
A D V I C E

Introduction

1. I am asked to advise Hertingfordbury Parish Council in respect of the management of four village greens within the parish and of which it is the owner. The greens were originally given to Hertford RDC by Julian WW Salmond in the period 1955 – 1961. Hertford RDC ceased to exist in 1974 and East Herts District Council succeeded to the rights and liabilities of Hertford RDC in 1974. I imagine the new District Council thought that something like a village green was best managed at parish council level – at any rate in 1975 that authority transferred ownership in the greens to Hertingfordbury Parish Council, who have looked after them ever since. All four greens have been registered under the Commons Registration Act 1965 as town or village greens. The effect of registration is that nobody can challenge their status as village greens. There are in law provisions by which village green status can be removed but this is not easy to achieve and, in the meantime, the greens receive strong protection from development by virtue of the provisions of nineteenth century legislation. I refer to this legislation in more detail below.
2. In the past, from time to time, the Parish Council has been asked to grant an easement (a legal right) for vehicular access over one or other of its greens by a person who has been using such an access for a long time. Also, from time to time, it has been asked to grant new easements for vehicular access to enable new development to take place on land adjoining the greens. In these circumstances and in the light of advice then current, it has sometimes granted an easement and sometimes a licence. This is against the background of changes to the law and in the understanding of the law. Currently, as I understand it, it grants neither easements nor licences.
3. The Parish Council has recently received advice from Mr Paul Clayden (who is a solicitor and an authority on the law of open space) that it is now possible for it to grant licences; and indeed Mr Clayden's advice is that, pragmatically, it could grant easements (although perhaps only in respect of short lengths of accessway). As Mr Clayden's advice is not

reasoned (this is not a criticism¹), it is not possible for me know the basis of advice. The Parish Council now wishes to have definitive and reasoned advice (or, at least, as regards the former characteristic, as definitive as may be in the circumstances) as to its power to grant easements over its village greens.

Consideration

4. I think that it will be most helpful if I begin by explaining the background to the issues which arise.
5. A typical situation where a traditional village green exists in a village is that houses will have been built around it, sometimes going back hundreds of years. Originally many of those houses will not have had vehicular access. However with the invention of the motor bike and motor car, householders began to take such access across the green. This could involve damage to the village green, and, to address this, the owner of the green would sometimes permit such accessways to be tarmacked. *De facto* both vehicular easements and tarmacked tracks were established across the green.
6. The position in law was however doubtful.
7. It is helpful to begin with section 34 the Road Traffic Act 1988. This provides as follows:
 - 1) *Subject to the provisions of this section, if without lawful authority a person drives a mechanically propelled vehicle—*
 - (a) *on to or upon any common land, moorland or land of any other description, not being land forming part of a road, or*
 - (b) *on any road being a footpath, bridleway or restricted byway,*
he is guilty of an offence².
8. This is a provision that has been continuously in force since 1930. Thus since 1930 any person who drove across a village green without lawful authority committed a criminal offence. In the light of this provision, it used to be thought that in order to establish a vehicular right of way across a village green by virtue of long user (20 years being the appropriate period), it was necessary to go back to 1910 i.e. it wasn't possible to rely on post 1930 use. That this was the position was confirmed by a decision of the Court of Appeal

¹ I think that he was asked to provide short advice on particular situations without giving reasons for his views.

² Note that section 193 (4) of the Law of Property Act 1925 contained a prohibition in similar terms. This provision applies to village greens over which there were rights of common.

called *Hanning v Top Deck Travel Group Limited*³, decided in 1994 (a case relating to a common, not a village green). In the light of this case, the owners of commons and village greens sometimes sought a “ransom” price for the grant of a vehicular easement which might have been exercised by an individual landowner for many years (but not as far back as 1910). Typically, a long standing owner wanted such a formal easement when he came to sell his house. The exaction of a ransom price might perhaps be thought of as unconscionable but sometimes the landowner was a public authority, which has a relationship of quasi-trustee to its ratepayers and asked for a ransom on that basis.

9. By way of response to what it perceived as a problem, Parliament passed section 68 of the Countryside and Rights of Way Act 2000. This provided for an owner or occupier to require the grant of an easement in circumstances where, but for the statute making access a criminal offence, an easement would have arisen by prescription. A fee was payable, but the owner of the common or village green did not enjoy a position from which he could “blackmail” the person who wanted an access.
10. In 2004, *Hanning* was overruled by the decision of the House of Lords in *Bakewell Management Limited v Brandwood*⁴. This case focused on the words *without lawful authority* in the relevant statutes, and held that in circumstances where such words appeared it was possible to obtain an easement by 20 years’ use over land to which the prohibition applied.
11. Section 68 of the Countryside and Wildlife Act 2000 became a dead letter and was repealed by the Commons Act 2006.
12. The upshot of *Bakewell* is that there is no reason why, by reference to the Road Traffic Act 1988, an easement may not be acquired over a village green by 20 years’ use. Further, if someone who had enjoyed vehicular access for 20 years asked the owner of the village green for the formal grant of an easement, it would not be appropriate, by reference to 1988 Act, for the owner to charge over and above the cost of preparing the legal document. As regards the grant of a **new** easement, *Bakewell* did not change the position. In terms of the 1988 Act, it was always possible for the owner of land to which the Act applied to give the requisite lawful authority to drive across such land by way of the grant of a new easement, and (if he chose) to charge a ransom price for so doing.

³ (1994) 68 P& CR 14 (CA).

⁴ [2004] 2 AC 519 (HL).

13. However, there were, and are, reasons for thinking that there are additional issues which may arise in relation to vehicular easements across village greens which do not apply to such easements across commons and other non-village green land to which the 1988 Act applies.
14. The first arises from a case that was similar to *Bakewell*, decided after *Hanning* but before *Bakewell*. This was a case in the Court of Appeal called *Massey v Boulden*⁵. In this case, the Court of Appeal specifically applied to a village green the reasoning of *Hanning* in respect of the application of section 34 to a common. In this regard it has now been overruled by *Bakewell*. However, the Court did notice – without deciding – a further argument, namely whether it was possible to acquire by prescription rights which might conflict with public rights of access across a green. The argument is that the public have rights to use village greens to indulge in lawful sports and pastimes upon them. If driving a vehicle across a green (unlawfully) interfered with those rights, it cannot, it is said, be a lawful use of land properly forming the basis for the assertion of a prescriptive right. Simon Brown LJ did not think that the argument was a good one⁶, Sedley LJ was more doubtful⁷. My own view is that in principle there could be an issue here if the vehicular right of way is reasonably foreseeable of interfering with the right to indulge in lawful sports and pastimes⁸. However if one is looking at vehicular access to a single house, it seems to me that it is unlikely that the comparatively limited use involved would interfere to a material extent with the ability of villagers to use the land for lawful sports and pastimes.
15. The next point is that the exercise of vehicular rights of access could damage the village green, contrary to section 12 of the Inclosure Act 1857. This provides as follows:

And whereas it is expedient to provide summary means of preventing nuisances in town greens and village greens, and on land allotted and awarded upon any inclosure under the said Acts as a place for exercise and recreation: If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or

⁵ [2003] 1 WLR 1792 (CA).

⁶ See paragraph 34 of his judgment; and also paragraph 31.

⁷ See paragraph 68.

⁸ Approaching the matter on the basis that, in any event, there has to be reasonable “give and take” between the sports and pastimes and the access use: see *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70 (SC). If a new right was being expressly granted (as opposed to being acquired by prescription), the right of way could expressly be made subject to the right of recreation, which might be a way of meeting this particular concern.

*wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or **do any other act whatsoever to the injury of such town or village green or land**, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof before two justices, upon the information of any churchwarden or overseer of the parish in which such town or village green or land is situate, or of the person in whom the soil of such town or village green or land may be vested, forfeit and pay, in any of the cases aforesaid, and for each and every such offence, over and above the damages occasioned thereby, any sum not exceeding [level 1 on the standard scale] ... (emphasis supplied).*

16. If it is likely that the exercise of a right of vehicular access would damage the green, it could be argued that the owner of the green has no right to grant such a right. Of course it may be argued that this is a matter for the user and does not inhibit the right of the landowner to grant an easement. On this view that the landowner can grant any easement he likes and if the grantee damages the green by driving across it, that is his responsibility. I do not think that is altogether convincing, particularly in circumstances where the owner of the green is a public authority. If it is apparent that the grant of an easement **would** lead to damage to the green and thus to a criminal offence under the nineteenth century statutes being committed, it seems to me that this is not a matter to which the authority should seek to “turn a blind eye”. There may be an issue as to whether such damage would occur – which depends, I imagine, on the nature of the terrain and the number of vehicles likely to use the access. If, doing the best it can, the authority thinks that damage would occur, it could not properly grant the vehicular right of way.
17. The next matter concerns the “making up” of accessways. I do not know what the position may be as regards the four village greens of by Hertingfordbury Parish Council, but, as I have observed above, it is not unusual for those with long standing accessways over a green to have surfaced them in some way. In practical terms this may have happened so long ago that there is nothing that can be done about it, even though it will evidently diminish the amenity value of the village green. However the surfacing will have been contrary to section of the Inclosure Act 1857 set out above. It would also seem to be contrary to section 29 of the Commons Act 1876. This provides as:

*An encroachment on or inclosure of a town or village green, also any erection thereon or **disturbance or interference with***

or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned.

This section shall apply only in cases where a town or village green or recreation ground has a known and defined boundary (emphasis supplied).

18. Although it is plain that the draftsman of these sections had what one might generically describe as nuisances to village greens in mind rather than the provision of a surface to an access across a village green, I think that these sections are generally wide enough to inhibit the provision of tarmacked surfaces across greens. Thus I do not think that, in granting an easement, the owner of a green can grant it together with a right in the grantee to surface and thereafter maintain the new surface to the accessway. In practice, this is potentially a serious inhibition on the power to grant easements because a person developing a new house on the edge of a village green and requiring access across it may not be satisfied with just a vehicular right of way; he may also want the ability to provide a “proper” access. It may indeed be a condition of planning permission that such a proper access is provided.
19. There is a further point that arises in respect of village greens (and indeed other open space) owned by local authorities.
20. It is not absolutely clear from the material with which I have been supplied what is the statutory power under which the Parish Council acquired the greens from the District Council. It seems to me however that the obvious relevant power is section 9 of the Open Spaces Act 1906. In particular it seems to me that this is more apt than a power under section 164 of the Public Health Act 1875 (which is essentially a power to acquire land for the purposes of a public park). The aptness of the power is illustrated by the fact that by virtue of section 8 of the Commons Registration Act 1965, land which was registered as a town or village green but which nobody claimed was vested in the relevant parish council as if it had been acquired under the 1906 Act.
21. The complication arises that land acquired under section 9 of the 1906 Act is held by the relevant local authority under section 10 of the Act. That section provides as follows:

A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

*(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation **and for no other purpose:** and*

(b) maintain and keep the open space or burial ground in a good and decent state.

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them (emphasis supplied).

22. I note first of all the concluding words of section 10 which empower the local authority that have acquired the land to inclose it. This is, of course, precisely what it cannot do (because of the terms of section 29 of the 1876 Act). However not all land held under section 10 will be a village green – most will not. In my judgment the position is that the power to inclose which can be freely exercised in respect of the generality of land held under section 10 must in respect of village greens be read subject to the constraint of section 29 of the 1876 Act.
23. It will be apparent that, given the terms of section 10, it is difficult to argue that a local authority holding land under this section could properly grant a vehicular right of way over it. There is however a potential way around the argument, which I need to consider.
24. Section 127 of the Local Government Act 1972 provides for the disposal of land held by parish councils. Its terms, so far as material, are as follows:

(1) Subject to the following provisions of this section, and to those of the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010, a parish or community council, or the parish trustees of a parish acting with the consent of the parish meeting, may dispose of land held by them in any manner they wish.

(2) Subsections (2A) and (2B) of section 123 above shall apply in relation to the disposal of land under this section as they apply in relation to the disposal of land under that section, with the substitution of a reference to a parish or community council or the parish trustees of a parish for the reference to a principal council in the said subsection (2A).

25. Subsections (2A) and (2B) of section 123 provide as follows:

(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.

(2B) Where by virtue of subsection (2A) above or in accordance with the provisions of regulations made under section 1 of the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010 a council dispose of land which is held—

(a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or

(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds)

the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10.

26. By virtue of section 270 of the Act

“land” includes any interest in land and any easement or right in, to or over land.

27. The argument in the light of these provisions is that a parish council can sell an easement under section 127 and that the land which consists of that easement would be freed from the trust to which it would otherwise be subject under section 10.

28. However I am very doubtful if an easement is land consisting or forming part of an open space – it is not a natural use of language. In *Housden v Conservators of Wimbledon and Putney Commons*⁹ the Court of Appeal took just this point in the context of the the Wimbledon and Putney Commons Act 1871, holding that the grant of an easement was not a disposal of *any part of the commons*, an action not permitted under the Act. As Carnwath LJ put it *In ordinary language the words “part of the commons” denote a physical concept, not a legal right.* If this be right (and I think it is) neither subsections (2A) and (2B) would apply to disposition of an easement. Thus the argument articulated at paragraph 27 above would be

⁹ [2008] 1 WLR 1172 (CA).

wrong. I note that it could still be argued that the Parish Council could dispose of an easement – so that there is no need to advertise its disposition; and that, although sub-section (2B) does not operate to free the easement from a trust under section 10, there is no need for it to do so – an easement cannot per se be subject to an open space trust. I doubt the correctness of this argument. It would be odd that section 123 (B) had no application to a situation where, before the disposition, the entirety of the land was subject to a section 10 open space trust. Further, the trust under which the land is held by the parish council is a trust for the purposes of the enjoyment of it by the public as open space and for no other purpose. It is one thing to dispose of the land in its entirety and, in these circumstances, for the land to be freed from its trust under section 10¹⁰; it is another to retain it subject to that trust and to grant an easement over it which has the result that it is used (in part) for another purpose. One can say that the local authority as trustee of the land has the formal power to dispose of an easement (with or without advertisement) but in my view it cannot exercise that power consistently with its continuing trusteeship. Thus on the basis that the greens are held by the Parish Council under the Open Spaces Act 1906 (which I think is the case), I do not think that the Parish Council does have a power to grant a vehicular right of way over any of them.

29. Although what is set out in paragraph is my clear view and the view that would be taken by a Court, it is appropriate to record that it does seem to me that the contrary position is arguable. Although I have relied on the reasoning in *Housden*, it should be noted that the effect of the decision in that case was to allow an easement to be acquired by prescription in circumstances where there was what might reasonably have appeared to be a prohibition on so doing. A court might have some sympathy with a long user of a vehicular right of way across a village green held by a local authority under the terms of the 1906 Act¹¹.
30. I should also record that the argument based on the effect of section 10 is noted in the DEFRA guidance *Vehicular access across Common Land and Town or Village Greens: Non-statutory Guidance Note* (Revised October 2007¹²). Unhelpfully, all that is said about it is ...

¹⁰ I should add, for the avoidance of doubt, that it would still remain a village green in these circumstances.

¹¹ Note that if the Parish Council could not grant an easement because of the 1906 Act, it would not be possible to acquire a right of way across it by reference to 20 years' use. It might however be possible to rely on 20 years use before the land was held under the 1906 Act.

¹² This has now been archived by DEFRA but I do not understand this to affect its legal status, such as it is.

*the point has not been tested in the courts*¹³. NALC Legal Topic Note *Easements over Common Land and Village Greens* (April 2011) (LTN 57) does not note the argument¹⁴.

The position of the Parish Council in the light of my Advice

31. Since at the moment the Parish Council is granting neither vehicular easements nor licences, if the Parish Council adopt my advice it will not lead to any change in the way it manages its greens.
32. It is perhaps likely that all those householders who might claim a vehicular easement by prescription and who might look to the Parish Council for confirmation of their right have already been granted new easements, so that the only requests that the Parish Council will have in relation to vehicular easements will be for the grant of easements for new development. If it does receive an application for a confirmatory easement, it should look at the case on its merits¹⁵.
33. I do not think that the Parish Council can (if it wanted to) “get round” the fact that it has no power to grant a formal legal easement by granting a (less formal) licence. If it has no power to grant an easement, it has no power to grant a licence.
34. Even if I were wrong about the power to grant an easement, the Parish Council could not lawfully grant with an easement the power to surface the route of the easement, since that would involve damage to the green.
35. As regards a licence for a disabled person to cross the green in a wheelchair or for ambulances to cross it, it is hard to see any point being taken by anybody about such access, particularly in circumstances where this is only a temporary requirement. But the Parish Council could not authorise such access and, in particular, authorise damage to the green by the laying of a surface to such an access.
36. Apparently at Letty Green all that was required in physical terms was a short length of accessway to join an existing accessway. It seems to me that the shortness of the new accessway does not affect the principle that needs to be applied. It is worth observing however that any owner of the newly restored house would want a legal right over not just the short new section of accessway, but over the existing accessway also. The inhibition

¹³ See paragraph 19.

¹⁴ I am not sure if I am referring to the current version. This document, referred to in my papers, is freely available on the NET, although it may perhaps represent advice which is intended for the benefit of NALC members only.

¹⁵ The greens have only been held under the Open Spaces Act 1906 since 1955 – 1961, so the possibility exists of a right being acquired by 20 years’ use before that period.

arising from the 1906 Act would apply to the grant of a right over this section of the accessway as well as to the new accessway.

37. Some may think that the protection afforded to village greens is too great in its scope to inhibit development on land adjacent to village greens; others may disagree. In the present case there appears to be an environmental “downside” to the protection in that it leads to on street car parking. The relevant statutory provisions do not however enable the Parish Council to carry out a balancing exercise, weighing the pros and cons of the grant of accessways over a green.

38. I turn to consider the specific questions which I am asked.

A Would it be lawful for the Council to grant a revocable licence for a new crossing?

No. The facts that (i) the Council would be granting a licence and not an easement (a licence being a lesser interest than an easement) and (ii) that the licence would be revocable and not permanent does not get away from the fact that, by virtue of the terms of the Open Spaces Act 1906, the Parish Council should not be granting any interest over the greens at all.

B Would it be lawful for the council to allow a new user to use an existing licensed crossing?

No, for the same reason given in my answer to question A above. It flows from my answer at A above that if the existing licensed crossing came into being by virtue of a license granted by the Parish Council, the Parish Council would have lacked the powers to grant such a license. I have not been asked to consider the position in law as to any such existing access. In practical terms, it would not be appropriate for the Parish Council to seek to disturb the continued enjoyment of any such access and one doubts if anyone else would seek to do so. If any person did seek to do so, such a claim (to put it no higher) would not be straightforward.

C Would it be lawful for the council to allow a new user to use an existing crossing covered by an easement?

No, for the same reason as given in my answer to question A above. It may be the case that there are legal easements over the greens, dating from before the time that they were in the ownership of a local authority. However, it does not seem to me that this fact now allows the Parish Council to permit additional non-open space use of the land.

D Could the council charge an administration fee?

I think that if the Council could grant a licence over the greens, it could charge for so doing. However, on the view that I take, the point does not arise.

E Views of Mr Clayden

Mr Clayden has commented on an earlier draft of this advice¹⁶. Mr Clayden accepts that the grant of an easement or licence would probably be a breach of **the letter of the law** (my emphasis) but considers that the grant of a licence (and that of the most limited kind) would address **the practical issues** (my emphasis). It seems to me (and I hope I do not misrepresent him) that his position is that the grant of a licence would be in breach of the law but that in the scale of things it would not be significant and would be a “common sense” way of approaching the matter. I do not think that the sort of licence here being considered can be described as *de minimis* or not worthy of legal notice. Once the possibility of so treating it is discounted, it seems to me that the grant of such a licence is outwith the powers of the Parish Council for the same reason that the grant of a less limited licence would be or the grant of an easement. This might be inconvenient and in the case of increased use of existing accesses (*de facto* or *de jure*) might seem to be too rigorous but in my view it is the law. I should add that nothing in the Road Traffic Act forbids the use of a wheelchair across a green; and I do not think that a wheelchair is a *carriage, cart, caravan, truck or other vehicle* within the meaning of section 193 of the Law of Property Act 1925. I think that there is not power to grant an easement or licence in respect of a wheelchair because of the terms of the 1906 Act but from no other aspect is it objectionable and I cannot see anyone taking objection to it. I do not know anything about the circumstances of the case where a concern about wheelchair access arises; if appropriate I could consider these further in the light of information about those circumstances.

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1 May 2014

¹⁶ *Draft* in the sense that I invited the Parish Council to get back to me if it did not address everything that they wanted addressed. I have added paragraph 38 in this advice to what I there said in response to their request.