

Town and village greens

Some thoughts on Defra's proposed consultation

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Background

Defra is planning to consult on a review of the current town and village green ("TVG") registration system this Spring. It seems likely that a wholesale review of the law of town and village greens is not anticipated. Rather, it would seem that Defra wishes to take soundings on the mechanics of the registration process and on the interplay, or perceived lack of it, between the TVG registration scheme and the planning process.

Some thoughts...

The consultation marks a useful point to consider some practical issues left unresolved by the Commons Act 2006, the Commons Registration Act 1965 and the associated case law.

"...should there be some formal system of assessing and filtering applications at an early stage?"

It is the act of registration by the registration authority that confers TVG status and the associated protection on the application land (so held the House of Lords in *Oxfordshire County Council-v-Oxford City Council & O's* [2006] LGR 713).

Before 2007 a practice had grown up of landowners applying to the High Court for a declaration that potential application land was not capable of being registered

as a TVG. *McLaren-v-Kubiak* [2007] EWHC 1065 (Ch) put paid to that practice. Here the High Court decided that the courts did not have jurisdiction to decide that land was not capable of registration. This should mean that those cases likely to be harder fought are now being decided by the registration authorities rather than by the courts.

A registration authority operating under the old regulations can decide to reject an application that is not "duly made" but the limited scope of this power and the risk of a judicial review challenge of such a decision both beg the question of whether there should be some formal system of assessing and filtering applications at an early stage.

How does the TVG registration procedure fit with the principle that there should be an end to litigation? Most actively contested applications are determined by the process of holding a non-statutory public inquiry before an Inspector who reports to the authority. There is no determination of the land's status by a court and, because of the decision in *McLaren*, there cannot be. The only way the courts will consider the status of the application land is indirectly, if a decision not to register is then judicially reviewed.

"...what about the serial applicant who makes applications for the purpose of frustrating a sale and/or development...?"

Nothing automatically stops an unsuccessful applicant from making a further application or applications. If the new application raises new points of law or relies on new evidence is the registration authority entitled to reject the application on the basis of *res judicata*? If not, then ought it to be, given the very limited ability to reject an application as being other than “duly made”?

What, too, of the serial applicant who makes or threatens serial applications in respect of potential development land for the purpose of frustrating a sale and/or development but has no real intention of pursuing the applications?

One view is that once the registration authority has decided (properly) to treat the application as duly made, it also has the power to determine the application, even if the applicant purports to withdraw it, but how must this be done? Should the registration authority be obliged to go through the whole non-statutory public inquiry process with only the objectors taking an active role in the proceedings?

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Some of these issues are addressed in the pilot of the new regulations governing the procedure, but not the law, for applications made under the 2006 Act (the Commons Registration (England) Regulations 2008.) For example, these regulations provide for the ability to have an application determined by the Planning Inspectorate where the registration authority has an interest in the outcome.

The rollout of the pilot has been delayed. The responses of the pilot authorities to

the forthcoming consultation will no doubt be of particular interest, but there are other issues to consider above and beyond those addressed by the 2008 regulations, some of which are identified above.

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