

CO/2605/05

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday 3rd November 2005

B E F O R E:

MR JUSTICE SULLIVAN

MEYRICK ESTATE MANAGEMENT LTD AND OTHERS
(CLAIMANTS)

-v-

SECRETARY OF STATE FOR ENVIRONMENT, FOOD & RURAL AFFAIRS
(DEFENDANT)

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(Official Shorthand Writers to the Court)

MR ROBERT McCracken QC & MR OLIVER WRIGHT (instructed by LEE
BOLTON & LEE, WESTMINSTER) appeared on behalf of the CLAIMANTS
MR DAVID ELWIN QC & MR JAMES MAURICI (MR DAVID BLUNDELL -
JUDGMENT ONLY) (instructed by THE TREASURY SOLICITOR) appeared on behalf of
the DEFENDANT

JUDGMENT
(As Approved by the Court)

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MR JUSTICE SULLIVAN:

Introduction

1. This is an application under paragraph 8 in Part III of Schedule 1 to the National Parks and Access to the Countryside Act 1949 ("the Act") to quash the New Forest National Park (Designation) Order 2002 ("the Order") as confirmed by the defendant on 1st March 2005, in so far as the order relates to Hinton Park.
2. The Order was made by the Countryside Agency ("the Agency") on 24th January 2002 and submitted to the defendant for confirmation in February 2002. In accordance with the procedures contained in Schedule 1 to the Act, notice was given that the order was about to be submitted for confirmation. A total of 374 objections and representations was received, and the defendant appointed an inspector, who was assisted by a landscape assessor ("the Assessor") to hold a public inquiry ("the Inquiry"). The Inquiry took place between 8th October 2002 and 10th April 2003.
3. Hinton Park is part of the Hinton Estate, a large estate totalling allow 2,428 hectares (6,000 acres) which is managed by the claimants on behalf of the Meyrick family. Hinton Admiral House, which is within Hinton Park, is the family's ancestral home.
4. The main part of the Hinton Estate, including Hinton Park itself, lies in the south western corner of the National Park as designated by the Agency, to the north of the built-up area between Christchurch and New Milton. Most of the main part of the estate was within the National Park boundary proposed in the Order, although part was outside it. The Avon Tyrrell Estate is another substantial estate which lies to the north of the main part of the Hinton Estate. The two estates are separated by the village of Bransgore and a wedge of open land to the west of that village.

The Inquiry

5. The claimants were represented at the Inquiry by counsel, who called witnesses, including a landscape consultant, Ms Reynolds. The two estates presented a joint case and Ms Reynolds' proof of evidence dealt with both estates. At the Inquiry the claimants argued my reference to a plan showing their suggested New Forest National Park Boundary that the boundary of the National Park at its south western corner should be modified so as to exclude Hinton Park (and other land), leaving a smaller but still significant acreage of the Hinton Estate within the National Park.
6. The Inspector set out the terms of reference of the Inquiry. So far as relevant, they were as follows:

"1. Does the area as a whole enclosed within the proposed boundary meet the criteria and purposes of designation as a National Park set out in the National Parks and Access to the Countryside Act 1949?

2. Should the boundary be altered to include or exclude any areas

specifically referred to by the objectors to the Order, bearing in mind the criteria and purposes of designation?"

The Inspector's reference to the "criteria and purposes of designation" is a reference to section 5 of the Act, as amended by the Environment Protection Act 1990 and by section 61(1) of the Environment Act 1995 ("the 1995 Act"):

"5(1). The provisions of this Part of this Act shall have effect for the purpose---

(a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and

(b) of promoting the opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

(2) The said areas are those extensive tracts of country in England ... as to which it appears to the Agency that by reason of---

(a) their natural beauty and

(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,

it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.

(3) The said areas, as for the time being designated by order made by the Agency and submitted to and confirmed by the Minister, shall be known as, and are hereinafter referred to as, National Parks."

7. Subsection 114(2) of the Act, as amended, provides that:

"References in this Act to the preservation or the conservation of the natural beauty of an area shall be construed as including references to the preservation or, as the case may be, the conservation of its flora, fauna and geological and physiographical features."

8. In summary, the claimant's contended at the Inquiry that parts of the Hinton Estate (including in particular Hinton Park) should be excluded from the designated area because the Agency had misapplied the "natural beauty" criterion in paragraph (a) of subsection 5(2); and/or because the areas the claimants proposed should be excluded from the National Park did not afford "opportunities for open-air recreation" as required by paragraph (b) of subsection 5(2). It was common ground at the Inquiry that designation would not be lawful unless both of these criteria were met in respect of the tract of country under consideration.

9. The Assessor's conclusions in respect of "Land at Hinton Park" were as follows:

"4.165 I find that the contended land at Hinton Park and the surrounding associated countryside has long been recognised for its natural beauty, having been part of the NFHA [New Forest Heritage Area].

4.166 While accepting that the landscape of Hinton Park is not often visible from surrounding countryside due to the extensive layout of woods beyond the central parkland area and the mosaic of smaller woodlands within, I do find that the wider landscape setting is appreciable at various locations in the surrounding countryside and from longer distance viewpoints. The landscape character is one that is redolent of the New Forest, markedly intact and of a very high quality, which typifies a well-managed estate that is intrinsically part of the wider New Forest landscape and amply meets the natural beauty criterion.

4.167 Beyond the highly regarded designed landscape of the parkland, which is recorded and detailed in the Hampshire County Register of Historic Parks and Gardens, with English Heritage Grade I listing for the buildings it contains, I find the wider landscape within which it sits consistently includes all the characteristics of its Heath Associated landscape type which is a classic New Forest type found elsewhere within the NFNP [New Forest National Park].

4.168 I therefore have no hesitation in recommending that this area should be included in its entirety within the NFNP as it more than adequately satisfies the natural beauty criterion and I see no reason on these grounds for a boundary revision in this area."

10. The Inspector concluded under the heading "Land at Hinton Park":

"4.190 Turning to the large area of contention based on Hinton Estate, I agree with the Landscape Assessor that this area meets the natural beauty criterion. From our extensive accompanied visit I am satisfied that the area has a very high quality, intact, well-maintained landscape containing considerable elements of variety from broad parkland to intimate wooded valleys to the well-ordered woodland-fringed fields of the dairy farms.

4.191 This area of Heath-Associated Estates landscape is extensive and forms an important and integral part of the highly attractive ring of landscapes immediately surrounding the perambulation. The various elements of this landscape provide the foreground for those travelling through the area on the A35 and the various other minor roads, including that leading to Forest Lodge, and there are also occasional longer distance views into the landscape. These visual opportunities all add greatly to public enjoyment of the area by considerably extending the experience of being in the Forest.

4.192 Although there is little public access to this particular section of the area within the Designation Order south west of the preambulation it is not necessary for such access to exist across every part of a qualifying tract. The estate has a track record of granting and considering access to other nearby areas within the same tract of 'heath-associated estates' landscape type although it has expressed a current desire not to provide access to the area in contention other than, as now, to the Hinton Admiral parklands on special occasions. However, circumstances can change and, given the quality, scale and tranquillity of the landscape resource here, I do not consider it unreasonable to conclude that the general question I have posed in relation to 'potential opportunities' for open-air recreation offering a markedly superior recreation experience (at paragraph 15 of Appendix 2) could be answered in the affirmative.

4.193 Overall, therefore, I recommend inclusion of this area in the NFNP."

11. I will deal with Appendix 2 to the Inspector's report and also with Appendix 1, which is the Assessor's "General report on issues relating to the natural beauty criterion", when considering the claimants' grounds of challenge in more detail.
12. In the present case nothing turns on the defendant's decision letter dated 28th June 2004 because she accepted the Inspector's reasoning and recommendation as set out above. The challenge therefore focuses upon the reasoning in the Inspector's report and Appendices 1 and 2 thereto.

The grounds of challenge

13. On behalf of the claimants, Mr McCracken QC submitted that the defendant had erred in law in the following respects:
 - (1) In not applying the statutory test in paragraph (b) of subsection 5(2) in examining whether there were "opportunities for open-air recreation", but a different test of whether there were "potential opportunities for open-air recreation".
 - (2) In not applying the statutory test in paragraph (a) of subsection 5(2), "natural beauty", but the extended definition applicable under section 114(2) only to the management of National Parks under subsection 5(1) once they had been designated under subsection 5(2).
 - (3) In failing to take into account the fact that the Countryside and Rights of Way Act 2000 ("CROW") did not confer upon the public any "right to roam" over land such as Hinton Park.
 - (4) In concluding, contrary to the evidence, that the Hinton Estate had a "track record of considering and granting access to other nearby areas within the same tract of 'heath associated estates'".
 - (5) In attaching importance to views into Hinton Park from the A35 and other roads,

when such "visual opportunities" did not fall within the meaning of "opportunities for open air recreation" in subsection 5(2)(b).

(6) In reaching an irrational conclusion that criterion (b) in subsection 5(2) did not have to apply to disputed tracts of land at the outer boundary of the proposed National Park.

14. Although the grounds continued a reasons challenge, Mr McCracken did not pursue it as a separate ground in its own right in his submissions before me. In essence, he submitted that in adopting the Inspector's conclusions the defendant had clearly erred in her approach to both the "natural beauty" and the "opportunities for open-air recreation" criteria in subsection 5(2), and if and in so far as there was any lack of clarity, then her reasoning in respect of those two issues was inadequate.
15. Grounds (3)-(6) are detailed aspects of the underlying complaint in ground (1), that the Inspector erred in his approach to the criterion in paragraph (b) of subsection 5(2). I find it convenient to follow the order set by subsection 5(2) and to consider first the Inspector's approach to the "natural beauty" criterion in paragraph (a) of the subsection (ground (2)), and then to consider the Inspector's approach to the criterion in paragraph (b) in principle (ground (1)) and then in detail (grounds (3)-(6)).

Ground (2) Natural Beauty

16. There is no definition of "natural beauty" in the Act. The genesis of the 1949 Act is set out in the Assessor's General Report, Appendix 1 to the Inspector's report. In 1945 the Dower Report, which recommended the establishment of National Parks, described a National Park as "an extensive area of beautiful and relatively wild country in which ... the characteristic landscape beauty is strictly preserved". The Dower Report was followed in 1947 by the Hobhouse Report, which said in paragraph 35:

"The essential requirements of a National Park are that it should be of great natural beauty, high value for recreation and substantial continuous extent ... Lastly there is merit in variety; and with the wide diversity of landscape that is available in England and Wales, it would be wrong to confine the selection of National Parks to the more rugged areas of mountain and moorland, and to exclude other districts which, though of lesser grandeur, have their own distinct beauty ..."

17. It was common ground at the Inquiry that "natural" in paragraph (a) of subsection 5(2) could not be given its literal meaning. Since all the landscapes of England, even those commonly thought of as "wild", have been moulded by centuries of human activity it was agreed that the criterion in paragraph (a) must be one of relative "naturalness". This is reflected in the advice contained in Department of Environment Circular 12/96 which deals with National Parks, which says in paragraph 8 that National Parks are:

"... areas of exceptional natural beauty. They contain important wildlife species and habitats, many of which have been designated as being of national or international interest. But the parks are also living and working landscapes and over the centuries their natural beauty has been

moulded by the influence of human activity. Their character is reflected in local traditions which have influenced farming and other land management practices. It is also reflected in the local building material and vernacular style, monuments and landscape, often of archaeological or historical significance, and in the words, customs, crafts and art which mark the individual characteristics of each Park."

Paragraph 11 of the Circular gives National Park Authorities guidance on "identifying the nature of the special qualities" of a National Park and says:

"Particular emphasis should be placed on identifying those qualities associated with their wide open spaces, and the wildness and tranquillity which are to be found within them."

18. These characteristics are well illustrated by the first four National Parks to be designated in 1951, the Peak District, the Lake District, Snowdonia, and Dartmoor. Others followed, including NorthYork Moors, the Yorkshire Dales, Exmoor and the Brecon Beacons.
19. The background to the claimants' submissions in respect of the Agency's application of the "natural beauty" criterion was the earlier designation of the New Forest Heritage Area ("NFHA"). In the 1950's the New Forest had been judged to be worthy of National Park Status, but designation was not pursued because it was felt that the core of the Forest (within the preambulation) was adequately protected by the Forestry Commission's Management of the Crown Lands coupled with the powers of the Verderers under the New Forest Acts of 1877-1970.
20. In response to increasing development pressures, and the demand for more recreational use, the New Forest District Council, the Forestry Commission and a number of other interested bodies, including the Countryside Commission (as it then was), established the New Forest Review Group. The Group's report advocated the recognition of a wider New Forest, which included countryside beyond the preambulation which had strong visual and historical links with the Forest and which provided off-forest grazing land which sustained commoning.
21. In due course the New Forest Group became the New Forest Committee. The Committee established the boundary of the NFHA (which had originally been designated on an interim basis in 1985 by the New Forest District Council). The NFHA is a local landscape designation which is recognised in the Statutory Development Plans for the area and is protected through the planning process in the normal way.
22. The proofs of evidence at the Inquiry, the Assessor and the Inspector all referred to a number of Core Documents. CD104 was the "New Forest National Park Draft Boundary Consultation Report" published by the Agency in October 2000. CD126 was a July 2000 report prepared for the Agency by Environmental Resources Management ("ERM"). The main objective of ERM's brief was to identify a boundary for the New Forest National Park. CD206 was a report by Land Use Consultants ("LUC") to the

New Forest Committee which led to the designation of the boundary of the NFHA in 1991.

23. In paragraph 3.16 of her proof of evidence Ms Reynolds explained:

"LUC was appointed to establish the NFHA boundary and their starting point was that the revised boundary should:

'incorporate essential grazing land as well as the best of the landscape, around the forest's preambulation...'

The two principal criteria for the NFHA boundary drawing exercise were:-

(a) to incorporate the land of outstanding national importance for its natural beauty, including flora, fauna, geological and physiographical features, and elements that arose from human influences on the landscape, including archaeological, historical, cultural, architectural and vernacular features. (emphasis added)

(b) To incorporate essential grazing land. This was to include peripheral farmland which was or had recently been used as grazing land in conjunction with the New Forest, or which was part of an area which could be suitably utilised for grazing relating to the New Forest ... so as in aggregate to include a sufficient pool of land to provide an adequate supply of back-up land and the continued functioning of the historic dispersed pastoral regime relating to New Forest commoning in the long term..."

Ms Reynolds commented in paragraph 3.17 of her proof of evidence:

"Unlike section 5(2) of the Act, these two NFHA criteria are not conjunctive. In other words, there is no necessity for land within the NFHA to satisfy both criteria: the satisfaction of just one is enough. Indeed, LUC identified that there were 'some areas where the landscape case is not strong, or which are of a landscape type not proposed for inclusion, which could be added on the grounds of their value as back-up grazing alone'. (CD206)"

24. In paragraph 3.23 she referred to Table 2 in CD104, which included the following criteria for defining the National Park's boundaries:

"* Areas of high landscape quality should be included within the area of land identified for designation (criterion (a)').

* Areas to be included may be of differing landscape character; where this is so quality will be the key determinant rather than uniformity.

* Areas which provide or are capable of providing a markedly superior recreational experience should be included ('criterion (c)').

* Land and settlements which contribute to the rural economy and community life should be included.

* ...

* Features of scientific, historical or architectural value situated on the margins of the National Park should be included where practicable."

25. She said that the Countryside Agency's approach to National Park designation was further expanded upon in CD104. When commenting on CD126 she said "the salient points of ERM's approach" as set out in that document were:

"* There is evidence that in the past, natural beauty has been regarded as the primary criterion for designation, which must be satisfied for all areas. Other factors (including opportunities for outdoor recreation) have tended to be regarded as secondary.

* "It can be seen that the natural beauty criterion effectively encompasses both of the criteria that were used to identify boundaries for the New Forest Heritage Area, that is natural beauty and essential grazing land. The principal 'additional' criterion is opportunities for open-air recreation.

* "The key question for the boundary study is how far the area of national importance for natural beauty and recreation extends. We assume that all areas included should meet both criteria, in varying degrees."

Ms Reynolds added:

"* The issue of whether land peripheral to the New Forest core (ie land outside the New Forest perambulation) satisfies the access designation criterion was assessed in terms of how that peripheral land could service and accommodate the Core, rather than whether this peripheral land satisfies the access criterion in its own terms. The approach states: *The inclusion of marginal areas within the National Park offers new scope to alleviate pressures on the forest core ...*

"* *Existing and potential opportunities for understanding and enjoyment of the area's special qualities*" (emphasis added) was considered to be a boundary designation factor.

"* *In general, the approach (to National Park designation) was a more generous and inclusive one that was used in defining the boundary for the New Forest Heritage Area ...*"

26. Against this background she said in paragraphs 8.77-8.80 of her proof of evidence:

"8.77 The Countryside Agency's revised approach to boundary-making is to include areas of historical value. This is misguided as marginal areas are inappropriately included, based on a flawed understanding of the section 5(2) and the meaning of natural beauty. Hinton Park is such an area and should not be included within the New Forest National Park on account of its historical designation for the house (Grade I listing) and the parkland.

8.78 The Hinton Estate parkland and Grade I Listed house lie within the NFHA. However, as previously noted, the NFHA designation criteria are very different to the section 5(2) designation criteria. Consequently, and at the very least, the inclusion of Hinton Admiral House and the Hinton Park parkland requires consideration of its ability to satisfy the National Park designation criteria, and not just mere inclusion within the Designation Order area simply on the basis of its inclusion within the NFHA.

8.79 The role of the parkland is to provide the setting to the Grade I Listed house and to provide the private gardens to the family home. It would be incorrect to open the immediate grounds for public access for reasons already explained, and because the CROW Act deems parkland and gardens to be 'excepted land'.

8.80 Furthermore, the parkland does not exhibit the natural appearance of the adjacent woodland and countryside. By contrast, the parkland is a designed landscape and created for ornamental beauty and the control of nature, far removed by design from the remote wilderness of the wider landscape for which the National Parks are designated. The Hinton parkland has been managed with these roles and objectives for over a century and to change this approach would be historically inappropriate. The parkland therefore is neither suitable, nor appropriate, in relation to the qualities of natural beauty necessary for National Park designation."

27. While considering this part of Ms Reynolds' evidence, it is convenient to read the next paragraph, 8.81, of her proof of evidence, dealing with Avon Tyrell park because it will be relevant when ground (4) of the challenge falls to be considered:

"In contrast, the Avon Tyrell parkland and House has been managed by 'UK Youth' since 1949 and contains a less clearly designated parkland around the house, with the immediate gardens contained in part by walls. These gardens lie close to the fabric of the house, and the outer perimeter of the lawns are enclosed by woodland belts. As a consequence, UK Youth (pursuant to its own objectives) has been able to introduce footpaths away from the gardens and house and within the woodlands. This has changed, although not degraded, the historic fabric of the parkland."

28. The Inspector summarised the claimants' case in respect of the "natural beauty" criterion by reference to the summary contained in the Assessor's report, as follows:

"4.111. The Landscape Assessor's report deals with the following general conceptual matters raised by the objector:

- While nearly all landscape in England is heavily influenced by Man, natural beauty is not defined in section 114(2) of the Act in a way which incorporates the cultural or historical influence of Man in itself. Under the 1949 Act, as amended, the essence of natural beauty is that it must apply to countryside, it must be principally 'visible' and 'natural' (derived from nature) and it must be outstanding. Insufficient attention to these requirements has led the Agency into giving too much weight to inappropriate factors such as history, cultural associations, commoning considerations, archaeology and nature conservation interests (such as the presence of a rare species or habitat) even where this is unrelated to scenic landscape beauty. Such factors may be relevant to the process of landscape character assessments but they are not relevant to judgments on the quality of natural beauty required under the Act. In considering designation of the NFNP the Secretary of State must confine herself to the strict terms of the designation criteria in section 5(2). The extended definition of natural beauty in section 114(2) only relates to the statutory purposes set out in section 5(1), as does the reference to 'cultural heritage' in section 5(1), although flora and fauna may be relevant to designation if they have a major influence on the landscape. This is a very different situation from that applying in Scotland where more recent (and perhaps arguably more 'modern') legislation in the National Parks (Scotland) Act 2000 provides at section 2(2)(a) that an area may be designated for 'outstanding national importance because of its natural heritage or a combination of its natural and cultural heritage'.

- Some of the boundary-setting criteria in table 2 of CD104 also extend beyond the scope of the designation criteria, eg the following references:- at 2(d) to whether settlements contribute to the rural economy and community life of the Park and to its special qualities and purposes; at 2(g) to whether or not towns contribute to the character and purposes of the Park; at 2(j) to including features of historic or architectural value at the margins ...

- CD126 states at para 4.2.1 that '*in general the approach (to developing the boundaries) of the National Park was a more generous and inclusive one than was used in defining the boundary for the New Forest Heritage Area*'. However, in reality the tests should be harder and the area more tightly defined."

29. The Agency's landscape consultant, Ms Martin, identified the claimant's "main arguments" for the exclusion of Hinton Park as including the argument that:

"Historical and cultural (ie commoning) factors do not form part of the natural beauty criterion and therefore should not be used to support inclusion of land at Hinton Park."

She said that that point had been addressed by Mrs MacIlwaine, another of the witnesses called by the Agency, and so would not be covered in her proof of evidence.

30. Under the heading "Natural Beauty" Ms Martin said:

"Hinton Park is historic parkland set within the heath associated estates landscape type that occurs in a number of areas around the New Forest preambulation. The objection land, which lies within the New Forest Heritage Area, comprises extensive areas of mixed woodland within the valley of Sheers Brook to the west, parkland forming the setting to Hinton Admiral House (listed Grade I), and a mosaic of mainly arable farmland and large blocks of woodland east and south of the A35.

25. The landscape in this area is very clearly part of the New Forest. Heath associated estates landscape are described in the 'New Forest District Landscape Character Assessment' as enclosed wooded estate landscapes, often on undulating ground, around the fringe of the Forest. They are closely associated with former heathland and still retain a healthy character. Pine and oak plantations are interspersed with tracts of intensively farmed land consisting of large fields enclosed by hedgerows and woodland edges. All these characteristics occur within the objection area, the landscape quality (ie condition) of which is very high, with few if any detractors. Because of the high degree of woodland cover, there is also a strong sense of being 'in the Forest'.

26. Hinton Park itself is identified in 'New Forest District Landscape Character Assessment' as being historic parkland, which means that its character differs, at a detailed level, from that of surrounding areas. However, historic parkland is also characteristic of many parts of the New Forest ... The landscape quality of the parkland (which can be seen from the A35) is high, and it is included on the Hampshire Register of Historic Parks and Gardens. English Heritage's Grade I listing of Hinton Admiral House indicates that it is of outstanding historical and architectural importance.

27. Much of the estate and its parkland have Forest rights of grazing attached and we note that the estate also lets backup grazing to commoners, at Poors Common and Burton Common just to the north and west of the objection area. In this sense it is an integral part of the historic dispersed pastoral system that created and helps to maintain New Forest character.

28. All these factors led the Countryside Agency to take the view that land around and within Hinton Park merits inclusion in the New Forest

National Park on grounds of natural beauty." (my emphasis).

31. Under the heading "The statutory criteria for National Park designation" Mrs MacIlwaine, who was the Agency's lead officer for designation of the New Forest as a National Park, said this in paragraphs 12 and 14-16 (so far as relevant) of her proof of evidence:

"12. As the Agency has already made clear to this Inquiry, the Agency shares Ms Reynolds' view that National Park purposes come into effect once a National Park has been designated. National Park purposes, as defined in the Environment Act 1995, do not form part of the statutory designation criteria. The Agency has not, as Ms Reynolds states, *'conflated the purposes and duties of the National Park Authority ... with the criteria for designation ...'*

...

14. The 1949 Act, which defines the statutory criteria for National Park designation, does not exhaustively define 'natural beauty' or 'opportunities for recreation'. The way in which the Countryside Agency interprets and applies the statutory National Park criteria is explained in ... (CD/104). The Agency has not failed to appreciate that in assessing whether land should be included in the National Park, both of the statutory criteria need to be met. The Agency's position is that while both of the statutory criteria need to be met, they do not need to be satisfied to the same extent in every tract of country.

15. The Agency does not accept Ms Reynolds' assertion that it has 'adopted an understanding of *'natural beauty' which goes beyond its true meaning by incorporating cultural and historical components'*. Section 114 of the 1949 Act sets parameters for the definition of 'natural beauty' when it states that it should *'... be construed as including references to ...'* but this does not mean that it should be limited only to the factors listed.

16. According to statute, natural beauty embraces flora, fauna, geological and physiographical features. Guidance and precedent [reference is made *inter alia* to Circular 12/1996] clearly indicate that historical, cultural, architectural and vernacular features form part of natural beauty, as stated in Table 1 of ... (CD/104). This is why landscape, ecological, historical and cultural considerations, ie commoning, were each considered in turn in section 3 and 5 of the 'New Forest National Park Boundary Study' (CD/126), [and] in (CD/104). ... All of these factors (ie landscape, ecological; historical and cultural) were assessed as part of the 'natural beauty' criterion in identifying the extensive tract of country that meets the statutory criteria."

32. The Inspector summarised the Agency's case in paragraphs 4.119-4.123 of his report:

"Natural Beauty

4.119 Hinton Park is historic parkland set within the 'heath associated estates' landscape type that occurs in a number of areas around the preambulation. The area of contention is all within the NFHA and comprises extensive areas of mixed woodland within the valley of Sheers Brook, parkland forming the setting to Hinton Admiral House, and a mosaic of mainly arable land and large blocks of woodland east and south of the A35.

4.120 The landscape here is very clearly part of the New Forest. Heath associated estates are described in the District Landscape Character Assessment as enclosed wooded estate landscapes, often on undulating ground, around the fringe of the Forest. They are closely associated with former heathland and retain a heathy character. Pine and oak plantations are interspersed with tracts of intensively farmed land consisting of large fields enclosed by hedgerows and woodland edges. All these characteristics occur within the objection area, the landscape quality of which is very high, with few if any detractors. The high degree of woodland cover imparts a strong sense of being in the Forest.

4.121 Hinton Park itself is of high landscape quality and included on the Hampshire Register of Historic Parks and Gardens. Hinton Admiral House is listed as Grade I.

4.122 In the Hinton Park area the boundary follows the clear transition in landscape character and quality that occurs south and east of Hinton and Beckley beyond which the land is adversely affected by arable intensification, transmission lines and urban fringe development.

4.123 Much of the estate and its parkland have grazing rights and some land is let to commoners. In this sense it is an integral part of the historic dispersed pastoral system."

33. Appendix 1 to the Inspector's report contains the Assessor's response to these rival contentions. Under the heading "Interpreting the Statutory Criteria in the New Forest National Park" the Assessor described the "pathway that led to the production of one of the key documents at the Inquiry, that is CD104, and particularly Tables 1 and 2". In paragraph 1.33 of Appendix 1 the Assessor said:

"Table 1 on page 6 explains the Agency's approach to interpreting the statutory criteria for the NFNP, the first being natural beauty. The natural beauty criterion is interpreted in the following terms:

* 'Natural beauty' implies a landscape of outstanding national or international importance.

* It is defined to embrace flora, fauna, geological and physiographical features. Archaeological, historical, cultural, architectural, and vernacular

features are also included (in accordance with guidance and precedent).

* A key concept is that of landscape quality. This is a function of distinctive character, presence of key characteristics, absence of atypical or incongruous features, and the state of repair of the landscape as well as how intact it is.

*Visual, intangible, ecological, historical and cultural characteristics, features and values are all relevant to natural beauty and landscape quality.

* In the New Forest, the historic dispersed pastoral system is a key cultural characteristic that created and helps to maintain New Forest character, and as such should be taken into account in designation."

34. Under the heading "The Natural Beauty Test" the Assessor said:

"Several objectors (particularly ... Hinton Estates ...) commented on the way in which the Agency had defined and interpreted the natural beauty criterion. In section 1 of this report I detail the way in which the Agency reached their understanding of the criterion, as set out in Tables 1 and 2 in CD104.

3.4. Although I have found the Agency's interpretation of the criterion to be generally justified by the explanation given in the audit trail in CD301, I am not always convinced by the way in which this interpretation has been applied in defining the precise NFN boundary.

...

3.6. I support the notion (as did the Agency in Table 1 of CD104), and in many of their responses to objectors) that the key primary consideration of natural beauty is the presence of outstanding landscape quality through the presence of intact and distinctive New Forest landscape character, with an absence of atypical or incongruous features. However I did not find that the Agency applied this approach consistently or with rigour in the case of the Southampton Waterside boundary of the NFN, or around Lymington and in parts of the Avon Valley.

3.7. All the landscapes of England are heavily influenced by human activity. Bearing that in mind, natural beauty as defined in section 114(2) of the Act cannot imply pristine or completely natural landscapes or there would be no land in England that could meet the natural beauty criterion. The terms of the Act must therefore require a high degree of 'relative naturalness', accepting that the cultural influences on the landscape should be taken into account in assessing any English landscape. I agree, however, that the essence of natural beauty under the Act is that it must apply to countryside. It must be principally 'visible' and 'natural' (derived from nature) and it must be outstanding.

3.8. Hinton Estates argue that the Agency paid insufficient attention to section 114(2) of the Act, and gave too much weight to inappropriate factors, such as history, cultural associations, commoning considerations, archaeology and nature conservation interests, even where these are unrelated to landscape beauty. In my view the Landscape Character Assessment (LCA) process needs to take account of these factors, as they are important in understanding how the countryside has evolved to its present state. However, the weight to be attached to them in assessing landscape quality needs to be carefully considered if they are not to be given undue attention in reaching judgments on natural beauty under the Act.

3.9. I believe that the inextricable linking of criteria and purposes is unavoidable in considering designation of the NFNP, as the strict terms of the designation criteria in section 5(2) should be informed by the extended definition of natural beauty in section 114(2) even if the latter only relates to the statutory purposes set out in section 5(1) (as does the reference to 'cultural heritage' in section 5(1))."

35. The Inspector summarised the Assessor's conclusions and recommendations on "natural beauty", in so far as they related to Hinton Park, in paragraphs 4.165-4.168 of his report which I have set out above.

36. In paragraph 4.171 the Inspector said that with two small exceptions, which the parties are agreed are not relevant for present purposes, he agreed with the Assessor's conclusions on the applicability or otherwise of the "natural beauty" criterion within the various areas of contention. I have also set out above his conclusions in paragraphs 4.190-4.193 of his report. Although these conclusions are contained in the section of the report dealing with "Opportunities for open air recreation", they reiterate the Inspector's agreement with the Assessor's view that the Hinton Estate meets the "natural beauty" criterion:

"... I am satisfied that the area has a very high quality, intact, well-maintained landscape containing considerable elements of variety from broad parkland to intimate wooded valleys to the well-ordered woodland-fringed fields of the dairy farms.

4.191 This area of Heath-associated Estates landscape is extensive and forms an important and integral part of the highly attractive ring of landscapes immediately surrounding the preambulation ..."

37. I have set out the rival contentions at the Inquiry in respect of the "natural beauty" criterion at some length and in some detail so that the Assessor's and the Inspector's responses to those contentions can be properly understood in context. Documents such as the Inspector's report should not be construed legalistically or in a vacuum, but in a common-sense way and always bearing in mind that they will be a response to the evidence and arguments that have been deployed at the Inquiry.

38. It is clear that the Inspector agreed with the Assessor (see paragraph 4.190).
39. How then did the Assessor resolve the conflict between the claimants and the Agency? Did she accept the claimants' contention that in drawing the National Park boundary the Agency had had regard to factors such as historical and cultural associations, commoning considerations, archaeological and nature conservation interests, and the inclusion of features of historical or architectural value at the margins, which were not relevant for the purposes of deciding whether an extensive tract of countryside had the necessary quality of "natural beauty"; or did she accept what appears to have been the Agency's final position, as explained by Mrs MacIlwaine, that:

"All of these factors (ie landscape, ecological, historical and cultural) were correctly assessed as part of the 'natural beauty' criterion in identifying the extensive tract of countryside that met the statutory criteria?" (my emphasis).

40. I say what appears to have been the Agency's final position because it will be remembered that Mrs MacIlwaine had said in paragraph 12 of her proof of evidence that National Park purposes did not form part of the statutory designation criteria. Hence the Agency had not conflated the duties of a National Park Authority once a National Park had been designated with the criteria for designation. In the first sentence of paragraph 15 of her proof of evidence she had said that the Agency did not accept that it had "adopted an understanding of 'natural beauty' which goes beyond its true meaning by incorporating cultural and historical components". However, and notwithstanding what was said in paragraph 12 of her proof, it would appear from the remainder of paragraph 15 and from paragraph 16 of her proof of evidence that the Agency was not saying that "cultural and historical components" had not been incorporated into its definition of natural beauty, but rather that they had been incorporated and that the Agency had been right to do so. That this was the Agency's position is confirmed by the Inspector's summary of the Agency's submissions in the report and by the various factors considered in Ms Martin's evidence under the heading "natural beauty" (see above), "all of which" she told the Inspector had led the Agency to take the view that designation was merited.
41. It will be remembered that the Inspector's summary of the Agency's response under this heading referred both to the fact that "Hinton Park itself is of high landscape quality and included on the Hampshire Register of Historic Parks and Gardens. Hinton Admiral House is listed as Grade I" (4.121), and to the fact that "much of the estate and its parkland have grazing rights and some land is let to commoners. In this sense it is an integral part of the historic dispersed pastoral system" (4.123).
42. In his submissions on behalf of defendant Mr Elvin QC did not place any reliance upon the Agency's approach to the "natural beauty" criterion. He submitted that the Assessor, having noted the rival contentions, had formed her own view, which the Inspector had then adopted.
43. I have set out the relevant extracts from Appendix 1 to the Inspector's report (above). On any fair reading of section 3 of Appendix 1, the Assessor accepted the Agency's

approach to the factors that could and should be taken into account when considering whether the "natural beauty" criterion was met: see paragraphs 3.4 and 3.6 of Appendix 1 (above). Her concern was not with the Agency's interpretation of the criterion, but with the way in which the Agency's interpretation had been applied by the Agency in defining the precise boundary of the National Park, and in particular whether the Agency had applied its own approach with sufficient consistency and rigour (ibid).

44. The claimants do not quarrel with the substance of paragraph 3.7 in Appendix 1. They accept that, for example, flora, geological or physiographical features may contribute to, or even be the principal reason for, an area's "natural beauty". Nor do the claimants dissent from the Assessor's proposition that factors such as history, cultural associations and archaeology are all important in understanding how the countryside has evolved to its present state. However, they submit that there is a clear distinction between understanding how a landscape has evolved, and deciding for the purposes of paragraph (a) in subsection 5(2) whether an extensive tract of country has the necessary quality of "natural beauty".
45. Although the Assessor said in the final sentence of paragraph 3.8 of Appendix 1 that the weight to be attached to factors such as history and cultural associations "should be carefully considered" if they were "not to be given undue attention in reaching judgments on natural beauty under the Act", it is clear from paragraph 3.9 that she did consider that (subject only to the question of weight) such factors could be taken into account, and that she agreed with the Agency's approach to the factors mentioned in section 114(2):

"The strict terms of the designation criteria in section 5(2) should be informed by the extended definition of natural beauty in section 114(2) even if the latter only relates to the statutory purposes set out in subsection 5(1)."

46. Mr Elvin submitted that in determining the extensive tracts of country to be designated under subsection 5(2) the Agency and the Secretary of State were furthering the purposes in section 5(1)(a), and hence the expanded meaning of "natural beauty" in section 114(2) was applicable also to subsection 5(2). He further submitted that it would be surprising if "natural beauty" had a wider meaning in subsection (1) than it had for the purposes of subsection 5(2).
47. I do not accept those submissions. Parliament could easily have made provision for an expanded meaning of "natural beauty" which would have been of general application throughout the Act:

"References in this Act to the natural beauty of an area shall be construed as including references to its flora, fauna and geological and physiographical features."

48. If possible, subsection 114(2) should be interpreted in such a way as to give effect to all of the words used by Parliament, and not an interpretation which would, in effect,

render the two references to "the preservation or [as the case may be] the conservation of ..." otiose.

49. While at first sight it may appear strange that "natural beauty" is given an extended meaning in subsection (1) as substituted by the Environment Act 1995, but not in subsection (2) of section 5, I accept Mr McCracken's submission that one does not have to look far for a sensible justification. Once an extensive tract of country has been designated as a National Park, that will have been not merely because of its natural beauty, but also because of the opportunities it affords for open air recreation, and the latter may well threaten not merely the natural beauty that those seeking open air recreation come to enjoy, but also the flora, fauna, geological and physiographical features within the area, even if those features do not contribute to the area's natural beauty. To take a simple example, visitor pressures may threaten the continued existence of rare flora or geological features which are of great scientific interest, or physiographical features that are of great historic interest, but are wholly lacking in beauty.
50. It will also be noted that the ambit of what should be conserved and enhanced pursuant to section 5(1) (as amended) once a National Park has been designated extends beyond "natural beauty" to include the "wildlife and cultural heritage" of the areas in question. By contrast, the wildlife and cultural heritage of an area are not made relevant considerations for the purpose of deciding whether that area should be designated as a National Park under subsection 5(2).
51. It is therefore not surprising to find that once an area has been designated as a National Park, on the basis of its "natural beauty" and the opportunities it affords for open air recreation, the duty of the Park's Authority to conserve and enhance is extended to a wider range of the area's special qualities, including, but not limited to, its natural beauty.
52. Mr Elvin submitted that the Inspector did not err in any event since he did not rely on the extended definition in section 114(2).
53. I would accept that the issue between the claimants and the Agency did not simply turn on the extended definition in section 114(2), because the Agency's approach went further and included a wider range of factors, not limited to those mentioned in section 114(2), in its assessment of the "natural beauty" criterion: see Mrs MacIlwaine's evidence (above). Ms Reynolds had identified the two principal criteria for the NFHA boundary drawing exercise:

"To incorporate the land of outstanding national importance for its natural beauty, including flora, fauna and geological and physiographical features, and elements that arose from human influences on the landscape, including archaeological, historical, cultural, architectural and vernacular features [and] To incorporate essential grazing land ..."

She had also referred to the fact that the criteria in the Agency's draft consultation report (CD104) had included, for example, the proposition that "features of scientific,

historical or architectural value situated on the margins of the National Park should be included where practicable." She had argued that rather than defining a National Park boundary upon an approach to "natural beauty" that the Agency itself had said in CD104 was "more generous and inclusive" than that which had been adopted in defining the boundary of the NFHA, the test should have been harder and the area more tightly defined (see paragraph 4.111 of the Inspector's report).

54. I have set out the Assessor's response to the claimants' case in respect of the "natural beauty" criterion. What is perhaps of more importance than her response in section 3 of Appendix 1 to the conceptual arguments, is her justification for concluding that the land at Hinton Park "more than adequately satisfies the natural beauty criterion" (see paragraph 4.168). First, in paragraph 4.165 the Assessor found that the land at Hinton Park and the surrounding associated countryside "has long been recognised for its natural beauty having been part of the NFHA".
55. The claimants' argument that a number of the factors considered in designating the boundary of the NFHA were irrelevant for the purposes of deciding whether the "natural beauty" criterion in section 5(2)(a) had been met was either ignored, or more probably, in view of paragraph 4.167 of the report, rejected.
56. Paragraph 4.167 began by referring to the "highly regarded designated landscape of the parkland, which is recorded and detailed on the Hampshire County Register of Historic Parks of Gardens, with English Heritage Grade I listing for the buildings it contains". Although the Assessor goes on to say that the "wider landscape" within which the parkland sits, "includes all the characteristics of its Heath Associated Landscape type which is a classic New Forest type found elsewhere within the NFNP", there is no suggestion that she considered that the undoubted historic or architectural interest of the Grade I house and its parkland setting, whilst highly relevant for many planning purposes, were not relevant for the purpose of paragraph (a) in subsection 5(2). Indeed it would appear that the Assessor was, in practice, endorsing the criteria in the Draft Boundary Consultation Report (CD104) which had stated *inter alia* that features of scientific, historical or architectural interest situated on the margins of the National Park should be included where possible.
57. The Inspector agreed with the Assessor. His approach is best summarised in paragraphs 4.190 and 4.191 of his report. The full text is set out above. For convenience I repeat the following extracts (with emphasis added):

"From our extensive accompanied visit I am satisfied that the area has a very high quality, intact, well-maintained landscape containing considerable elements of variety from broad parkland to intimate wooded valleys to the well-ordered woodland-fringed fields of the dairy farms. ... This area of Heath-Associated Estates landscape is extensive and forms an important and integral part of the highly attractive ring of landscapes immediately surrounding the perambulation."
58. If the criterion in subsection 5(2)(a) was a "highly attractive landscape" or the old development plan designation of Great or High Landscape Value, now more often

described as Special Landscape Areas, one could well understand a conclusion that "well maintained" parkland on the Register of Historic Parks and Gardens and "well-ordered" fields of dairy farms, were a "highly attractive" or "high quality" landscape. But the criterion for designation as a National Park is an extensive tract of countryside that has the quality of natural beauty, not simply "dairy". In some contexts "natural" might simply mean rural, as opposed to urban, but "natural beauty" has to be understood in the context of section 5 which is concerned with the designation of "extensive tracts of country" which have the particular quality of natural beauty. I would endorse the approach of the Assessor in paragraph 3.7 of Appendix 1 to the Inspector's report. For the reasons she gives, what is required is "a high degree of 'relative naturalness'". Since the concept of naturalness is a relative one, there will be a spectrum with the "wildest" areas or the "more rugged areas of mountain and moorland" at one extreme. However, if the concept is one of relative "naturalness" (rather than visual attractiveness) "well-maintained" historic parkland providing the setting for a Grade I Listed building, and "well-ordered" dairy fields of dairy farms would seem to be the antithesis of naturalness. In such landscapes man has very obviously and deliberately tamed nature. As Ms Reynolds said "the parkland is a designed landscape and created for ornamental beauty and the control of nature ..." This argument is nowhere addressed by either the Assessor or the Inspector.

59. The Assessor and the Inspector's approach effectively discarded the requirement for a high degree of relative naturalness and substituted a test of "visual attractiveness" or "landscape quality". The distinction between natural beauty and attractive landscape is well illustrated in terms of planning policy by the contrast between Areas of Outstanding Natural Beauty ("AONB"), which were originally designated under section 87 of the Act and now designated under section 82 of the Countryside and Rights of Way Act 2000, with the Areas of Great Landscape Value ("AGLV") designated by local planning authorities in the old-style Development Plans. There may or may not be a degree of overlap between the boundaries of an AONB and an AGLV (or its successor designation recognising an area of attractive landscape in the new Development Plan system).
60. Before leaving ground (2) I should make it clear that the proper interpretation of subsection 114(2) (whether it extends the meaning of natural beauty in subsection 5(2) as well as in subsection 5(1)) is not the determining issue. The Agency was contending that a broader range of factors, including, for example, historical and cultural factors, could be taken into consideration in deciding whether the "natural beauty" criterion in subsection 5(2) was met. While such factors were relevant (as the Assessor said) to an understanding of how a particular tract of countryside had evolved to its present state, they were not relevant when it came to deciding whether it possessed the necessary quality of natural beauty so as to justify designation as a National Park.
61. I realise that the defendant may well consider that this is an unduly restrictive approach to the ambit of her and the Agency's powers under section 5(2). However, it must be remembered that the question is not what factors should, as a matter of good countryside planning practice in the 21st century, be taken into consideration in designating a National Park, but what factors may lawfully be taken into consideration under an enactment that is now over 55 years old. It might well be the case that "more

modern" legislation would not be satisfied with such a straightforward and simple concept as "natural beauty". As an example of a more up-to-date approach to countryside planning the claimants mentioned the provisions of the National Parks (Scotland) Act 2000, which provides that an area may be designated for "outstanding national importance because of its natural heritage or a combination of its natural and cultural heritage". Recognition of the concept of cultural heritage is also to be found in subsection (1) of the Act, as substituted by the 1995 Act. Parliament had the opportunity in 1995 to bring subsection (2) up to date if it wished to do so. It did not. It left the "natural beauty" criterion in subsection (2) unchanged.

62. The 1949 Act was a contemporary of the New Towns Act 1946 and the Town and Country Planning Act 1947. The new towns are no longer new, and a brief perusal of today's planning Acts would be sufficient to demonstrate the extent to which relatively simple provisions which sufficed in 1947 have been repealed and replaced by far more elaborate and sophisticated controls in response to the many changes that have taken place over the last 50 years. Views as to which tracts of countryside have the quality of "natural beauty" may (or may not) have changed over the last 50 years, but the "natural beauty" criterion in subsection 5(2)(a) of the Act has not been changed to embrace wider considerations such as "cultural heritage". If the "natural beauty" criterion in subsection 5(2)(a) is to be changed to reflect 21st century approaches to countryside and leisure planning then the change must be effected by Parliament, and not by administrative action on the part of the Agency in adopting a wider range of factors for the purposes of designation. This application therefore succeeds on ground (2).

Ground (1) "Opportunities ... for open air recreation"

63. The claimants argued that those parts of the Hinton Estate which they sought to exclude from the National Park and in particular Hinton Park did not afford any "opportunities ... for open air recreation". In paragraph 8.77 of her proof of evidence Ms Reynolds summarised the position thus:

"* ... CROW provides guidance on types of land which are suitable and these specifically exclude parkland, gardens, improved grassland, ploughed land and land close to animal accommodation from the access regime for open-air recreation. In addition, woodland and riversides are not deemed worthy or suitable for public access rights. These areas are equally unsuitable for access in relation to the National Park designation. Hinton Park is comprised of these land types and does not contain any 'open country' as defined by the CROW Act.

* Existing opportunities for open-air recreation: there are no public rights of access over Hinton Park."

In paragraph 8.68 she said:

"Large parts of the Hinton Estate, including Hinton Park, Holmhill Lane and Allensworth, have been included within the Designation Order area notwithstanding the non-existence of public rights of way. Furthermore,

as these areas comprise parkland, woodland and agricultural land they are not eligible for public access rights under the CROW Act and therefore must be questioned under their suitability under the National Park designation. The consequence is designation with no reasonable prospect of the public being able to enjoy lawful opportunities for open air recreation."

She said in paragraph 8.69 that the Agency's failure to consider the meaning of opportunities for open air recreation had resulted in an inconsistent approach to designation:

"... On the one hand, some areas have been excluded from National Park designation on the grounds of limited access [examples were given]. On the other hand, [other land, examples given had been included] ... Another example of inconsistency is the inclusion of Hinton Park parkland, an area with no existing public access."

In paragraph 8.72 she said:

"Considerable concern is felt by the estates at the prospect of providing areas of farmland for public access. It is uncertain how conflicts in the use of land will be resolved."

64. In response Ms Martin said:

"The tract of country that includes Hinton Park makes an important contribution to visitors' experience of the New Forest. Although the Park itself does not include rights of way or access land, the parkland and woodland can be seen and enjoyed from surrounding areas, notably from Ringwood Road and the A35. In addition, in the southern and eastern parts of the objection area, around Hinton House and Beckley, there are a number of footpaths, a bridleway and quite rural lanes which offer excellent opportunities for walking, riding and cycling and for the enjoyment of the special qualities of the New Forest. The footpath network provides links to the south, giving the urban residents of Highcliffe easy access to these recreational opportunities."

65. The Inspector summarised the claimants' case in paragraphs 4.116 and 4.117 of his report:

"4.116 CROW indicates the current Parliamentary view about which parts of the countryside have a character that lends to open-air recreation. The 'access land' referred to in section 2(1) of CROW for the purpose of open-air recreation as defined in section 1(1) is being limited to 'open country' defined on the appropriate statutory map (predominantly mountain, moor, heath or down) or registered common land. According to the draft CROW map there is no such land or proposed land within the area that the estate seeks to exclude from the NFNP.

4.117 ... access or open-air recreation facilities should either exist now or there should be a realistic potential for them to be provided within the land to be included in the NFNP. Vague or unrealistic aspirations are not sufficient."

66. CROW gives the public what is commonly called "the right to roam" over "access land" as defined in the Act. "Access land" is open country as shown on a map prepared by the Agency. Section 1(2) defines "open country" as land which appears to the Agency "to consist wholly or predominantly of mountain, moor, heath or down". The descriptions of "excepted land" are set out in Schedule 1 to CROW and include land covered by buildings or the curtilage of such land and land used as a park or garden.
67. The Inspector's conclusions as to "Opportunities for open air recreation" were set out in paragraphs 4.190-4.193 of the report (see above). In the final sentence of paragraph 4.192 the Inspector, in a somewhat convoluted conclusion, said that he did not consider it "unreasonable to conclude that the general question I have posed in relation to 'potential opportunities' for open-air recreation offering a markedly superior recreational experience (at paragraph 15 of Appendix 2) could be answered in the affirmative".
68. In Appendix 2 the Inspector dealt with "The Second Statutory Criterion - Opportunities for open air Recreation". Having set out the Agency's approach, he identified two common threads which had emerged from the objections and representations, which he considered in turn. The first of those was:

"(1) How far can 'potential opportunities' be taken into account in areas currently without major areas of current open access or substantial networks of rights of way?"

The Inspector said that that issue has been raised by, among others, the claimants. In paragraph 9 he said:

"It seems to me inherent in the term 'opportunities for open-air recreation' that consideration needs to be given not only to existing conditions but also to appropriate assessment of the potential of land with qualifying natural beauty to provide for additional forms of recreation in the future. I therefore have no difficulty in agreeing with the Agency's boundary setting criterion 2c that areas should be included if they *'provide or are capable of providing a markedly superior recreational experience'*. The issue is what factors need to be considered in making a judgment about an area's 'capability' to do so."

69. In paragraphs 13-16, the Inspector answered that question:

"13. The view of Hinton and Avon Tyrrell Estates was that while consideration can be given to realistic potential facilities, vague or unrealistic aspirations will not suffice. However, at times some objectors appeared to adopt a very narrow approach, for example to rule out any

facilities not already programmed for implementation, or not specifically identified by the Agency as likely candidates for adoption by a future NPA.

14. I consider this an unrealistic and excessively conservative approach. The Concise Oxford dictionary defines 'opportunity' as '*a chance or opening offered by circumstances*'. It does not require one to be too 'speculative' to recognise that the circumstances surrounding the realisation of recreational potential can and do change, but that some forms of change are more likely to occur than others, having regard to particular local conditions.

15. So in my view the following question needs to be posed in relation to 'potential opportunities':

Is it feasible to conclude that the area's potential scope to provide a markedly superior recreational experience (based upon and complementing the landscape character and quality of the area) could be achieved within a reasonable timescale after designation, without the application of unrealistic levels of resources, and without interfering excessively with other competing interests?

16. In other words, a broad, practical and common sense conclusion is needed about the ways that an NPA (or independent landowners in a designated National Park) might act within the circumstances of the particular tract of land."

70. In paragraph 27 of Appendix 2, the Inspector said that he had carried forward these remarks into his consideration of the individual areas in contention.
71. As indicated in paragraph 13 of Appendix 2, the claimants accepted that it was inherent in the term "opportunities" that one could look to the future, and that consideration was not limited to the present facilities for open air recreation, for example the existing network of footpaths and bridleways. That was undoubtedly correct, given the powers in the other parts of the Act, for example to create new public rights of way, to promote long distance routes for walkers and riders and to make agreements for public access to open country.
72. Thus, the claimants rightly did not take issue with paragraph 9 of Appendix 2. However, Mr McCracken submitted that both in Appendix 2 and in paragraph 4.192 of the report, the Inspector repeatedly applied a less stringent test: that there had to be, not opportunities for open air recreation, but "potential opportunities". Put shortly, the Inspector was not asking the question 'are there opportunities', but 'even if there are no opportunities at the moment, might there be opportunities in the future'. Mr Elvin pointed out that the Act did not define "opportunities". He submitted that the Inspector's approach to "opportunities" was the correct one and in any event the court would allow the tribunal of fact a broad discretion as to the meaning of an undefined,

ordinary English word: see R v Monopoly & Mergers Commission ex parte South Yorkshire Transport Ltd [1993] 1 WLR 22, per Lord Mustill at pages 29 and 32. In any event, he submitted that no exception could reasonably be taken to the "broad, practical and common sense" approach adopted by the Inspector (see paragraph 16 of Appendix 2).

73. I prefer Mr McCracken's submissions on this issue. It is one thing to consider whether there are opportunities or whether there is potential for something to occur, it is another thing to consider whether there are potential opportunities for something to occur. Asking the latter question lowers the statutory threshold. An occasional reference to "potential opportunities" might well not have been a cause for any real concern, since Inspector's reports should be read in a broad and common-sense way and legalistic nitpicking is not appropriate. However, it is clear that the Inspector's use of the test "potential opportunities" was not an occasional oversight. The expression is used consistently throughout the Inspector's consideration of the first of the two general issues, and is expressly carried forward into and used in, paragraph 4.192 of the Inspector's report.
74. I accept Mr Elvin's submission that in the first sentence of paragraph 14 of Appendix 2 the Inspector was responding to some objectors (not the claimants) who had "appeared to adopt a very narrow approach". However, it will be noted that in deciding in the somewhat convoluted final sentence of paragraph 4.192 that it was not unreasonable to conclude that the general question posed in relation to "potential opportunities for open air recreation" (my emphasis) in paragraph 15 of Appendix 2 could be answered in the affirmative, the Inspector was neither using the statutory language, nor was he answering the simple question: "Does this area have potential (or scope) to provide a markedly superior recreational experience"; but instead he was considering whether it was feasible to conclude that an area's "potential scope" to provide a markedly superior recreational experience could be achieved within a reasonable timescale after designation. Whether one chooses to translate the statutory criterion in relation to any particular area as "the potential" it affords for open-air recreation, or "the scope" it affords for open-air recreation", rather than "the opportunities it affords for open air recreation" may not matter overmuch, but what one should not do is water down the statutory requirement by applying a vaguer test such as "potential scope" or "potential opportunities". I accept that these criticisms of the Inspector's approach to paragraph (b) in subsection 5(2) might be regarded as merely academic if he had, in his report, clearly explained why the claimant's land did afford opportunities for open air recreation. It is therefore convenient to test the Inspector's approach in principle by reference to his approach in practice in respect of the claimant's land by looking at grounds (3)-(6) which challenge detailed aspects of the manner in which the Inspector considered this issue.

Grounds (3)-(6) Detailed matters

75. Although they are contained in the section of the Inspector's report which deals with the Inspector's conclusions under the heading "Opportunities for open air recreation", paragraph 4.190 and most, if not the whole, of paragraph 4.191 would appear to be concerned with the "natural beauty" criterion (see above). Mr Elvin accepted that

motorists enjoying views from the A35 and other minor roads would not be enjoying "open air recreation" for the purposes of section 5(2). He submitted that the visual attractiveness of the land of Hinton Park from the A35 and other roads was "an important part of the background" and that, particularly on other minor roads, including that leading to Forest Lodge within the park, there could be others - walkers, riders, on horses and bikes - who could be enjoying open air recreation. Unfortunately, paragraph 4.191 does not distinguish between, for example, walkers and riders on the minor roads (about whom there appears to have been no detailed information before the Inspector: see the extract from Ms Martin's proof of evidence above), and others travelling through the area, including motorists on the A35.

76. While I accept Mr Elvin's submission that the Inspector did not erroneously believe that motorists enjoying the views from their cars on the A35 would be engaging in "open air recreation", and would not therefore have allowed the application on ground (5) if it had stood alone, I am satisfied that reading paragraph 4.191 as a whole (and in conjunction with paragraph 4.190) it is not primarily, if at all, concerned with whether the claimant's land affords "opportunities for open air recreation" but rather with its visual attractiveness as high-quality landscape, which is quite a different matter (see also the discussion of ground (2) above).
77. That leaves paragraph 4.192 as the only substantive discussion in the Inspector's report of the section 5(2)(b) criterion in so far as it relates to the claimant's land. The Inspector begins by noting that "there is little public access to this particular section of the area ... south west of the perambulation". What then were the opportunities for open air recreation? The Inspector referred to two factors: (1) the Estate's "track record", and (2) the fact that "circumstances can change". Mr McCracken submitted that the Inspector was simply wrong in respect of the first of those two factors. On the evidence the Hinton Estate had no such track record. By contrast, the Avon Tyrrell Estate did have such a track record for the reasons explained in paragraph 8.81 of Ms Reynolds' proof of evidence (see above). He submitted the Inspector had simply confused the two estates.
78. An application by Mr Elvin to adduce a witness statement from the Inspector stating that he did not confuse the two estates, as late evidence (the witness statement was dated 2nd September 2005), and an application by Mr McCracken to cross-examine the Inspector if the witness statement was admitted into evidence, were not pursued after it became clear during the course of submissions that both parties were agreed that the real issue was whether there was any evidence that the Hinton Estate did have such a track record, and if there was, whether the Inspector's reasons in relation to this issue sufficiently clear.
79. The best Mr Elvin could do was to point me to paragraph 8.74 of Ms Reynolds' evidence, which had said this:

"... the result of this Core-focused approach to designation has been that land with little opportunities for open air recreation or otherwise unsuitable has been proposed for National Park designation. Indeed, inclusion of land within the NFNP without adequate opportunities for

open-air recreation is likely to create conflicts with the existing farming and management aspects of the estates. This is not to say that there is not land outside the New Forest Core or land within the Estates capable of providing opportunities for open air recreation. There may be areas of land within the Estates, for example Burton Common, Poors Common, Beckley Common and Shirley Common, which could be made available for public access subject to protection of their nature conservation status and interest. Indeed, the Estates specifically have made no objection to the inclusion of these areas within the NFNP."

Burton Common and Poors Common were both managed by the estate to conserve and promote their nature conservation value.

80. There was no suggestion that the information in paragraph 8.74 of Ms Reynolds' proof of evidence was altered in any way by oral evidence at the Inquiry. While an indication at the Inquiry that the various commons within the estate "could be made available for public access subject to protection of their nature conservation status and interest" might, at a pinch, be described as a "track record of considering access to other nearby areas", it could not reasonably be described as a "track record of granting access". The evidence before the Inspector clearly demonstrated precisely the opposite: there was no track record of the Hinton Estate granting access. Not every error of fact will result in an error of law. However, this particular factual error was central to the Inspector's consideration of the criterion of paragraph (b) of section 5(2). Ground (4) is therefore made out and it reinforces ground (1).
81. That leaves the Inspector's proposition that "circumstances can change". So they can, but as the Inspector observed in paragraph 14 of Appendix 2 "some forms of change are more likely to occur than others". While I accept Mr Elvin's submission that the Inspector did not erroneously rely on CROW in deciding whether the claimants' land afforded "potential opportunities for open air recreation", neither did he reject the claimants' evidence that CROW could not be relied upon for this purpose at Hinton Park: see paragraph 8.77 of Ms Reynolds' evidence, and paragraph 4.116 of the report.
82. The Inspector acknowledged that the estate had "expressed a current desire not to provide access to the area in contention". Absent any track record of granting access, absent any "current desire" to do so, and absent any prospect of the public being able to assert any rights under CROW, what was left other than (as the claimants put it) "vague aspirations"? As a general proposition, the assertion that "circumstances can change" cannot possibly be gainsaid, but absent a realistic assessment of the prospects for change in any given set of circumstances, the general proposition cannot, by itself, justify a conclusion that criterion (b) in subsection 5(2) is met in respect of any particular area. As with ground (4), ground (3) reinforces ground (1) and demonstrates that the Inspector was neither in theory nor in practice applying the correct statutory test in subsection 5(2)(b), but instead a watered-down test where vague hopes, rather than opportunities, sufficed.
83. Ground (6) criticises the first sentence in paragraph 4.192 of the report that "it is not necessary for such access to exist over every part of a qualifying track". As I

understand the claimants' argument under this head, they would accept that the proposition is correct within the main body of a National Park, so that a designation can "wash over" a large tract even though there is no public access to parts of the tract, but they submit that when defining the outer boundary of a National Park a more detailed examination of where there are, and are not, opportunities for open air recreation is required. Mr Elvin submitted that there was no warrant in the Act for such a distinction being drawn between the main body of a National Park and its outer boundary.

84. While I accept that submission in principle, in practice there may well be more scope for excluding particular areas which do not meet the criteria in subsection 5(2)(b) when defining the outer boundary of a National Park. Whether that is so in any particular case will be very much a matter of judgment for the Inspector on the ground. In view of my conclusions that the Inspector erred in principle in his application of the "natural beauty" criterion, and both in principle and in detail in his application of the "opportunities for open air recreation" criterion to the claimant's land, ground (6) does not add anything of substance to the claimants' case.

Conclusion

85. For the reasons set out above, I grant the application and quash the order in so far as it affects so much of the claimant's land as in contention at the Inquiry, as shown on the claimants' plan showing their suggested New Forest National Park Boundary.