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Green In Judgment

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The system for registering new Town and Village Greens (TVGs) has become a tool for mischief and a weapon in the hands of those resisting development where objections through the planning system have failed. Imminent changes through the Growth and Infrastructure Bill are bold and will cut applications back down to a trickle, but before they come into effect even more care is needed in dealings with land that may still be a TVG.

Green lobby

Unlike planning, there is no place for qualitative judgement in the TVG regime. There are questions of law and fact. If the tests for registration are met, land must be registered. Once registered, it is subject to the same strict protections from interference and encroachment as common land. The test, under Section 15 Commons Act 2006, is of continuous use by a significant number of the inhabitants of a locality (or neighbourhood within a locality) for 20 years to the date of any application. Crucially, the use must be 'as [if] of right', which means it has not been forceful, secret or permitted (either expressly or impliedly)[1]. More gloss has now been applied to this test by the Courts than the Forth Bridge.

Changes introduced through the 2006 Act made it easier to register greens by changing the law so that – where land has already been in qualifying use for 20 years – giving permission to use it no longer disqualifies applications. Prohibiting or preventing such use became the only option to de-risk land, but the 2006 Act also introduced a two-year grace period for claims to be brought once use has become forcible (or ceased altogether). Only then does immunity arise. Years of work on land assembly, planning permission and (in some cases) construction may be thwarted by a viable claim made up to two years after a site was first hoarded off. The cards are therefore stacked against landowners who do not carefully manage their estate and creating certainty is not always easy. Currently, where there is a suspicion of 20 years' use, there is often little commercial option but to fence the land and wait out the two-year period.

Perverse incentives

As a result of the widening of the scope of lawful sports and pastimes in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 and the empowering effect of the 2006 Act, the number of TVG applications is estimated to have risen from around 10 per year in the decade from 1993, to 100–200 per year between 2006 and 2009[2]. The 2006 Act is estimated to have triggered a fourfold increase in Devon, for example[3]. This has placed a significant burden on the public sector. It has interfered with the development of public sector land (and the release of value from it) – which often has a history of public use – and imposed significant financial and the administrative costs. Each hearing is estimated to cost authorities a minimum of £13,000 in legal fees[4], for example. TVG applications are now commonly used to prevent or delay housing schemes – in particular affordable housing.

It was not meant to be this way. The Commons Act 1965 was intended to codify the law and give effect to the recommendations of the 1958 Royal Commission on Common Land (by protecting, and enabling the improvement of, existing commons and greens). Allowing new registrations was meant to enable existing rights or *de facto* greens to be protected from encroachment. The Commission's crucial recommendation – a character test to constrain new claims to 'open land surrounded by houses in rural parishes' – was ignored.

It can take 18 months to determine an application and, where a hearing is unavoidable, owners and registration authorities are forced to engage in time-consuming and fact-sensitive litigation. Applications are often described as 'vexatious'. In some cases the evidence does indeed unravel as motivations and facts are thrown in to focus under forensic scrutiny, but many are in fact entirely within the amended tests for registration.

One action group website inadvertently makes the case for reform:

"The disappointment of Menston residents [due to refusal to register the land as TVG] is offset by the knowledge that the process of application and Public Inquiry has delayed construction by at least a further 9 months, and the legal proceedings have given us access to all sorts of information which we would not otherwise have been able to find, such as the title to the land, the original sales proposition and (crucially) the geophysical and drainage impediments to construction. We are now much better equipped to fight the next legal battle, which we always anticipated, ie. the Judicial Review".[5]

The Penfold Review of non-planning consents (July 2010) and the Farm Regulation Task Force (May 2011) both recommended changes, which were trailed in the House of Lords debate on the Localism Bill. DEFRA published a draft consultation package last July, split into five main areas (see box).

Growth Not Localism Bill

The Growth and Infrastructure Bill now aims to give effect to several of the DEFRA reforms. Firstly, by making it easier to pull the plug on qualifying use: landowners will be able to deposit a map and statement bringing use as of right to an end. If 20 years' qualifying use has already accrued, it will simply trigger the two-year grace period (without the cost of measures to end or prohibit use). Where the 20 years has not yet accrued, it will essentially be the same as giving of permission to use the land – it will prevent any further qualifying use. Whilst not radical, this measure will make the regime more proportionate.

Secondly, the Bill will rule out TVG applications during protected periods after certain 'trigger events', (e.g. making a planning application, a draft Local Plan allocation/ neighbourhood plan or development consent application/order). The protection lasts until a terminating event, such as the withdrawal, refusal or lapse of the permission, allocation or DCO as applicable. If land is authorised or allocated for development, and developed as a result, it will be immune from the curse of TVG status. Finally, the Bill will also allow regulations to prescribe more flexible fees for TVG applications.

DEFRA Reforms

- **Streamlining:** including vetting and early rejection of hopeless and vexatious claims.
- **Declarations by landowners:** to prevent rights being accrued in the future without the cost of fencing land (or, where 20 years' use has already accrued, trigger the two-year grace period for latent claims).
- **Character test:** only land that is unenclosed, open enough for 'most' sports and pastimes and uncultivated could be registered.
- **Integration:** immunity for land subject to a planning application or extant permission for development (or designated for development or as a Local Green Space).
- **Fees:** refundable charges to deter frivolous applications.

Grey Area

The changes are adventurous, overdue and in need of improvement. The grace period should be cut to 13 weeks to create certainty and the obvious lacunae addressed. The status of section 73 applications/ permissions should be clarified, for example, as should the status of new 'fast track' applications/ permissions being introduced by the Bill (to which the measures appear not to apply). The restrictions should probably also terminate where permissions are quashed following a legal challenge. Several ways of using planning permissions and draft allocations to game the system are already apparent. Similarly, the proposed trigger events would prevent TVG applications very early in the planning process and as the Bill progresses the Government may need to qualify the type of planning consent that would prevent a TVG registration (so that, for example, it is clearly for development that would be inconsistent with TVG use).

There is also likely to be a spike in TVG applications in the months before the measures come into effect. Owners, joint venture partners and developers will need to continue to be careful and where applications are made to invest in a forensic search for the magic bullet, or cumulative weight of

corroborated evidence, that will defeat a claim. Building a complete evidential picture at the outset and triangulating between aerial mapping, testimony, public records and forensic analysis of applicants' evidence (to separate strands of qualifying and irrelevant uses) will very often deliver the right result. At the very least it may make the risk insurable

Courts Finding an Appropriate Solution

The courts have a tendency to wind the sluices back after periods of litigation frenzy. Two recent cases on public land confirm the TVG regime is no exception. Local authority land will by its nature very often have a long and complex history of overlapping public uses. The statutory basis on which land is held is coming to play a key role in averting registration, which will continue during and after the transitional period for the reform measures.

In *R (Newhaven Port and Properties Ltd) v East Sussex CC* [2012] EWHC 647 it was held that whilst land with no fixed boundary (such as a tidal beach) could be registered, a statutory body could not (either as a matter of fettering its powers or of legal capacity) be taken to have permitted the use of land for recreational purposes where it was reasonably foreseeable that such use would conflict with its statutory function (in this cases as operational port land). Accordingly, no rights had been lawfully acquired, or no use of the land carried on without a necessarily implied permission, and so the beach could not be registered as a village green despite all the other tests being met. This is a strong indication of the public policy approach being adopted by the lower courts to stem the TVG tide.

In *R (Barkas) v North Yorkshire County Council* [2012] EWCA Civ 1373 the Court of Appeal has now applied judicial comments made in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 on the effect of local authorities holding land for recreational purposes. Because it is accepted that where local people have a legal right to use land for recreation, their use is "by right" and not "as of right", the issue which arose was whether certain powers actually confer such rights. Section 10 of the Open Spaces Act 1906 clearly does since it imposes an express trust of the land for public recreation. There are a variety of other statutes under which local authorities may hold recreational land purposes, but which do not impose a trust. *Barkas* concerned a recreation ground laid out on a housing estate (and subsequently maintained) under Section 80 of the Housing Act 1936 (now s. 12 of the Housing Act 1985). *Beresford* suggested that the position may be the same where land had been acquired or 'appropriated' (i.e. moved from one statutory purpose to another under the Local Government Act 1972) to a recreational purpose. The Court of Appeal upheld the High Court's finding that the public had a legal right to use the land because it was laid out under a statutory power rendering use 'by right' not 'as of right' as required by the 2006 Act.

The court said that where land is 'appropriated' for a recreational use, local authorities are under a public law duty to use the land for that purpose until such time as it was formally appropriated to some other statutory purpose. As such, it would be absurd to regard the public as trespassers. The legal basis for this approach remains obscure and the outcome is a little surprising – suggesting that for public policy reasons the public at large have a legal right to use any facility laid out under a statutory power, regardless of how the statutory scheme is actually drafted. For example, the 1906 and 1875 Acts are both worded so as to create a right to use (the former under a trust, the latter as a default position to be controlled by byelaws, confirmed in *Hall v Beckenham Corporation* [1949] 1 KB 716). The power to appropriate between purposes under s.122 of the Local Government Act 1972 is also expressly *"subject to the rights of other persons in, over or in respect of the land concerned"*. Presumably for that reason, s.122(2B) releases recreational trusts arising under the 1906 and/ or the 1875 Act. In contrast, the 1980 Act simply says that having assembled land for recreation purposes, any authority *"may make* " it available "as [it] *thinks fit"*. It is suggested that this is a different duty to that imposed (if any) under the 1980 Act (and that is why the LGA 1972 only provides for a release of 1906 Act and 1875 Act rights following appropriation).

The Court of Appeal's approach underlines how far the courts appear to be prepared to go to avoid absurd results. But it remains to be seen whether this approach creates a perverse outcome of hitherto unrealised public rights to use public facilities that are not subject to the purgative effect of s.122(2B). This is an area that the Bill should ideally have tackled.

More to be done

TVG applications will eventually be significantly reduced by the Bill measures, but there is still a need to go further. Applications must be processed more thoroughly and more quickly. Although registration authorities must give applicants an opportunity to rectify technical errors, extra fee income enabled by the Bill should be spent on resourcing rights of way teams to respond quickly. Where they have a track record of failing to do so, the Planning Inspectorate should be able to take the reins. Further reform of

costs and evidence should also encourage honesty by all sides by clearly penalising misleading testimony. Informal 'evidence questionnaires' are often overstated, optimistic and, in some cases, untrue. Applicants should be required to present all their evidence at the outset (rather than being given endless opportunities to supplement it) by way of Statutory Declaration, with the offences for misleading statements under the Perjury Act 1911 spelt out and enforced. Registration authorities and the inspectors they appoint should be give a statutory duty to report perjury where it is suspected, rather than simply note that enthusiasm for the cause may have clouded memories. That would reduce the volume of evidence from objectors and applicants alike and speed the process up. Similarly, it should be possible to make award costs against parties unreasonably promoting or resisting TVG applications.

Neighbourhood Plans

The Government's commitment in the Natural Environment White Paper to introduce a Local Green Spaces designation has materialised (almost) through the NPPF, which contains provisions for LGS to be protected like Green Belt where it has been designated through the Local Plan or Neighbourhood Plan process. LGS must be in 'reasonably close proximity' to the community it serves, 'demonstrably special' to a local community, hold particular local aesthetic, recreational, ecological or historic significance and be 'local in character and not a extensive tract of land'. By designating land as Local Green Space local communities will be able to 'rule out new development' other than in very special circumstances. The fact that the very suitability of such land for much needed housing or other development brings it to the attention of conservers may also make sterilising them difficult to justify through the Local Plan process.

Fundamentally, the LGS allocation is a policy filter not a legal protection in the same way as commons status. Although it offers real long-term protection for the openness of land, it does not offer public access. Nonetheless, it is the right approach because the Local Plan process, not the courts or a TVG hearing, is the place where land-use planning should be carried out. The Bill steers the regime in the right direction but further change is needed to ensure that it is fit for purpose and fair.

Endnotes

1 *R (Lewis) v Redcar and Cleveland Borough Council & Anor* [2010] UKSC 11

2 Consultation on the registration of new town or village greens (DEFRA, July 2011)

3 Planning Officers Society and Local Government Association Response to DEFRA Reform consultation

4 DEFRA, July 2011 Op. Cit.,

5 http://wardyorkshire.org/latest-news/village-greens-and-how-to-establish-them-part-4-the-verdict

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