter' which was aimed at 'everyone who loves to get out into the open air and enjoy the countryside.'¹⁶

The difficult question of how to strike an appropriate balance between the economic justifications for using land more efficiently with the wider social communal use of land cannot be addressed easily. This becomes more problematic as modern urban development spreads and competes with the preservation of the landscape in its rural context or for public use and enjoyment. In recent years this has become a paramount consideration with regards

⁹ Public access for the purposes of 'rights of access for air and exercise' was extended as a general right over metropolitan commons, borough and urban district commons: Law of Property Act 1925, s 193. See also, Law of Property Act 1925, s 194 which prevents the erection of fences or construction of buildings which may impede or prevent access to land.

¹⁰ See further, Royal Commission, *Report of the Royal Commission on Common Land, 1955-1958* (Cmnd 462, 1958) paras 80-83.

¹¹ See further P Readman, 'Preserving the English Landscape, c.1870-1914' (2008) 5 *Cultural and Social History* 197.

¹² *Report from the Select Committee on Public Walks with the Minutes of the Evidence Taken Before Them* (Parliament, House of Commons, 1833).

¹³ In Manchester, both Philips Park and Queens Park were purchased with the aid of public subscriptions and opened in 1846. Birkenhead Park in Wirral was the first publicly funded park and opened in 1847.

¹⁴ Joseph Strutt, a textile manufacturer, gave Derby Arboretum as a gift to the people of Derby in 1840.

¹⁵ For example, Open Spaces Act 1906.

¹⁶ J Blunden and N Curry (eds), *A People's Charter?* (London, HMSO, 1989) 62-4. The NPACA 1949 did not necessarily fulfil its true potential and was subsequently superseded by the Countryside Act 1968, which sought to deal with the increasing numbers of visitors to the countryside and coastal areas.

to TVGs where there is increasing tension between landowners seeking to utilise their land for building developments and that of the public who have exercised their customary rights over land. The increase of urbanisation from the 19th Century and the accompanying population shift made the preservation of open spaces a matter of increased public concern.¹⁷ In the 21st Century the transformation of property regulation to encompass environmental and ecological concerns has had the supplementary effect of informing and empowering citizens to assume a greater interest in and responsibility over their local communities and its environment. This empowerment of citizens can be attributed to the changes in political ideology notably in 1980s which centred on restructuring the State and where the focus was on empowering the individual, active citizenship and engagement with business knowledge.¹⁸ The overall result of these socio-economic changes has been the progressive development of a wider participatory and horizontal model of rural governance involving working in public/private partnerships and including a range of stakeholders, communities and citizens as opposed to paternal vertical governance of State regulation of urban development and rural land usage.¹⁹

III. Public/Private: Division Or Coexistence?

Property ownership in the modern era is not simply constructed on the basis of economic freedoms but envelopes the broader social or community orientated interests associated with land usage.²⁰ Together with the public regulatory mechanisms, for example planning control, any notion of absolutism of property ownership or non-interference is dissipated, and the overriding objective is to strike a balance between the rights of property owners and the community at large. At the micro level this can manifest itself between property owners who engage in private bargains, for example in the form of easements permitting or restricting use or access to land. Easements historically have been upheld where a right over servient land provides a clear benefit to the dominant land.²¹ Often such rights of access promote utility of the land thereby seeking to ensure that the use of land which remains a scarce resource is maximised. Similarly, freehold covenants may be used to protect the character of a property, and these covenants are not limited to just the appearance of individual properties, but also how this contributes to the appearance of the broader geographical area. This type of privately bargained right, together with freeholds covenants, have never been subject to wider controls or planning regulation.²²

¹⁷ In the twentieth century Milton Keynes is a good example where of a new town was designed with village greens as an integral utility for citizens inhabiting a built-up environment and which incidentally was built around the village Milton Keynes (now known as Middleton) which already had a village green.

¹⁸ M Woods, *Rural Geography: Processes, Responses and Experiences in Rural Restructuring* (London, Sage, 2005) 165.

¹⁹ This inclusionary model of rural governance finds its nexus in the 1995 White Paper on Rural England (Department of the Environment, *Rural England: a nation committed to a living countryside* (Cm 3016, 1995)) and this approach continues through to the White Paper published in 2000 on protecting the countryside: Department of the Environment, Transport and the Regions, *Our countryside: the future: a fair deal for rural England* (Cm 4909, 2000).

²⁰ Mitchell perceptively describes property ownership as ‘a web of relations’ and the public as stakeholders have a role in the decisions made over property, see J Mitchell ‘What Public Presence? Access, Commons and Property Rights’ (2008) *Social and Legal Studies* 351, 353.

²¹ This type of privately bargained right, together with freeholds covenants, have never been subject to wider controls or planning regulation.

²² In the case of freehold covenants these have been viewed as a form of localised private legislation protect and maintain the character of a local area or neighbourhood. Specifically, these types of covenants, that is ‘schemes of development’ or ‘building schemes’, regulate obligations at a local level. See K Gray and S Gray, ‘The Idea

The creation of such covenants not only creates interests over land, in a narrow property law sense, but more broadly such covenants may give rise to an impression that land in a specific geographical area possesses characteristics, be they social or environmental which are worth protecting.²³ Thus, even those ‘mundane’ third party property rights which many viewed as being a functional conveyancing requirement may possess or create effects which go beyond the one dimensional aspect of land usage. On this analysis easements and covenants are mechanisms which are upheld by the law as valuable property rights which not only have an economic dimension but also regulate and sustain the broader social characteristics of the land. This formula permeates across all aspects of land usage leaving significant scope to create tensions between landowners who wish to exploit their land for economic purposes and the wider community who opposed development or change of use of land because it may have a potential impact on their own recreational/social or even economic interests.

Notwithstanding the restrictions on land usage that may exist it is irrefutable that the period since the 1980s is characterised by a shift towards development and an increased rate of urbanisation. Whereas the imposition of easements and covenants may be considered in a micro context, urbanisation is a macro policy trend which is apparent across the country. Pressure for housing, economic and industrial development and shifting populations have all necessitated that long cherished notions of a ‘green and pleasant land’ are no longer as relevant in the 21st century. Urbanisation, together with a variation in land usage has brought about a change in the socio-economic relationship between individuals and land. In many respects the relationship is more polarised. For example, the environmental lobby and pro-development groups are regularly at loggerheads with respect to whether, how and to what extent land may be developed. This conflict is perhaps most clearly evident when one considers the law, policy and practice relating to TVGs. Town and village greens have become a ‘flash point’ in which developers and environmentalists regularly collide.²⁴ Yet the State, through the legislative process together with the judiciary has failed to provide a satisfactory mechanism through which disputes concerning public and private rights may be resolved.²⁵

More significantly, in the broader perspective of communal relations and living, the social dimension inherent in land usage is becoming more important as an antidote to what could be

of Property in Land’ in S Bright and Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, OUP, 1998) 42.

²³ Under s 84(1) Law of Property Act 1925 the Upper Tribunal has a discretionary power to modify or discharge restrictive covenants which are no longer desirable due to changes in the socio-economic make-up of the environment in which they exist. Reasons for modification or discharge are broad and include changes in the character of the neighbourhood or other material circumstances which are deemed significant to the Tribunal (s 84(1)(a)). Examples include: *Re Wards Construction (Medway) Ltd’s Application* (1994) 67 P & CR 379 a covenant was modified to permit redevelopment of land due to the change in the character of the neighbourhood from building developments which had taken place over time. In *Re Quaffers Ltd Application* (1988) 56 P & CR 142 the covenant was discharged because the surrounding motorway network had made a fundamental change in the character of the neighbourhood for which the restriction was intended to protect.

²⁴ See *Redcar* (n 1) and *Sunningwell* (n 2).

²⁵ The Supreme Court in *Paddico (267) Ltd v Kirklees Metropolitan Council* [2014] UKSC 7, [2014] 2 WLR 300 (SC) found in favour of the landowners on the issue of whether it was ‘just’ to rectify the register after a lapse of time where land was registered as a TVG when it should not have been ab initio. This case focuses solely on the formalities regulating rectification of the register and do not represent a major shift in judicial policy towards town or village greens. For an alternative view see further N Pratt ‘The application of the equitable doctrine of laches to the rectification of the town and village green register’ (2014) *Journal of Planning & Environment Law* 588.

described as ‘urbanisation creep’. This creep arises where the edge of the town gradually advances into the rural domain due to the increasing use of land on peripheral locations of towns for commercial purposes, such as warehouses, retail parks, superstores and rubbish tips. The established network of transport links of roads and motorways, and perhaps now to a lesser extent the railway, has facilitated the growth in the developments of such commercial enterprises. In large part, the increasing number of TVG disputes can be viewed as a more proactive measure on the part of citizens to protect areas of land for recreational purposes where there has been long established use, and they have, in a number of instances, proved to be an effective vehicle through which urbanisation may be challenged.

A. Public Access Over Private Land

Public access over private land is both multifarious and organic with each form raising distinct regulatory challenges.²⁶ From a regulatory standpoint, of the more complex forms of access to private land are TVGs and common land.²⁷ TVGs and common land are often referred to in the same breath; indeed TVGs are often mistakenly considered to be common land, but from a regulatory standpoint they are undoubtedly different beasts.

Historically, in the case of common land, the existence of common land is rooted in the economic development of England whereby a Lord of the Manor would permit *specific* smallholders to utilise unused parts of the manorial land for rearing livestock.²⁸ In the 19th Century, the Inclosure Acts maintained this existing common land and enabled it to be fenced off. This development, intended to promote better management of common land is by stark contrast to the regulatory framework of TVGs where the enduring and defining regulatory principle, which the courts have consistently upheld, requires access to the land to be ‘as of right’ and uninhibited.²⁹ However, though, in regulatory and substantive terms TVGs and common land are different, neither TVGs or common land create *any* form of general public right of usage; on the contrary, in both instances the statute provides the parameters within which a strictly defined and limited class of the general public may exercise certain customary rights over the land.

²⁶ The various forms of access include, inter alia, public rights of way, open access land and national parks. A more recent development in this area is providing coastal access for the public around the English coast.

²⁷ The use of the nomenclature of ‘common land’ does not necessarily imply either ownership by a public body which generates a specific public right of way or usage (though much common land is, today, in local authority ownership), or that the land is available for use by the public at large. For a comprehensive overview of the historical development of common land see N Ubhi and B Denyer-Green, *Law of Commons and of Town and Village Greens* (Bristol, Jordans, 2006) Ch 5.

²⁸ This 11th Century practice was consolidated through the Inclosure Acts of the 19th Century by which time much of the manorial ownership had ceased and the land had been transferred in to private ownership, and where manorial rights existed they continued to do so unaffected by these changes. Under the Inclosure Acts common land was maintained and fenced off to enable its continued use and for better management.

²⁹ The question of ‘as of right’ was discussed in *Redcar* (n 1) where the Supreme Court reviewed the case law and discussed what type of restrictions with regard to accessing the land are required before the users are no longer entering as of right (see paras 17-20). See further R Austen Baker and B Mayfield, ‘Uncommon confusion: parallel jurisprudence in town and village green applications’ (2012) 76 *Conveyancer and Property Lawyer* 55, 60, and L Blohm ‘The “by right” doctrine and village green applications - a response’ (2014) *Conveyancer and Property Lawyer* 40. Moreover, s 29 of the Commons Act 1876 makes encroachment or inclosure of a green and interference with or occupation of the land illegal unless it is with the aim of improving the enjoyment of the green.

Through the creation of TVGs and common land public law and the courts have imposed limitations upon private landowners in favour of third parties. But, unlike easements which constitute proprietary rights for the dominant owner, neither designation as a TVG or common land constitutes the granting of any form of proprietary interest in favour of the user and in this they differ in form and substance from easements and covenants. However, while there remains no change of entitlement, the public law may have a particularly adverse impact upon a landowner's rights which are far in excess of the constraints that exist upon the granting of an easement. In particular, by granting customary rights this may lead to a disproportionate influence or control over the land, for example, through users seeking to restrict the commercial development of the land.

Land that is subject to registration as a TVG or a right of common remains private land and statute does not alter ownership rights. It is for this reason that neither right is deemed incompatible with Article 1 of the First Protocol to the European Convention on Human Rights (ECHR).³⁰ However, it would be inaccurate to suggest that the statutory regime is absolute and that registration as a TVG generates no spill over effect or other material impact upon the property. On the contrary, in the case of TVGs, the statutory provisions, though concisely drafted have been on a number of occasions been subject to broad judicial interpretation. The judiciary has employed significant discretion in their application of the criteria, which has, in turn, encouraged opportunistic litigants to use TVG applications in order to secure environmental or conservation objectives.³¹ The liberal interpretation of the criteria has encouraged the 'village greens industry',³² to push at an already open door and to exploit the judicial liberalism to thwart planning applications more effectively than via the planning process. For this reason, a TVG application must be every land developer's worst nightmare because, not only can the inquiry process be lengthy, the effect of a successful application is to prevent *any* further development on the land.

B. Regulating The Relationship Between Public And Private

The principle of entitlement, or what Gray describes as the 'quantum of property' has remained a constant principle of English land law and expresses the bundle of rights owned by an estate owner.³³ The concept of 'private property' is one which has always emphasised the individual freedom of landowners to control their land without interference from the State, but this idea of property absolutism has, in Gray's view, been replaced by a property relativism that pursues peaceful coexistence between landowners and which suggest that landowners cannot exploit their land regardless of the common good.³⁴ For example, registration of TVGs in accordance with the statutory regime grants recreational users rights over privately owned land, and these rights form part of a welter of other forms of third party right or statutory control that can exist over land, and which may limit the quantum of property which an individual may claim.

Within Locke's understanding of property ownership, which contended that property ownership was inextricably linked to labour, he isolated the ownership of private property

³⁰ See *Oxfordshire C C v Oxford C C* (n 1) paras 86-90.

³¹ *Ibid.* In this case the land at issue consisted of scrubland which was not suitable for recreational purposes.

³² See R Meager, 'The 'Village Green Industry': Back in Business' (2010) *CLJ* 238.

³³ See K Gray and S Gray, *Elements of Land Law*, 5th edn (Oxford, OUP, 2009) 1.5.11-1.5.16.

³⁴ *Ibid.* 1.5.54.

from a notion of property for the ‘common good’.³⁵ Locke’s interpretation would therefore suggest that customary rights have no place in privately owned land, and by doing so he draws a sharp distinction between society as a whole and the property rights of the individual. This ‘dualistic’ understanding therefore discounted the possibility for forms of property to exist that do not fall exclusively into public or private ownership and usage.

Yet, in the twenty-first century, this monochrome assumption that land is either exclusively in public or private control, and used exclusively for either public or private purposes can be criticised for being one dimensional, and encapsulates an outmoded view of property ownership and regulation. Furthermore, it is debateable if English land law ever adhered to this rigid Lockean distinction because an element of reciprocity has always existed between landowners. It would not be incorrect to conclude that the rights of one landowner are necessarily constrained by the rights of neighbouring third parties. To continue with the example of TVGs, the enduring purpose of their existence has been to permit an identifiable group of the public, residing in a particular locality, to exercise recreational rights over another’s land. By protecting this right, public law and the courts have consistently recognised a right the primary purpose of which is to promote the social use of land.

In addition to rights created by TVGs and common land, the need for planning control and environmental considerations have increasingly become important public policy requirements which influence the regulation of land, and which can divide landowners and the public. Thus, in the twenty-first century, land use has diverged significantly from the Lockean understanding of private property rights as natural rights, and the view that landowners can exercise their rights in isolation from others is wholly unrealistic. The rejection of this notion of property ownership has, since the latter part of the twentieth century, been largely moulded through socio-economic and environmental values which the public law encompasses, and which increasingly reflect the pervasive ecological demands of the social citizen.

The increased prominence of environmental concerns within land use policy has created tensions in the regulation of what have become competing socio-economic values. This has led to significant debate about the precise scope to which non-economic factors can and should be determinants of land use policy. For example, in the context of environmental regulation Rodgers³⁶ has criticised two classic functional property typologies, which categorise legal rules used to protect property rights, previously posited by Calabresi and Melamed,³⁷ and Harris,³⁸ as not fully appreciating the ‘legacy effect’ of environmental factors which may influence future land usage. Rodgers’ critique of these functional typologies, and their emphasis upon project delivery, is that they come at the expense of land use policy not sufficiently encompassing the long-term benefits nor the positive forward-looking land management obligations which environmental objectives can input into the land use matrix.³⁹ However, while environmental factors are useful, it may be argued that simply determining land usage through this single prism, does not fully meet the expectations of the various relationships that individuals have with land.

³⁵ J Locke, *Two Treatises of Government* (Hamilton, Ont., McMaster University, 2000).

³⁶ C Rodgers ‘Nature’s place? Property rights, property rules and environmental stewardship’ (2009) *CLJ* 550.

³⁷ G Calabresi and AD Melamed, ‘Property rules, liability rules, and inalienability: one view of the cathedral’ (1972) 85 *Harvard Law Review* 1089.

³⁸ JW Harris, *Property and Justice* (Oxford, OUP, 1966) 22ff.

³⁹ Rodgers (n 36) 556-558, 569-574.

To this extent it may be argued that, when regulating public/private relationships within the context of land, environmental policy is a highly important factor, but one which should not necessarily be considered as *primus inter pares*. A more preferable paradigm to Rodger's property management typology, which focuses on the interaction between land use and property rights in the application of environmental law in land use policy, arises from a broader view point which focuses on the balancing various strands of land based utility which combine to form the constituent elements of any land interest.⁴⁰ This latter regulatory model advocated by Gray and Gray embodies the various relationships with land. Specifically this is whether public or private, or a hybrid of these two, which Gray and Gray conveniently define as 'quasi-public',⁴¹ offers a more inclusive mechanism through which to regulate the balance of relationships. It is this latter quasi-public use of land which reflects more broadly the various push and pull factors which interact with property rights, and includes *inter alia* environmental public policy objectives as well social purposes which shape and impact upon the way which land is and will be used in the future. Whilst it may be incorrect to surmise that one consequence of the increased State regulation has led to the creation of some new form of 'hybrid' public/private property right *per se*, from a regulatory perspective it can be concluded that the modern State, through its use of the public law, has emerged as the primary source of this change which grants the public greater powers to influence how private property is used.⁴²

The dynamic behind this change can be attributed in part to what Gray and Gray describe as 'meta principles' in law. These reflect normative drifts that shape modern English land law, namely: rationality when dealing with one off transactions, and in particular on the exchange value of dealings at a micro level. These also embrace social cooperation in dealings between neighbours which are infused with reasonableness, and finally, in a wider context of citizens' interactions on community oriented issue these interactions are based on reciprocity.⁴³ Of the three swathes of tendencies influencing norms relating to land the latter two demonstrate more accurately the drivers behind the more environmentally aware citizen and society, and this has increasingly imbued land usage discourse with what Gray and Gray term as 'community value'. In this context the notion of civic equity provides a justification for the sacrifice of, land for compulsory purchase, for an overriding public necessity. Taken together with the second meta principle of where neighbourliness reflects social cooperation under which reasonableness finds its nexus, TVGs sit between these two areas and cannot be readily classified in Gray and Gray's taxonomy of meta principles. By contrast, easements and rights of access, such as the right to roam or vehicular access over common land, more readily reflect reasonable access and neighbourhood in the context of social well-being. In contrast TVGs reflect neighbourliness through long use and the broader social gains of access for recreational purposes to land, but their protection is justified on wider values of citizenship and community, for example, as exemplified by Lord Hoffmann in *R v Oxfordshire C C, Ex p Sunningwell Parish Council*.⁴⁴

⁴⁰ See Gray and Gray (n 22) 39ff.

⁴¹ Rodgers (n 36) 558. K Gray and S Gray, 'Private property and Public property' in J Maclean (ed), *Property and the Constitution* (Oxford, Hart, 1999) 18-20.

⁴² See T Murphy, S Roberts and T Flessas, *Understanding Property Law* (London, Sweet & Maxwell, 1987) 180-182, where the authors identify that increasingly since 1945 'an owner of land in modern society . . . is potentially subject to a plurality of restrictions and controls on his freedom to enjoy the property as he wishes'.

⁴³ See generally, K Gray and S Gray, 'The Rhetoric of Realty' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London, Lexis Nexis, 2003) 204-280.

⁴⁴ *Sunningwell* (n 2) 347-348.

More generally, public disapproval of greenfield development, which is considered as lying at the outer reaches of urbanisation creep is reflected in an array of planning and environmental policies both at national and EU level which may restrict development. These policies are supported by enhanced robust planning enforcement regime.⁴⁵ The closer public affinity towards their immediate environment has been characterised as a ‘return to the Land’ where increased use of land for more traditional agricultural and/or social activities by the general public, together with the protection of the local environment by local people has become an integral part of land policy and usage.⁴⁶ To this end, the public law agenda, together with greater awareness amongst citizens has helped to fashion what can be defined as the ‘environmental citizen’ who uses the legislation proactively, usually at the expense of the landowner who seeks to develop their land. The environmental citizen is interested in the cultural heritage and legacy of land and such citizens are aware of their rights and are able to co-ordinate their interests through potent civil society organisations to create a semi-formal national political movement which expresses an anti-development platform. Moreover, environmental citizens in their pursuit of their aims pursue an environmental agenda⁴⁷ which addresses *their* immediate socio-economic and environmental needs, and the courts have proved amenable to their concerns, through *inter alia*, permitting the registration of a large number of TVGs. The patchwork nature of the disputes around the country, when considered in its entirety such that it includes not TVGs but also tree preservation orders, and re-routing footpaths and bridleways, reinforces the argument that local action has the capacity to resonate with citizens everywhere.

IV. Modernisation:⁴⁸ Land Policy Fit For The 21st Century?

In 2010, with the inception of a new coalition government came a move towards empowering citizens collectively, and more specifically, communities. Though the jury is still out on the question of how much power the Localism Act 2011 has *really* transferred to local communities from central government, the general principle of a greater commitment to localism cannot be disputed. The Localism Act 2011 endeavours to promote greater local democracy and community engagement, and this includes participation in the decision-making process when land usage and land use policy is at issue.⁴⁹ For example, under the Act, a community organisation will be able to purchase assets of community value and, engage and contribute to neighbourhood planning in a more proactive manner with the potential to build new homes, businesses, playgrounds or community centres.⁵⁰ In this way

⁴⁵ On the changing nature of land and how land usage is influenced by public law regulation and citizen attitudes see R Home, ‘Land Ownership in the United Kingdom: Trends Preferences and Future Challenges’ (2009) *Land Use Policy* 103, 107; P Bibby, ‘Land Use Change in Britain’ (2009) *Land Use Policy* 2, 8-9. See also, D Adams and A Scott, ‘In Search of Positive Planning’ (2013) *Town & Country Planning* 88, 89.

⁴⁶ This arises from an observation made by Professor Sue Farran in her paper: S Farran ‘Earth under the Nails: the Extraordinary Return to Land’ in N Hopkins (ed), *Modern Studies in Property Law* (Oxford, Hart, 2013).

⁴⁷ Citizens are aided in doing this, for example, by EU legislation such as the Environmental Impact Assessment Directive.

⁴⁸ Modernisation is an agenda that been applied to a broad range of policies since the mid-1990s with a focus upon creating a State and its Institutions as a monolith that is fit to meet the expectations of the people in the 21st century. Land has not been immune from this see for example, Law Com 271.

⁴⁹ Localism Bill: Explanatory notes. Available at www.publications.parliament.uk/pa/bills/lbill/2010-2012/0071/en/2012071en.pdf.

⁵⁰ mycommunityrights.org.uk/community-right-to-build/.

the local people within their neighbourhood can ‘shape the place’, and within this paradigm the local community can also envision ‘*their*’ local public spaces.⁵¹

The new localism agenda, in which communities assume greater control over land use policy, may be identified as the third and most recent incarnation of a policy by which the general public is granted some form of stakeholder rights over private land. The first period, which may be identified as enabling controlled and limited use of private land, arose in Victorian times when wealthy industrialists took the initiative to make their land available to the community in the form of a recreational park.⁵² Interestingly, this initiative shares some of the principles of the modern day localism agenda because it occurred without the direct intervention of the State and essentially could be categorised, in today’s language, as a ‘bottom up’ scheme which was designed to improve the lives of the local community. By contrast, the second identifiable period, started in the twentieth century, and was an age in which the State gradually assumed increased regulatory control over broad range national assets. The State’s influence hit its apex in the post-war period through nationalisation and which led, for example, to the creation of National Parks.⁵³ The private became public and land was considered a national asset and the State could determine the purposes for which it was used.

The identifiable departure in regulatory principles within modern day localism is that it has brought about a clear move away from the State assuming overall responsibility for creating land use policy. The core principle of localism is that in order to determine land use a principle of self-determination, from the bottom up, is actively encouraged by which local groups organise themselves, through the use of local referenda, in order to determine the most appropriate use of land in their community. This may be explained as the creation of a new form of local democracy in which land use policy has journeyed from a period of individual paternalism, through an age in which the State dominated, to one where the individual is empowered and encouraged to take decisions.

The opportunity for community asset transfer benefits the community and provides the necessary continued support for community based activities. Though there are potentially negative effects that could arise from this form of participatory engagement with the local community. On the one hand, it could also be used as a mechanism by which a community may seek to prevent developers from buying property with a view to building on the land, and on the other, there could be exclusionary effects that stem from community engagement process as well as the final decision. Whilst this process provides the community with to determine their place, that power of ‘place shaping’ also contains a ‘symbolic power to exclude’.⁵⁴ This power to exclude, according to Walsh,⁵⁵ is evident in situations involving compulsory purchase programmes and which can have a negative impact on local

⁵¹ A Layard, ‘Property paradigms and place-making: right to the city; a right to the street?’ (2012) *Journal of Human Rights and the Environment* 254, 262. See also C Allen and L Crookes, ‘Fables of the Reconstruction: A Phenomenology of “Place Shaping” in the North of England’ (2009) 80 *Town Planning Review* 455, 458.

⁵² This included land and Public Health Act 1875, Open Spaces Act 1906, and the Public Amendment Act 1907, and signalled a transfer from private initiative to State policy.

⁵³ See for example the discussion above about National Parks.

⁵⁴ Allen and Crookes (n 51) 469.

⁵⁵ R Walsh, ‘The Evolving Relationship between Property and Participation’ in N Hopkins (ed), *Modern Studies in Property Law* (Oxford, Hart, 2013) 285.

communities.⁵⁶ The power to exclude which may not have been envisaged by the decision makers is a potential negative consequence of shaping the place through collective participation of neighbourhood planning.⁵⁷ This then raises questions relating to representativeness of these ‘already-engaged actors’ or groups participating in neighbourhood planning.⁵⁸ Such parties may be pursuing a narrow agenda which could affect a decision(s) on land use.⁵⁹

Despite the potential negative consequences of this process the development of community and neighbourhood engagement has the potential to create a new form of socio-environmental governance that functions by bottom-up citizen participation. In particular, this form of socio-environmental governance is premised upon land in a neighbourhood or community as being considered as a shared resource that the local community have control over and by using the community asset transfer enables local people achieve their objectives of shaping the place. This devolved approach is intended to reflect the connection which citizens have with their local community or neighbourhood, and they are considered to be stakeholders whose voice should be heard within their neighbourhood and community when planning decisions are taken, whether for social or commercial reasons. Such direct participation may be viewed as an expedient formula through which social and commercial priorities may be brought together and the need for a lengthy and potentially divisive planning dispute may be avoided.

More recently, the coalition government has sought to encourage economic growth and to compete more effectively at a ‘global stage’ by undertaking a number of practical reforms to eliminate barriers which delay or inhibit decision making in relation to business investment, new infrastructures and job creation.⁶⁰ This policy objective is encapsulated within the GIA 2013, and though the aim of competing on a global stage appears to be somewhat aspirational, the underlying theme centres on promoting economic development, job creation and social cohesion through amongst other things, the building of new affordable homes. Together with the National Planning Policy Framework (NPPF) 2012⁶¹ this policy circle is squared (at least in theory) through the coalition government’s ‘help to buy scheme’ which offers State guarantees for mortgages taken to purchase properties where there is a housing need. The help to buy scheme is particularly generous for new build houses, often located in urban areas where affordable housing may be in short supply, and has been extended to 2020 in the March 2014 budget.⁶²

The GIA 2013 seeks to remove the obstacles that often hinder the progress of housing developments. For example, an amendment to s.106 of the Town and Country Planning Act 1990 enables developers to renegotiate their planning agreements with the Local Planning

⁵⁶ These could include a disparity between the compensation and the cost of buying an alternative property which could impact upon the possibility of buying another property, communities or neighbourhoods being destroyed and for some may also include mental health issues.

⁵⁷ Walsh (n 55) 285.

⁵⁸ A Layard, ‘The Localism Act 2011: What is ‘Local’ and How do we (Legally) Construct it?’ (2012) *Environmental Law Review* 134, 139-140.

⁵⁹ Walsh (n 55) 286. See also, P Brest, ‘Constitutional Citizenship’ (1986) 34 *Cleveland State Law Review* 175, 196.

⁶⁰ www.gov.uk/government/news/bill-to-boost-growth-and-infrastructure-goes-before-parliament.

⁶¹ The planning policy document promotes and reinforces the presumption of sustainable development from an inclusionary and pro-active development perspective, focusing on three elements for sustainable development, namely economic, environmental and social: see paras 7-22.

⁶² Originally it was supposed to end in December 2015.

Authority where the development scheme has stalled because it is no longer economically viable to go ahead.⁶³ This could arise where the original obligations on providing a set number of affordable housing negotiated during better economic times would have been economically viable, but the change in the economic climate has meant the building programme(s) stalled because they were no longer economically feasible. Where such a situation has arisen then under s.106BA of the GIA 2013 the planning authority is required to review those planning obligations where the affordable housing requirement makes the project non-viable with a view to making those development projects viable.⁶⁴

This review may impact upon the number of affordable houses to be built, but the desire to proceed with economically viable projects to promote economic growth appears to potentially outstrip the wider social mix of the community within that development. This is evidenced by the announcement in the 2014 budget of the creation of a new ‘garden city’ in Ebsfleet on the fringes of London.⁶⁵ This proposed development illustrates the government’s dualist approach to land policy in which it simultaneously seeks both social and economic objectives. To that extent, the GIA 2013 and the announcement of a new garden city has at least partial echoes of the policy of the NPACA 1949 which provided that development in the nation’s infrastructure and social enjoyment of land should go hand in hand. This development is also a nod to the Ebenezer Howard’s vision from the 1890s of a Garden City.⁶⁶ The city would be surrounded by green belt and provide a balanced combination of the social and economic benefits and opportunities that are present in both towns and the countryside. The reference to ‘garden city’ is intended to conjure up the notion of a pleasant urban environment for local inhabitants, but it also suggests that land use policy in the twenty-first century has more than just a passing reference to a utilitarian objective of promoting ‘happiness’ amongst the population.

The tension that exists in local communities where planning issues are at stake usually surrounds the divergent views that may arise from planning applications and such tensions can often only be resolved through lengthy and costly planning inquiries. The Penfold Review in 2010⁶⁷ considered the issue of whether non-planning consents could be streamlined to promote efficiency and effectiveness of the planning process so as to fit within the government’s policy of deregulation and supporting sustainable growth. One area identified, for review was that of the registration of TVGs where this could have a negative impact on building development. The Penfold Review found that where building developments had already obtained planning approval, the development had often stalled because of an application which had been made to register a TVG. Where such a situation had arisen, Penfold identified that the motivation behind this was, in some cases, a means by which building developments were frustrated. Though this is not strictly speaking an issue of non-planning consent, it was seen as being high on the agenda for reform since it posed a commercial risk to developers and consequently it would impact negatively upon economic

⁶³ GIA 2013, s 106BA.

⁶⁴ GIA 2013, s 106 BA(5). See generally, M White, ‘Renegotiating planning obligations: an overview of the law’ (2013) *Journal of Planning & Environment Law* 1232.

⁶⁵ Deirdre Hipwell, ‘Garden City and Stamp Duty Hike aim to increase Housing Supply’ *The Times* (London, 19 March 2014) www.thetimes.co.uk/tto/business/budget2014/article4038397.ece. Two notable garden cities built in the early 1900s include: Welwyn Garden City and Letchworth.

⁶⁶ Howard’s model of a Garden City has been incorporated within the National Planning Policy Framework as a basis for planning large scale developments. See further, NPPF (n 6).

⁶⁷ A Penfold, *Penfold: Review of Non-Planning Consents* 2010, available at www.bis.gov.uk/penfold.

growth.⁶⁸ Penfold recommended that any potential application for a TVG should be presented at an earlier stage at the point where consideration is given to ‘if’ or whether the development should go ahead leading to more expediency.⁶⁹ Furthermore, as part of the streamlining proposition Penfold further suggested that improvements be made where planning and non-planning consents were concerned in specific areas and to avoid duplication. To this end, where there is a conflict between overlapping consent with respect to the same piece of land, for example, in circumstances of the registration of a TVG and where planning consent has already been obtained, the application to register a TVG will have the effect of placing a moratorium on the development whilst the local authority determines whether or not to register the TVG application.⁷⁰ If TVG status is granted the land is then subject to two conflicting permissions which traditionally have meant that the development, notwithstanding the completion of the planning process, is stopped.

Section 15C of the Commons Act 2006 effectively prevents the operation of the right to register a TVG except only in circumstances where one of the triggering events has arisen, for example, where a draft development plan document has been published which identifies the land for potential development.⁷¹ If the document is subsequently withdrawn at a later stage then this will amount to a terminating event and the right to register the TVG becomes exercisable again. Taking on board the spirit of Penfold’s streamlining measures, the 2013 Act reduces the grace period for applying for registration after the requisite 20 years of recreational use ‘as of right’ has ceased from two years to one year.⁷² Finally, landowners have been given the power to effectively stop the clock from ticking to prevent any claim for a TVG where land has been used for recreational purposes for a period of time. This involves the landowner simply depositing a statement with an accompanying map to the commons registration authority.⁷³ In the GIA 2013 the government generally adopts Penfold’s rational approach to resolving disputes concerning non-planning consents and in particular his recommendation concerning the future registration of TVGs. Though pragmatic and rational, the solution within the GIA 2013 is undoubtedly value laden with a presumption that, on balance, growth and economic development are considered to be more worthy objectives than permitting the potential registration of a TVG.

Although this legislative change will make it more difficult for those parties who have an interest in protecting a long established recreational activity on a landowner’s property, the harshness of this is to some extent mitigated by providing for Local Green Space designation.⁷⁴ This scheme does not attempt to replace customary rights such as TVGs but provides an alternative additional conduit by which local communities can protect green areas of significance which are local in character, in close proximity to the community it serves and demonstrably special to the local community. The type of land envisaged as potentially coming within the scope of such a designation could include areas of outstanding natural beauty, historic significance and urban areas of tranquillity and recreational value.⁷⁵

⁶⁸ In a study commissioned by Defra in 2009 it was found that just under half of the applications for a town or village were connected to a potential threat of building development. See randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=16581.

⁶⁹ Penfold (n 67), para 4.25.

⁷⁰ GIA 2013, s 16 inserting s 15C in the Commons Act 2006.

⁷¹ See Schedule 1A of the Commons Act 2006 as inserted by Schedule 4 GIA 2013.

⁷² s 14 GIA 2013 inserts s 15(3A) into the Commons Act 2006.

⁷³ s 15 GIA 2013 inserts s 15A into the Commons Act 2006.

⁷⁴ NPPF (n 6) paras 73-78.

⁷⁵ NPPF (n 6) para 77.

According to the NPPF where development issues arise within Local Green Space, it must be consistent with the policy protecting Green Belt land which aims to prevent urban sprawl by keeping land permanently open.⁷⁶ Green Belt boundaries have in the past been fluid and moved in to fulfil building development requirements. However, that does not necessarily lead to a loss in protected Green Belt land rather another piece of land located elsewhere is designated as Green Belt.⁷⁷ Where this sort of situation may arise, alteration according to the NPPF is only permitted in ‘exceptional circumstances’ through the Local Plan which covers the future development plans of a local area.⁷⁸ This approach of relocating a Local Green Space could potentially become a reality given the policy direction of sustainable development in the NPPF which could be viewed as being pro-developer rather than protecting Green Belt land from the urban sprawl. The potential redesignation of Local Green Space may arise irrespective of the local characteristics of the green space, and at a distance away from the local community which sought the designation of the Local Green Space initially. This lack of permanent affixing to the land of the Local Green Space is in some sense similar to the policy of deregistration of TVGs which are more than 200 square metres in area. Section 16 of the Commons Act 2006 provides that where an application for deregistration is made for land which is more than 200 square metres in area must be accompanied with a proposal for replacement land to be registered as a substitute to the released land. In contrast, where the where land is less than 200 square metres in area deregistration is possible subject to compliance with certain conditions, and without the obligatory proposal for replacement land.⁷⁹ It is apparent that neither the Local Green Space nor the TVG (over 200 square metres) are protected in absolute terms to remain in the same designated area forever though their permanency is ensured to a certain extent albeit the designated area may be subject to change.

The paradigm used by the government to reconcile, on the one hand, limiting the ability of those who have a vested interest in protecting a TVG and that of providing an alternative to creating a ‘modern green’ in the form of a Local Green Space is similar to the observations made by Gray in relation to compulsory purchase of land for commercial recreational purposes, for example to build a golf course or football stadium.⁸⁰ Gray in the context of recreational property considered ‘at what point did a purported exercise of eminent domain cross the borderline between beneficial state intervention and impermissible preferment of another’s private commercial advantage?’⁸¹ Gray’s question identifies the tension between the public and private interests, and encapsulates the government’s policy that economic regeneration and public utility must go hand in hand. However, in the various examples Gray considered, in relation to recreational property,⁸² he questions the justification posited for urban regeneration that there exists some dual benefit that offers both economic and social gains. Significantly Gray dissects the economic and social benefits of these regeneration ventures to identify projects which can be characterised for exhibiting a measurable economic benefit with some definitive social gains.⁸³ Thus, to return to local green spaces, if viewed

⁷⁶ NPPF (n 6) paras 79-92.

⁷⁷ See R Gant, G Robinson and S Fazal, ‘Land-use change in the ‘edgelands’: Policies and pressures in London’s rural-urban fringe’ (2011) *Land Use Policy* 266.

⁷⁸ NPPF (n 6) para 82.

⁷⁹ Commons Act 2006, s 16 (6)-(9).

⁸⁰ K Gray, ‘Recreational Property’ in S Bright (ed) *Modern Studies in Property Law* (Oxford, Hart, 2011).

⁸¹ *Ibid*, 13.

⁸² *Ibid*, 20-27.

⁸³ In the case of the Olympic and Legal project the regeneration of East London encompassed the concept of some form of ‘national prestige and importance’ as the prime purpose, with economic rejuvenation being

through Gray's analysis, then their designation may be questionable especially where the economic objective significantly outweighs the utility that the local green space can deliver the community. In particular, Gray's matrix may lead to scepticism that Local Green Spaces are insufficient because they do not offer the rights that were associated with a TVG. Put bluntly the designation of a local green space can be viewed as a functional trade off in order to permit a development to proceed in circumstances where a TVG may have previously existed.

The socially motivated doctrines of being for the 'greater public good' or social utility provide the nexus for the justification for State intervention. The case for State intervention in the case of TVGs is couched in the terms of promoting sustainable economic growth through building developments, which include affordable housing, and at the same time fostering private commercial enterprise. The social benefits cannot be ignored, but they appear in the GIA 2013 to be ancillary to the primary aim of securing economic growth objective. On this analysis, though the creation Local Green Spaces to some extent may mitigate against the curtailment of the ability to register a TVG and may offset commercial development, but it is questionable whether the character or potentially lack of enduring nature of a Local Green Space will pacify opponents of a development and may provide a basis for further flashpoints.

V. The Social Dimension Of Land

The regulation of land usage has always encompassed an economic and social dimension, but it is the extent to which the emphasis is placed on either or both of those elements that is at issue. In the previous section it was noted that contemporary planning policy focuses predominantly on the economic benefits to be gained from the development of land and this has been achieved at the expense of fully integrating into land use policy a defined and universal understanding of what constitutes a social need for land. It is true that the social dimension of land has a dynamic and protean character which reflects the changing nature of our society, our perceptions and community dynamics, but there remain some underlying core and universal features which are associated with social usage such as for recreational purposes and health benefits. It is these features which have remained a constant and justifications for the social usage of land.

Historically, land has not been solely used for agriculture and pasture, but it has also provided local communities with a meeting place and acted as a venue for social and recreational activities. TVGs, for example, although their exact origin is often unclear the land will, at least in living memory, have existed for recreational purposes. To this extent the land can be said to embody the social and customary nature of a place within the community which it serves. In referring to TVGs in the present day connotations of nostalgia and heritage usually prevail over these areas of land and perhaps provide some form of justification for their protection.⁸⁴ This nostalgic view of village greens is exemplified in the *Report of the Royal Commission on Common Land 1955-1958*⁸⁵ where it states 'Village green'- the very words are evocative of great age and tranquillity, of turf as rich in hue as it is trim in a setting untouched by time'. Lord Hoffmann in *R v Oxfordshire C C, Ex p. Sunningwell Parish*

enveloped within that. The Olympics with its social and cultural, public interest dimension provided the vehicle for justifying urban regeneration and economic development (see Gray (n 80) 20-21).

⁸⁴ See further Lord Denning MR in *New Windsor Corporation v Mellor* [1975] Ch 380 (CA), 386-387.

⁸⁵ Royal Commission, *Report of the Royal Commission on Common Land, 1955-1958* (n 10) para 18.

*Council*⁸⁶ reinforced the nostalgic imagery of a village green by describing the town or village green under s.22(1) of the Commons Act 1965 as ‘. . . the traditional village green with its memories of maypole dancing, cricket and warm beer’.

This poetic view of a town or village green is far removed from what has recently been recognised and registered as a green, for example, a beach.⁸⁷ In identifying the traditional connotations of a village green and long usage, Lord Hoffmann recognises the importance of balancing interests of the landowner and the public interest in the preservation of open spaces where usage for recreational purposes has occurred over a long period of time. His Lordship’s reasoning encapsulates the social dimension of TVGs, which is representative of the altruistic spirit of the legislation which seeks to protect and preserve TVGs and elucidate Parliament’s intention.⁸⁸ By protecting this right, public law and the courts have consistently recognised a right whose purpose is to promote the social use of land and also acts as a means to promote retrospective heritage protection of a nostalgic perception of TVGs. Lord Hoffman further underscores this point by referring to TVGs as an ‘important national resource’⁸⁹ suggesting that they deserve to be protected because they constitute part of a *shared* social heritage, irrespective of whether a person actually physically makes use of them.

In the previous section it was noted that the designation of a Local Green Space provides a mechanism by which green space can be protected for use by the local community and is not dependent upon long usage ‘as of right’ for registration purposes as in the case of TVGs. This provision of Local Green Space within the NPPF can be viewed as a means offsetting the economic objectives of promoting economic growth with sustainable development. Specifically, government objectives of increasing the housing stock are offset by providing local communities with a stakeholder status giving them the means by which land can be divested to the community through asset transfer or by the designation of a communal Local Green Space. This latter development is an antidote to streamlining the registration process for TVGs which had the effect of making it more difficult to register a TVG.

Though in more recent history, it is becoming apparent that in a broader perspective of communal relations and living, the social and recreational dimension inherent in land usage is becoming more important as a counter-balance to urbanisation. In this context from the late 1800s to the mid-1900s it is clear that although there was a huge pressure to build housing, protection for green spaces for public use and enjoyment was given equal importance to stem the flow of urbanisation. The protection of National Parks, as areas of outstanding natural beauty is an enduring example of the protection of the broader social facets of land and this form of national policy is as relevant today as it was in the immediate post-war era. In more recent times, the government’s response to demands from the environmental citizen for increased access to rural land⁹⁰ and the coastal areas⁹¹ have resulted in a more managed

⁸⁶ *Sunningwell* (n 2), 347F.

⁸⁷ *R (on the application of Newhaven Port and Properties Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWCA Civ 673; [2014] QB 282. The High Court is currently considering whether a skateboarding park in the Southbank Undercroft can be registered as a TVG: see N Richmond and L Rachel, ‘A village green on the South Bank?’ (2013) 1323 *Estates Gazette* 73.

⁸⁸ See Lord Hoffmann’s judgment in *Oxfordshire C C v Oxford C C* (n 1) for a historical outline of the development of the law in this area, in particular paras 2-27.

⁸⁹ See the judgment of Lord Hoffmann in *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, 31.

⁹⁰ Countryside and Rights of Way Act 2000.

⁹¹ Marine and Coastal Access Act 2009.

approach with the State regulating access.⁹² The ‘right to roam’ and having access to coastal paths can be viewed as civic rights and which promote social equity, inclusion and utility,⁹³ but they also provide a formal means by which they implement a ‘mediated sense of place for rural sites’.⁹⁴ This management of rural land by the State in part enables the State to directly ensure that such designated spaces do not interfere with economic development. The planned creation of an integrated coastal path network is part of the social matrix of land and through this project has gained national significance which is perhaps on a par with the legacy of the NPACA 1949. In that context the coastal paths project will form a part of our national heritage,⁹⁵ it will enhance the experience of open air recreation and boost tourism.⁹⁶

The justifications for State intervention are based on perceived utility to the public on the one hand in relation to the social benefits, but also coupled together with the potential economic benefits. This approach adopted by the government reflects Rodgers’ view of how environmental regulation is no longer simply focusing on protection, but should also adopt a forward-looking approach.⁹⁷ Such a methodology will undoubtedly impact upon on how property rights are exercised. Property rights within the framework of environmental regulation are characterised as limiting or restricting the exercise of rights, but it is also apparent that that a net effect of this policy involves a redistribution of rights. This redistribution of rights is rooted in utilitarian arguments of voluminous social benefit that may be achieved through the fulfilment of public policy objectives and such an interpretation may also be applied to current State intervention in the case of creating a network of coastal paths. Though economic benefits may not be necessarily the prime motivation where coastal paths are concerned, the perceived greater public benefit and preservation of national heritage offered a justification for intervention redistribution, and possibly the restriction, of landowner’s property rights that this entails.

It is without question that preservation of coastal paths carries a degree of social utility. Yet, the rationale behind this is not without difficulty, especially when the geographical location of coastal paths is considered and the ability of coastal paths to be used by a significant part of the population. It may be argued that for many citizens the preservation of land for social utility purposes lies ‘closer to home’ and is encapsulated through a culture of NIMBYism and that challenges raised from loss of green belt land, or the restriction to register TVGs potentially outweighs the benefits of creating coastal paths. State intervention in land distribution projects tends to focus on ‘grandstand’ projects where economic regeneration and protecting national heritage go hand in hand, for example the post-war rebuilding and nationalisation of industry was accompanied by the 1949 legislation. A similar interpretation

⁹² The environmental citizen can no longer be simply perceived as an urban socialist but one who is more representative of a wider ‘class’ of citizen who has an increased interest in recreation and the environment: see B Mayfield, ‘Access to Land: Social Class, Activism and the Genealogy of the Country and Rights of Way Act’ (2010) *Statute Law Review* 63.

⁹³ See S Pascoe, ‘Social obligation norm and the erosion of land ownership?’ (2012) *Conveyancer and Property Lawyer* 474, and K Gray, ‘Pedestrian democracy and the geography of hope’ (2010) *Journal of Human Rights and the Environment* 45.

⁹⁴ A Layard, ‘Shopping in the Public Realm: A Law of Place’ (2010) *Journal of Law and Society* 412, 435.

⁹⁵ This is a legacy from the Labour Government. In their 1997 manifesto the Labour Party was committed to providing ‘greater freedom for people to explore our open countryside’, and they regarded the countryside as a ‘natural asset’ and a ‘part of our heritage which calls for careful stewardship’: www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml.

⁹⁶ In June 2012 the first coastal path running along Weymouth Bay had been completed and the Minister at the time had expressed the economic benefits from such a path being made accessible to the public: see www.naturalengland.org.uk/about_us/news/2012/290612.aspx

⁹⁷ Rodgers (n 36), 557-558.

may be applied to modern times where economic growth through land development have been accompanied by roaming rights in Countryside and Rights of Way Act 2000 and now the creation of coastal paths. However, irrespective of the government's ambitions the significant litigation to protect TVGS in recent years demonstrates that the environmental citizen remains primarily concerned about local issues and how they affect their own neighbourhood.

VI. Concluding Remarks

The current policy trend within land regulation appears to broadly maintain the approach adopted since the industrial revolution. Land continues to be viewed as primarily an economic whereby urbanisation is promoted to the extent of fulfilling the demand for housing. This has been tempered, only marginally, by incorporating social utility into land use policy but such social objectives are largely secondary, and policy changes have reflected a public desire to use land for social purposes, as seen in the right to roam which is guaranteed by Countryside and Rights of Way Act 2000.

Today, the GIA 2013 and NPPF have shifted the emphasis and focus more directly on the economic benefits that can be extracted from land usage rather than creating an equal balance with social benefits. The NPPF is directed towards fostering a competitive environment on a global stage with the vision of achieving this through a presumption of sustainable economic growth. Economic policy, therefore, takes primacy with social and recreational considerations are relegated to an ancillary consideration. Where local recreational spaces are concerned their protection has generally been left in the hands of citizens who form part of an informal 'bottom up' movement that relies upon socio-environmental direct action. This empowerment of the local citizen is to be welcomed and can be said to promote local democracy and stakeholder involvement in the local community, but such sporadic participation lacks a coherent strategy through which clear socio-environmental policies may be achieved more generally and land protected for social purposes. Land use policy, continues to emerge in a piecemeal fashion and the State may suggest a consensus around the need for economic development but protection of the land for social purposes is left primarily in the hands of the citizen to determine the extent of their access to open spaces and rural areas.