EASEMENTS OVER COMMON LAND AND VILLAGE GREENS

Introduction

1. This topic is complex. The difficulties stem from the fact that the courts have been required to grapple with legislation which was drafted before use of the car became the norm and have been required to reconcile conflicting common law principles and statutory principles with the needs of the modern (car-using) public. The only way to make sense of the position is to understand a little of the history.

The Statutory Provisions

2. A number of statutory provisions make it an offence to drive motor vehicles over commons and village greens. These provisions are as follows:

- Section 12 of the Inclosure Act 1857 (described in more detail in LTN 56 - the Provision of Play and Sports Equipment on Village Greens);
- s 29 of the Commons Act 1876 (described in more detail in LTN 56 – the Provision of Play and Sports Equipment on Village Greens);
- s 193(4) of the Law of Property Act 1925 (described in more detail in LTN 53 – Protection of Common Land); and
- s 34(1) of the Road Traffic Act 1988 (described in more detail in LTN 18 – Powers to provide parking spaces and in LTN 53 – Protection of Common Land).

Common Law Principles

3. 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). Shortly stated however, a person may acquire an easement by prescription 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.

4. In the case of easements over village greens and commons in respect of motor vehicles 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. Further confusion was created when a further rule of the common law was added to the mix. In earlier cases, the courts had decided that an easement by prescription could not be acquired where the use in question had been unlawful. The courts, in a number of cases set out below, attempted to create some order out of the confusion.

Caselaw

(i) Hanning v Top Deck Travel Group Ltd (1993)

5. In *Hanning*, double-decker buses belonging to a company had been using a track across a common for well over 20 years. No authority to do this had been given by any owner of the common. The judge noted that this use was an offence under section 193(4) of the 1925 Act. The Court of Appeal stated that 'an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute'. Accordingly, the court held that it was not possible to acquire an easement by prescription over common land.
6. After *Hanning* Parliament enacted section 68 of the Countryside and Rights of Way Act 2000 which introduced the Vehicular Access Across Common and Other Land (England) Regulations 2002.(SI.1711). The effect of the regulations was to permit owners of commons and village greens to grant easements for a fee which could, in some circumstances, be quite substantial. The purpose of the provisions in the 2000 Act and the subsequent regulations was to counter the effects of the decision in *Hanning*.

(ii) Massey v Boulden (2002)

7. In *Massey* the owners of a house had used a track across a village green to access their house by car for more than 20 years. Relying on the case of *Hanning*, and noting that it was open to the owners of the house to purchase an easement pursuant to the 2002 regulations, the court stated that the provisions of the 1988 Act and the common law rule (that an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute) meant that the owners of the house could not have acquired an easement across the village green by prescription.

(iii) Bakewell Management Ltd v Brandwood (2004)

8. 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. Bakewell relied on the *Hanning* decision.

9. 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 pursuant to the 2000 Act and the regulations there under 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 the case of *Hanning* had been wrongly decided and 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.

10. 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.

Ramifications of the decision in *Bakewell*

11. Section 68 of the Countryside and Rights of Way Act 2000 Act and the subsequent 2002 regulations were introduced to counter the effect of the decision in *Hanning*. When the House of Lords overruled *Hanning*, section 68 and the regulations became redundant and were repealed by s.51 of the Commons Act 2006 which took effect in England on 1 October 2006 and Wales on 6 September 2007.

Payments made under section 68 and the regulations

12. 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 3 above. Inevitably many individuals who applied for easements under the regulations and who paid a fee for them have requested refunds.

13. NALC's view is that the 2000 Act and the regulations imposed a duty on local councils to grant easements (for a fee) unless they could decline to do so on very narrow grounds set out in the regulations. Had councils failed to grant easements when required to do so they would have been liable to a legal action. In those circumstances, NALC is of the view that councils had no choice other than to grant easements and are not required to refund money which was paid in accordance with the Act and with the regulations.

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

14. The legislation set out above 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 3 above councils should agree to document easements acquired (usually by a Deed of Easement). Councils will be able to pass on the charges in respect of legal fees incurred but will not be able to charge for the easement itself.

15. A different, but related issue is whether councils can grant easements for a fee where applicants have not already acquired easements by prescription. Councils have the power to grant such easements (pursuant to section 127 of the Local Government Act 1972) but will need to take into account a number of considerations which differ – depending whether they relate to commons or to village greens.

(i) Commons

16. 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.'

17. In essence, councils are allowed to grant easements over common land but they must balance that right with their obligations:-

- Pursuant to powers under s. 193(4) of the Law of Property Act 1925 and s. 34 (1) Road Traffic Act 1988 ; and
- to commoners.

(ii) Village Greens

18. Similarly, councils contemplating the grant of easements over village greens will need to be aware of their responsibilities pursuant to s. 12 of the Inclosure Act 1857 and s. 29 of the Commons Act 1876 (as set out in paragraph 2 and as described in further detail in LTN 56 (the Provision of Play and Sports Equipment on Village Greens). In July 2006 Defra stated as follows:

'Section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 are both concerned with injury to the green. In our view, 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**.'

19. 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 19th century Acts and refuse to grant easements where it would be necessary to do so to prevent more serious damage being caused.

The Grant

20. When granting easements councils should obtain legal advice. The grant of an easement will be a disposal within the meaning of section 127 of the Local Government Act 1972 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 parish trustees):

    - 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);
    - 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'.

Charges

21. Local councils must obtain the 'best consideration' (i.e. the best price) for the grant of an easement but have the power to receive less where the terms of the disposal fall within the General Consent issued by the Secretary of State. In 2003 the ODPM published a document - 'circular 06/03: Disposal of Land for Less Than Best Consideration' - which gives guidance on the General Consent. The circular clarifies that it is for local authorities to consider whether a given disposal meets of the General Consent. The circular also states:

    'In determining whether or not to dispose of land for less than the best consideration reasonably obtainable, and whether or not any specific proposal to take such action falls within the terms of the Consent, the authority should ensure that it complies with normal and prudent commercial practices, including obtaining the view of a professionally qualified valuer as to the likely amount of the undervalue.'

    Similarly the National Assembly for Wales who issued a General Disposal Consent (Wales) 2003 and circular which is applicable to community councils advises that ' *it is for a [community council] to decide whether a proposed disposal requires the consent of the National Assembly, seeking its own legal or other professional advice as appropriate and to bear responsibility for its decisions.*'

Other Legal Topic Notes (LTNs) relevant to this subject:

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