

26 NOVEMBER 2020

LTN 57 | EASEMENTS OVER COMMON LAND AND VILLAGE GREEN

Introduction

1. This note will consider rights of way over common land and village green and the relevant law. A number of statutory provisions make it an offence to drive motor vehicles over common land and village greens. These are as follows:
 - S12 of the Inclosure Act 1857 (the 1857 Act) - described in more detail in LTN 56 - The Provision of Play and Sports Equipment on Village Greens;
 - S29 of the Commons Act 1876 (the 1876 Act) - described in more detail in LTN 56;
 - S.193(4) of the Law of Property Act 1925 (the 1925 Act) - described in more detail in LTN 53 - Protection of Common Land; and
 - S.34(1) of the Road Traffic Act 1988 (the 1988 Act) - described in more detail in LTN 18 - Local Councils' Powers to Provide Parking Spaces and in LTN 53.

Common law principles

2. Alongside statutory law is judge-made law - also known as the common law. Among the body of law decided by the judges is the principle of the acquisition of a right of way through long use. In law, this is known as an 'easement by prescription.' Full details of easements and, in particular, easements by prescription are set out in LTN 47 (Easements). Simply put, an easement by prescription may be acquired if the following conditions are met:
 - the rights claimed must have been exercised for 20 years or more;
 - no force must be used in order to enjoy the claimed right, nor must the use of the land have taken place under protest from the owner;
 - use of the land must not have been secret - as the owner would not have an opportunity to protest;
 - the owner of the land must not have given permission.

3. In the case of vehicular easements over village greens and commons there has been a clash between (i) the statutory provisions set out above (which prohibit the driving of motor vehicles on village greens and commons) and (ii) the common law which states that a right to do something may be acquired if it is done for 20 years or more.

Bakewell Management Ltd v Brandwood (2004)

4. In Bakewell, each of the appellants in this House of Lords case owned a house bordering on a 144-acre common, Newtown Common, near Newbury. Vehicular access to each of the houses from the nearest public road had, since each house was built, been obtained via one or other of a number of tracks over the common. The owner of the common (Bakewell Management Ltd) had given no permission authorising this use of the tracks and commenced proceedings to establish that the appellants had no vehicular rights over the tracks.
5. It is important to note that it would have been open to all of the owners of the houses to apply to the owner for an easement under the Countryside and Rights of Way 2000 and the related regulations but the owners did not wish to do so as they did not wish to pay the fees requested by the company. Instead, they argued that it was possible to acquire an easement by prescription over common land notwithstanding that doing so would be in breach of the legislation set out above.
6. The House of Lords agreed with the home owners and held that it was possible to acquire easements over commons and village greens notwithstanding the legislation set out above.
7. The effect of the decision in Bakewell is that owners of land can acquire rights of way over village greens and commons if they can demonstrate that they have complied with the requirements set out in paragraph 2 above.

Are there any restrictions on the abilities of councils to grant easements?

8. The Bakewell case has clarified that it is possible for owners of property abutting commons and village greens to acquire easements by prescription over them. If such owners are able to meet the requirements set out in paragraph 2 above, and the easement can be registered with Land Registry, councils should agree to document easements acquired (usually

by a Deed of Easement). Councils can pass on the charges in respect of legal fees incurred but will not be able to charge for the easement itself.

9. Also, where applicants have not already acquired easements by prescription a council can grant an easement under s. 127 of the Local Government Act 1972 (the 1972 Act) and charge a fee but they will need to take into account a number of considerations which differ depending whether they relate to commons or to village greens.

(i) Commons

10. In *Bakewell*, the House of Lords said the following: “The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners... to do so would be a nuisance ... Nor could the owner of a common lawfully authorise things to be done by others on the common that, if done, would constitute a nuisance. The ... owner of a common can [not] authorise to be done whatever he pleases. Authority given to too many people to camp on the common and light too many fires could damage the sufficiency of grass on the common for the commoners’ grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend on the facts. But, subject to that qualification, subsection (4) [of section 193 of the 1925 Act] allows the owner of a common to which section 193 applies to authorise the doing of an act that if done without that authority would be an offence under the subsection.”
11. In essence, councils are allowed to grant easements over common land but they must balance that right with their obligations under s. 193 (4) of the 1925 Act and s.34 (1) of the 1988 Act as well as their obligations to commoners.

(ii) Village greens

12. Similarly, councils contemplating the grant of easements over village greens will need to be aware of their responsibilities under s.12 of the 1857 Act and s.29 of the 1876 Act. As these provisions are both concerned with injury to the green, it is NALC’s view that whether or not driving across a green in a particular way contravenes those provisions would be a matter

of fact and degree, to be decided on the circumstances of individual cases.

13. Councils may conclude from the above that whilst it is possible that an easement may be granted over a village green, whether or not an easement should be granted in any given case will depend on the extent to which such use would injure the green. In NALC's view it is likely that the government and the courts would not consider that minor or superficial damage to a green would prevent the grant of an easement. At the other end of the scale, however, the courts would expect councils to comply with the 1857 Act and the 1876 Act and refuse to grant easements where it would be necessary to do so to prevent more serious damage being caused.

The grant

14. When granting easements councils should obtain legal advice. The grant of an easement will be a disposal within the meaning of s.127 of the 1972 Act and councils (and their lawyers) will need to comply with the following requirements which are set out in further detail in LTN 45 (Disposal and appropriation of land by local councils) and LTN 45A (Disposal of charity land by local councils):

- to obtain the best consideration (unless the transaction falls within the terms of the General Consent issued by the Secretary of State/ National Assembly in Wales - see LTN 45);
- to obtain the consent of the Charity Commissioners (where the land is subject to charitable trusts);
- to ensure that the proposed grant would not be in breach of any other trust or restrictive covenant; and
- to advertise the proposed disposal where the land in question is 'open space'.

LTN	Title	Relevance
45	Disposal and appropriation of land by local councils	Sets out the general obligations imposed on councils when seeking to dispose of land.

45A	Disposal of charity land by local councils	Sets out the general obligations imposed on council sole or managing trustees when seeking to dispose of charitable land.
47	Easements	Sets out the general nature of easements.
53	Protection of common land	Sets out the power and obligations of local councils to protect common land.
56	The provision of play and sports equipment on village greens	Sets out the matters local councils need to consider when dealing with village greens.
77	Public rights of way	Sets out the rights and responsibilities for a Footpath, Bridleway, Byway Open to All Traffic (BOAT), or Restricted Byway.