

Commons and Town Greens Sub-Committee

Guidance on the law relating to applications to register land as a Town or Village Green (received after April 2007 under S15 Commons Act 2006)

The Commons Act 2006 (“the Act”) makes provision for the registration of common land and of town or village greens. Registration Authorities were created under 1965 legislation to maintain two registers, namely one for common land and the other for town and village greens. The County Council is the Registration Authority for the County of Lancashire.

Section 15 of the Commons Act 2006 sets out new criteria for registering greens and came into force on 6 April 2007. It supersedes the criteria laid down in Section 22 of the 1965 Act, and applies to applications made on or after 6 April 2007. (The law under the 1965 Act continues to apply to all applications made prior to that date.)

The wording of Section 15 is –

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where–

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
- (b) they continue to do so at the time of the application.

(3) This subsection applies where–

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
- (b) they ceased to do so before the time of the application but after the commencement of this section; and
- (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

(4) This subsection applies (subject to subsection (5)) where–

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
- (b) they ceased to do so before the commencement of this section; and
- (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where–

- (a) planning permission was granted before 23 June 2006 in respect of the land;
- (b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and
- (c) the land–

(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or
(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.

Each of the elements of the definition must be satisfied by the Applicants on a balance of probabilities and guidance below deals with each element in turn.

Land

In order that it is clear what is sought to be registered, the Land must be clearly identified and the extent of the land must be shown on a plan submitted with the Application form.

There are no restrictions on the kind of land which may qualify for registration. It need not have any particular physical characteristics. Moreover, it is apparent from case law that overgrown or otherwise inaccessible areas may still be part of the land capable of registration as a whole as they may still be used for recreational purposes, such as flower beds and shrubberies in a public garden admired by walkers through the garden, or areas of land which is habitat for birds and wildlife and is part of a recreational experience in using the land.

It is advised that land may also include land covered by water, e.g. a pond or stream.

It is advised that the evidence may justify the registration of only part of the Application land by the Registration Authority.

It is advised that the Registration Authority must decide on a common sense approach as to whether the land or part of it has been used for at least twenty years with use having continued and for the required recreational purposes. For this purpose, it is required to take into account where appropriate the physical condition of the land during the relevant time period, bearing in mind that the physical condition may have changed during that period.

If any substantial part of the land by reason of its physical character has not been used for the twenty year period for the required recreational purposes, then that part may not have become a Green and may also affect whether the rest of the area of the land has satisfied the statutory tests. A registration authority would not expect to see evidence of use of every square metre but evidence does have to persuade that for all practical purposes it could sensibly be said that the whole of the site has been used.

Use for Twenty Years and continuing

It is advised that the 20 year period of use can be made up of several lesser periods of use by individuals using the application land so long as those lesser periods overlap and form a continuous unbroken period of use of twenty years. That use must not be interrupted over the twenty year period.

If the application seeks to satisfy S15 (2), the use must "continue" to the date of the application and therefore not only must the use be sufficient during the twenty year period claimed, but also for the period of time afterwards until the application is made. In effect, for at least the twenty year period immediately before the application there must have been sufficient as of right user.

If the use of the land has already ceased and the application seeks to satisfy S15 (3) the use will have ended on or after 6th April 2007 but not longer than 2 years before the application.

Significant Number

"Significant" is not defined in the Act and must be given its ordinary meaning in each individual case. The judicial guidance in case law is that a "significant number" should not be quantified in terms of a percentage of the neighbourhood or locality in question. Moreover, it need not be a substantial number nor the majority of those inhabitants. Instead "a significant number" means a number that is sufficient to indicate that the land is in general use by the local community for recreational purposes rather than being used occasionally by individuals as trespassers.

In the McAlpine case in 2002, there were six witnesses able to give evidence of use over the entire twenty year period and they gave evidence not merely about what they did themselves, but also about what they saw others doing. That evidence was supported by many other witnesses who were able to talk about their use during parts of the twenty year period. The court found that written evidence was to be treated with caution, but looking at the totality of evidence, the conclusion that it was consistent with and supportive of the oral evidence was one which one was entitled to reach. The conclusion reached as to whether use has been by a significant number has to be supported by an analysis of all the evidence and not based upon speculation.

Evidence of public footpaths or other highways leading to the land, the ease or difficulty of getting onto the land and the existence of any signs are all relevant circumstances to be considered.

It is for the applicant to prove use over the full 20 years and the continuing period. It is advised that such use would have to be by a significant number of inhabitants throughout those 20 years and the continuing period.

There may be concern if there is a concentration of usage from only part of the locality but recently the court was unimpressed with the argument that the supporters were inadequately spread over the claimed localities. Mr Justice Vos was on the particular facts of the case was not surprised that the majority of users lived closest to the application land but there is a strong argument that the view of Vos J was obiter anyway and the Court of Appeal in considering the matter did not address the issue. Also recently three independent inspectors have found that spread of user was important and it seems probable that spread is still relevant and evidence is required to show that user is sufficiently distributed to be sufficient to give the impression of the use of the application land by the inhabitants of the locality or neighbourhood

Inhabitants

The requirement that the use of an application site must have been by inhabitants is an aspect that has not been clarified to any great extent by case law.

There is no recent judicial guidance as to whether inhabitants would have to own a property or actually live there, or live there for the whole year or maybe even just work in the neighbourhood. In one very old case of 1797, which related to the inhabitants of a parish being entitled to make use of a particular village close for lawful games and pastimes, Mr Justice Heath ruled that renting a shop and working there twice a week was sufficient to establish inhabitancy in that matter.

It is advised that children are capable of being inhabitants.

Locality or Neighbourhood within a Locality

It is settled law that if an application is advanced solely on the basis of a locality there must be a single locality and it must be identified as having legally significant boundaries

A locality still needs to be shown even though use may have been evidenced as being by a neighbourhood within that locality.

An area with legally significant boundaries is generally understood to include a borough, parish, or ward . Whether that identity be a civil or ecclesiastical parish, a district or unitary authority would seem to be immaterial, provided it is a recognised locality known to law.

Mr Justice Sullivan further stated that the term neighbourhood, although not required to be a unit recognisable at law, must nevertheless be a cohesive entity. It is not any area of land that an applicant chooses to delineate upon a plan and he felt that the registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness.

The locality or neighbourhood itself ought to be identified in the application form.

It does not matter that many or even most users come from elsewhere so long as a significant number come from the locality or neighbourhood.

A neighbourhood is a cohesive area and capable of meaningful description in some way.

Where an application is advanced on the basis of use by a neighbourhood it is settled law that the reliance can be placed by an applicant on a neighbourhood or neighbourhoods within a locality and or localities. In a recent case two areas each qualified as a neighbourhood.

Use of the Land for Lawful Sports and Pastimes

For land to be registered as a town or village green, it must be shown that it has been used for lawful sports and pastimes. They need not be the traditional activities that took place on greens, but can be present day and informal activities. Lord Hoffmann in the Sunningwell case which reached the House of Lords in 1999 said that dog walking and playing with children were, in modern life, the kind of informal recreational activities which may be the main use of a village green. However, the use must be a recreational one to qualify.

It was also stated in the Sunningwell case that “sports and pastimes” is a single composite class and not two separate classes of activity. It is sufficient if an activity is either a lawful sport or pastime for it to fall within that composite class.

The use of the land for lawful sports and pastimes must be distinguished from the use of a right of way over the land or walking along an identified track. In the Oxfordshire case at the High Court hearing in 2004, the Judge considered the scenario where there are tracks across the land and whether their use may be a qualifying use for either a claim for a public footpath or for a green or both. The critical question in his view was how it would have appeared to a reasonable landowner as to whether the use of tracks would have appeared referable to the use of a public footpath or the use of the green for recreational activities or both. He considered that where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one point to the other, then use confined to the track may readily be regarded as referable to use as a public highway alone. He considered that it would be different if users of the track veer off the track and play or meander leisurely over and enjoy the land on either side. Such use is more particularly referable to use as a green.

Where a track which is already a public footpath crosses the land, the starting point must be to view the use as referable to the exercise of the established right of way.

It is suggested that lawful sports and pastimes have to be established as regular uses over the whole of the site. In the Cheltenham Builders case, the site had been so overgrown in places that it could not have been so used, and in the Laing Home case in 2003, there had been established footpaths around the edge of the site which had been used, but less evidence as to the use of the remainder of it.

The Courts have held that a common sense approach should be adopted to consider whether for all practical purposes the whole of the site has been used to such an extent as to indicate the assertion of a continuous right. The question in all cases should be how a reasonable landowner would have interpreted the use made of his land. The Court of Appeal in the Oxfordshire case confirmed that the question is how a reasonable landowner would have interpreted the use made of the land.

It is considered that extensive activity around the edge of an application site or on parts of an application site only would possibly not be sufficient to confer green status on the interior of the application site or on other parts of it.

There is an element of fact and degree when considering what parts have been used. It may not be essential to show that lawful sports and pastimes have taken place within an overgrown thicket, provided they have taken place all round it.

The recreational use must be continuous and not have suffered a material interruption throughout the twenty year period, although no-one expects the local inhabitants to indulge in lawful sports and pastimes every day for 24 hours throughout the twenty year period. There will be days when no lawful sports and pastimes take place at all, but it is advised that an intermission is not the same as an interruption.

It is suggested that the use must be sufficiently frequent and not merely sporadic in nature. It must give the landowner the appearance that rights of a continuous nature are being asserted. Moreover, at times when the lawful sports and pastimes were not being carried out, there must have been nothing else taking place on the land which would have prevented them taking place.

Use can be continuous even if there are periods when in practice the land is inaccessible, for instance if there was flooding. However, it is a different matter if the land is inaccessible because of physical activities carried out by the landowner, e.g. engineering works, which are inconsistent with the use of the land for lawful sports and pastimes.

Use of tracks across the land will possibly only be referable to building up a public right of way and each application will need to be considered carefully with careful cross examination of users to determine where they go on the land and for what purpose.

Use must be “As of Right”

For a use to be “as of right”, it must be exercised without force, without secrecy and without permission. User must also be such as to give the outward appearance that the user is being asserted and claimed as of right – openly and in the manner that a person rightfully entitled would have used it.

Use by force would possibly be use which is carried out by climbing a locked gate or where fences and prohibitory signage are torn down or ignored. It would probably be use by force. Whenever it is contentious or allowed under protest. User may be contentious when the landowner is doing everything consistent with his means and proportionately to the user to contest and endeavour to interrupt the user. What the users understood from the signage or notice is relevant. The actions of the landowner in previous applications about the land may also be relevant.

Use by secrecy could occur if the land was used at times and in a manner that a landowner could not expect to be aware of it, such as during hours of darkness when landowner was away.

Use by permission can be as a result of either express or implied consent from the landowner.

Express consent, whether oral or in writing to go on the land, would cause the use to be with permission and therefore not as of right. Since the Beresford case heard by the House of Lords in 2003, it is likely that such express consent would have to have been actually communicated to the user and be revocable or time limited. Permission which is unlimited may not preclude as of right use.

An implied permission to use land can arise where a landowner's conduct is such that it makes it clear to users that the use of his land is pursuant to his permission. However, it was made clear in Beresford that permission could not be implied from mere inaction on the part of the landowner with knowledge of the use to which his land was being put. An owner who knows of the ongoing use but cannot be bothered to do anything about it or knows there is little he could realistically do about it and turns a blind eye would be tolerating the use, but this would not be consenting to nor permitting the use which would then likely to be as of right.

Instead, for permission to be implied, a landowner needs to take some positive acts to make users aware that their use of his land is with his permission. It appears that what is required is overt conduct by the landowner such as making a charge for admission or asserting his title by the occasional closure of land to allcomers or erecting appropriate signs demonstrating that access to the land depends upon his permission. In contrast, conduct merely amounting to positive encouragement to use the land is not sufficient to amount to implied permission, such as grass cutting or the provision of pitches.

It is advised that use by permission for even a short period might be sufficient to stop a twenty year period of use "as of right" from running, although a new twenty year period of lawful sports and pastimes can recommence as soon as the period of permitted use ceases. Hence, to prevent the accrual of the right, it would not be necessary for a notice prohibiting entry or granting permission by the owner to remain in place throughout the twenty year period. Local inhabitants excluded from parts of the land when ticketed festivals or a cordoned off funfair was held on only a few occasions meant that the application failed. The landowner had permitted the land to be used for his private purposes and by his conduct had demonstrated to the public that their use was permissive.

User as of right cannot be established if the use is actually "by right" under a statutory right to do so. Land held expressly as open space under the Open Spaces Act 1906 is held under a recreation trust and not able to be registered. If land is held under a statute for recreation, playing field, gardens etc careful consideration as to whether use is "by right" will be required. The Open Spaces Act is one Act to consider but also the Physical training and recreation Act 1937 and Public Health Act 1875 and possibly others and byelaws or church measures.

Effect of Registration

One of the most important effects of registration in practice is that it impedes development.

Under the Enclosure Act 1857, it is an offence to do any act whatsoever to interrupt the use or enjoyment of a town or village green as a place for exercise or recreation. Secondly, the Commons Act 1876 provides that any enclosure or encroachment of a town or village green is a public nuisance and thus a criminal offence actionable by any claimant who can show special damage.

Lord Justice Pill in the Steed case stated that it was no trivial matter for a landowner to have land registered as a Green.

It was the view of the Court in the Oxfordshire case that the registration of a green coming into existence since 1970 does establish "rights" for the local inhabitants to use the land for recreational purposes and the nineteenth century statutory provisions do still apply to such new greens.

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