Town and Village Greens – Prevention in the absence of cure

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1. The Difficulties with TVGs

(1) The effect of designation

Construction work is a *criminal offence* – s.12 Inclosure Act 1857; s. 29 Commons Act 1876 – if contrary to use of TVG Oxfordshire County Council v. Oxford City Council ('Trap Grounds') [2006] 2 AC 647 at [57]

Disturbance of the right is a *public nuisance*

(2) The Inability to remove

Very limited rights of exchange/removal - Section 16 Commons Act 2006

But cf. BDW v. Spooner [2011] EWHC 1486 (purging effect of appropriation by local authority of land for planning purposes). Doubted in *Gadsden on Commons & Greens* at 14-70

(3) The Ease of Proof

(i) Technical Matters

- Need not be a Green – Trap Grounds;
- Need not relate to a Town or Village – 'Neighbourhood' Amendment by CROW 2000

- Need not be lawfully accessible – R v. East Sussex CC oao Newhaven [2013] EWCA Civ. 276
- Need not require formal sporting use – R v. Oxfordshire County Council ex p. Sunningwell PC [2000] 1 AC 335
- Does not require users to believe in existence of right – Sunningwell
- Does not require landowner to believe in assertion of right – R v. Redcar & Cleveland BC oao Lewis [2010] 2 AC 70

(ii) Practical Matters

- There is no specified procedure for resolving a dispute of fact or law on an apparently valid application. At non-statutory inquiries evidence is not given on oath. It is well recognised that in 'anti-development' applications feelings will run high, and lay evidence may be broader than justified.
- Use may be proven by inference and hearsay – R. v. Staffordshire County Council ex p. Alfred McAlpine Ltd. [2002] EWHC 76

(4) Development proposals prompt applications

This is essentially anecdotal, but true.

All reported cases relate to proposed developments.

(5) Process is difficult

- The regulations do not set out a scheme for the determination of disputes.

- A registration authority may well have an interest adverse to the application (either by reason of land ownership or strategic intention). In these circumstances the Courts have approved the use of a third party scheme of determination, often by an independent barrister – R v. Church Commissioners ex p. Whitmey [2005] QB 282.
- The hearing although advisory is quasi-judicial
- It may well be costly for the registration authority and for the landowner/objector – See *Warneford Meadow*; *Ashton Vale* and many others.
- There is no provision in the 2007 Regulations[1] enabling those costs to be recovered from a losing party
- There is no requirement in the 2007 Regulations requiring an applicant to pay for his application. Such costs as he incurs are voluntary.
- Delay is a frequent consequence of the need for a hearing and the many stages that it goes through, with the parties having the right to say their piece and remedy defaults before acceptance or dismissal.

(6) 'Pioneer' areas

Parliament has sought to address the procedural defects by instituting an alternative system of resolution, known as 'Pioneer' areas[2]. In certain designated part of the country TVG applications are passed to PINS, which designates an inspector to decide. This is intended to provide:

[1] Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007
[2] Under the Commons Registration (England) Regulations 2008.

(1) An experienced cadre of inspectors;

(2) Quicker resolution of disputes;

(3) An entitlement to direct the payment of costs in unreasonable applications.

Anecdotal evidence is that they have not prevented applications made with a view to preventing development, nor indeed were they meant to.

2. The Growth and Infrastructure Bill

(1) Its Purpose

The Government takes the view that the TVG legislation is being used unreasonably to prevent or stifle development, especially major development on open sites. This has arisen through the factual nature of the TVG inquiry (it is not a matter of judgment or discretion) and its absolute consequences if proved.

(2) Geographical Application

Although the Act as a whole applies to England and Wales, the relevant sections as to landowner's statements (s. 15A) and suspension of the right to make applications (s.15B) are stated to apply to land situated in England. Provisions for making regulations requiring fees to be paid on applications (s.24(2A)) are given separately to the Secretary of State (England) and the Welsh Ministers.

(3) Amendments and Progress

The bill has made its way through the committee stages and second reading largely unaltered. It is presently going through 'Parliamentary Ping-Pong' with the House of Lords due to consider amendments on 22nd. April 2013. The current amendments do not appear to affect the provisions relating to TVGs. On track for the Royal Assent in June.

3. Fees

(1) The new section 24(2A) of the Commons Act 2006 enables the Secretary of State and/or Welsh Ministers to pass Regulations which make provision as to the payment of fees.

(2) There is no statutory indication as to the level of such fees. Excessive fees or lack of exemptions may prompt a human rights challenge. Such is the pressure on local authority funding that they are likely to be set at as high a level as possible.

(3) Any significant level of fees is likely to have a dampening effect on the level of applications.

4. Landowner's Statement

(1) Operation

This is analogous to the operation of section 31(6) Highways Act 1980.

> "(1) Where the owner of any land in England to which this Part applies deposits with the commons registration authority a statement in the prescribed form, the statement is to be regarded, for the purposes of section 15, as bringing to an end any period during which persons have indulged as of right in lawful sports and pastimes on the land to which the statement relates"

(2) Points to bear in mind

(i) The right is given to the 'owner of land'. That is not expressly defined in the Act, but would appear to be limited to freeholder (see section 15(8),(9)).

(ii) To be effective the notification (a) must be made to the CRA, not the local planning authority (if different) and (b) must be made 'in the prescribed form'. It must enclose a map in the prescribed form identifying the land to which the statement relates (section 15A(3)). Given the strictness with which Courts have approached these words recently (See R v. Hampshire CC ex p. Winchester College [2008] 3 All ER 717) great care should be taken with the forms.

(iii) The statement is a one-shot weapon. It brings to an end a continuing period of usage; it does not prevent a new period from commencing (section

15A(2)[3]. It should be renewed on a periodic basis (see London Tara Hotels v. Kensington Hotels [2012] 2 All ER 554 for an example of the consequences of forgetting about one's landholdings in a different context)

(iv) The statement has the effect of bringing to an end any continuing period of recreational use then occurring. Although the effect of section 31(6) Highways Act 1980 is the similar[4], the consequence is different. This is because although for highways purposes the 'clock is stopped', the public may always rely on twenty years prior use to establish the claimed highway[5]. As far as statutory TVGs are concerned, that right exists only for a period of grace of two years (section 15(3) Commons Act 2006). Therefore, the effect of an effective notice will be to bar **any** claim after two years. It is for this reason that it is particularly important to consider the requirements for publication/notification of such a notice.

(v) The Act states, a little obliquely, that:

> "(6) Where a statement is deposited under subsection (1), the commons registration authority must take the prescribed steps in relation to the statement and accompanying map and do so in the prescribed manner and within the prescribed period (if any)."

[3] The draft proposal would have been for it to endure as an objection for ten years.
[4] Although the mechanism is different. Such a statement is evidence of intention not to dedicate a highway. Because use 'as of right' for TVG purposes has no requirement of a deemed intention to dedicate on the part of the landowner, it simply stops the continuing accrual of the right.
[5] See section 30(2) *ibid.*

Section 15B provides for the CRA to keep a register of section 15A statements, available for inspection and free of charge. This is unlikely to be anyone's idea of light reading. Although such a register will evidence the delivery of a statement, it will almost certainly not publicise it.

(vii) One of the amendments put forward to the Bill would have required the CRA to publish the statement by (inter alia) putting up a notice on the affected land. That amendment was withdrawn on the Government indicating that the Regulations would deal with the giving of publicity to such statements, the CRA would be obliged to publicise it and that the Regulations would be drawn up in consultation with (amongst others) the OSS[6]. So we will have to wait and see.

(viii) Notification is likely to be far less intrusive than fencing; less contentious that strongly worded keep out notices, and more effective that purporting to grant permission to use the land (see section 15(7) Commons Act 2006 – disregarding permission where otherwise 20 years use 'as of right').

5. Restrictions on Registration

[6] Hansard HL Deb 30.1.13 col. 1602. On 12.3.13 the Minister indicated this would be the CRAs obligation, but gave no further details.

(1) This is the most important part of the Bill as regards TVGs. The Government has considered that TVGs are being used as tools to prevent unwelcome development. It could have allowed planning permission to override the existence of a TVG, but it has instead provided for the Bill to operate to prevent *responsive applications* from being made.

(2) This is important because the rights that accrue to a TVG accrue only on registration (Trap Grounds). Unless the TVG can be registered under the statutory procedure, a century's prior usage as of right is only so much trespass.

(3) The Bill bars the right to make an application if a 'trigger event' (set out in the first column of schedule 1A to the 2006 Act) has taken place. Those events are all events that publicise decisions or steps that make it more likely that the land will be subject to development. So they include the publicising of an application for planning permission in relation to the land (para. 1), and the publishing of a draft development plan which identifies the land for potential development (para.3).

(4) The bar exists until the occurrence of a specified 'terminating event'. A terminating event is one which removes the trigger event. So in the case of a planning application, it includes:

- a withdrawal of the application, or

- its refusal coupled with an exhaustion of all means of challenging that refusal; or
- its grant followed by a failure to commence the development within the specified time.

In the case of a bar arising by reason of the publishing of a draft development plan, it includes a withdrawal of the document. However it should be noted that the Schedule provides for a series of such bars if the development moves through the planning process. So although adoption of the plan terminates the bar under para. 3, it triggers an equivalent bar under para. 4.

(5) Points to Note:

(i) Although the Act talks about the right to apply 'ceasing to apply', its operation is really suspended pending a trigger event.

(ii) If a development is carried out during a suspension period, then there will never be a terminating event, and the right will be suspended in perpetuity, which has the same effect as enacting that it ceases to exist.

(iii) There may well be arguments as to whether land is subject to a suspension or not. Take for example the case of a landowner seeking planning permission for a residential development, and as part of the application asserting that land that is being used as TVG (in fact) will be amenity land. In that case the issue would be whether the planning permission has been made in *relation to* that land. It would be difficult to

see what development was going on there; but query if he offered to enter into an appropriate section 106 Agreement in respect of that land. It is difficult to see how the red line on a planning application plan would be determinative.

(iv) The period of suspension starts when the application is first publicised or the draft first published. There may be a short period of time between application and publication when the period of suspension has not started. The point here is that it is in developers' interests to conceal their public interest in the site. In some cases developers will go public with consultation before applications are made, but that may now be unwise.

(v) If an application is likely to fail, the Act does not prevent a further application being made and the right to prevent an application being thus continued. Equally, there will no doubt be the possibility of variations and negotiations between the developer as the LPA to try to keep the development on foot. Even the grant of a planning permission on unwelcome terms may be preferred to a refusal or withdrawal, if it gives time for the making of a fresh application.

(vi) If the landowner prevents access or renders access contentious or otherwise not 'as of right' during the period of suspension, that will not help him on an eventual application if one is made. Section 15C(8) requires the CRA to disregard any period of suspension in calculating the two year period of grace under section 15(3).

(vii) The new section 15C is not retrospective (but see (ix) below). There may be a rush of applications prior to the commencement date. Developers are best advised to lay low for the time being.

(viii) An amendment has been tabled that a LPA should take the (factual if not legal) existence of a TVG into account as a material consideration when considering a planning application. The Government's response is that this is unnecessary in that the planning system presently takes into account the value of land as amenity land.

(ix) Finally, bear this in mind. If all else fails the government has reserved to itself the right to amend the 'trigger event' categories by order (section 15C(5)). It appears that these may have retrospective effect (see section 15C(6),(7)). Therefore it may be lawful for the government to designate the grant of planning permission in respect of a particular historic development as a 'trigger event', and torpedo an application *that has already been made* as long as it post dates the coming into force of the section (s.16(5) GIA).

6. Restriction of Period of Grace

The Government has indicated[7] that it would accept an amendment to reduce the period of grace under section 15(3) from 2 years to 1. This would not be retrospective.

The draft Bill now contains (s.14) a provision amending s.15(3) of the 2006 Act by limiting the period of grace in England to one year; but expressly retaining the period of two years in Wales.

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18th April 2013

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[7] HL Deb. 12.3.13.