

Vehicular access across Common Land and Town or Village Greens: Non-Statutory Guidance Note

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VEHICULAR ACCESS ACROSS COMMON LAND AND TOWN OR VILLAGE GREENS

Status of guidance

This guidance note is non-statutory and has no legal effect. It provides guidance about vehicular access across common land and town or village greens following the repeal of section 68 of the Countryside and Rights of Way Act 2000. It does not provide a comprehensive explanation of every issue.

Defra cannot provide advice on individual circumstances. Anyone needing this should consider taking independent expert advice.

Introduction

1. Most home owners with a garage or standing for a car expect to be able to drive on and off their premises without any difficulty. If asked, they would probably assume that they had a right to do so. In the vast majority of cases, they would be right: their home directly abuts a vehicular highway, and there is unlikely to be any difficulty¹. But sometimes, the only vehicular access to the premises is obtained over land which is neither owned by the householder, nor part of the public highway. Typically, it may be necessary to drive over open, unenclosed common land, over a town or village green, or over a wide verge which is not part of the highway. This land may be owned by a local authority, the lord of the manor², or any other person. In some such cases, a right to drive over the land may have been established by long use ('prescription'), or been granted by the owner of the land (for example, in a 'grant' of an 'easement'), and in either case, it may subsequently have been recorded as a legal right in the 'register of title' held by the Land Registry (see the Glossary on page 8 for an explanation of the terms in quotation marks).

2. This guidance note explains how some legislation affects the acquisition of a right to drive over intervening land, and looks in particular at the difficulties which can arise in relation to driving over common land, and over town or village greens.

Background

3. In the late 1990s Defra became aware of a problem faced by some householders who had discovered that, despite the fact that they (and their predecessors) had driven across common or similar open land to get to their premises for many years, they apparently had no legal right of vehicular access to their home. Typically, this was causing difficulties where they wished to sell their home, and they could not give any guarantee to potential purchasers about vehicular access to the premises.

¹ But note that section 184 of the Highways Act 1980 enables highway authorities to control access over a pavement where a dropped kerb has not been installed.

² Historically, the proprietor of a manor, which included the common and waste land within the manor. Today, common land within the manor is often in different ownership to the title of lord of the manor.

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4. These difficulties arose as a result of the judgment of the Court of Appeal in 1993, in a case called *Hanning v Top Deck Travel*³. Until then, the legal assumption had been that where people had driven to their homes over open land such as commons or village greens for at least 20 years 'as of right', they had established (by long use, or 'prescription') a legal right to continue doing so. 'As of right' means use without force, without secrecy, and without the landowner's permission. The *Hanning* decision cast doubt on this principle and resulted in some householders being asked to pay large sums of money to obtain a formal right to drive to their premises.

Why common land?

5. The difficulties arose because of legal provisions regulating vehicular access over common and other land. Section 193 of the Law of Property Act 1925 makes it an offence for a person without lawful authority to drive on certain commons with public rights of access under that Act. And section 34 of the Road Traffic Act 1988 (which reflects provisions first contained in section 14 of the Road Traffic Act 1930), also prohibits driving motor vehicles on any land without lawful authority, except where the vehicle is driven on land within 15 yards of a road for the purpose of parking on that land⁴. It may also be an offence to drive a vehicle on common land by virtue of a local Act or byelaws, (such as byelaws under a scheme of management made under the Commons Act 1899). In any case where one or more of these restrictions applies, the court in *Hanning* found that no legal right could be acquired to drive over the land by long use, because that would sanction the commission of a criminal offence.

6. Section 68 of the Countryside and Rights of Way Act 2000 and the Vehicular Access Across Common and Other Land (England) Regulations 2002⁵ were introduced to resolve the problems *Hanning* had created for property owners. The provisions had effect where a vehicular right of access to premises could have been claimed by prescription but for the judgment in the *Hanning* case. The regulations set appropriate levels of payment to the landowner for statutory easements giving a right of way to premises for vehicles, where the landowner was either unwilling voluntarily to grant an easement, or seeking excessive compensation in return for doing so. The compensation rates were in the range of 0.25%–2% of the value of the property, depending on its age. This compared with sums of between 6%–10%, which some landowners had been demanding previously.

Bakewell judgment

7. As a result of the case brought by some of the residents of Newtown Common in Newbury against the landowner, the House of Lords in *Bakewell Management Ltd v Brandwood and others*⁶ in 2004 overruled *Hanning*. The House decided in favour of the residents and confirmed that, provided the owner of open land could lawfully have granted permission to use the land for vehicular access, there was no bar on a

³ [1993] 68 P&CR 14.

⁴ That is, an offence may be committed if a vehicle is driven fewer than 15 yards from the highway across common land for the purposes of parking it in the curtilage of a dwelling.

⁵ SI 2002/1711: www.opsi.gov.uk/si/si2002/20021711.htm.

⁶ www.bailii.org/uk/cases/UKHL/2004/14.html.

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householder relying on their actual use of the land for access, even without the owner's express permission, to establish a prescriptive right to do so. The *Bakewell* judgment effectively resolved the problem that the 2002 Regulations were designed to address. In consequence, section 68 became redundant and the statutory arrangements for securing an easement were no longer needed.

Repeal of section 68 CROW

8. Section 68 (and the 2002 Regulations made under it) ceased to have effect on 1 October 2006⁷. This does not affect any statutory easements which were previously obtained in accordance with those provisions.

Registering a prescriptive right

9. The *Bakewell* case now establishes the circumstances in which it is possible to claim a prescriptive right of vehicular access. Acquisition of a prescriptive right does not involve the payment of compensation to the landowner.

10. The Land Registry can register prescriptive rights. It will require evidence of user as of right against the freehold owners of the property for a period of at least 20 years. The Land Registry has also advised that if the access is across land where the owner cannot be traced or identified an entry may be made to the effect that the registered proprietor claims that the land has the benefit of a prescriptive right, but the entry will state that the right claimed is not included in the registration. Further details of these procedures can be found in Practice Guide 52⁸.

Existing easements and repayment of compensation

11. Since the House of Lords' decision in *Bakewell*, some people have asked for the return of compensation sums paid under the provisions of section 68 and the 2002 Regulations, in circumstances where they now find they could have claimed a right of vehicular access through prescription. Landowners must reach their own decision about refunding payments and it would not be appropriate for Defra to intervene. At the time the payments were lawful and properly made. Any dispute is ultimately a matter for the courts, which are best placed to consider the issues and come to a conclusion based on the particular circumstances of each case.

New easements

12. Easements can still be negotiated between a property owner and the landowner. This is particularly likely to happen if a prescriptive right cannot be claimed — for example:

- a. if vehicular access has always been obtained with permission from the landowner,
- b. if vehicular access has been obtained for less than twenty years, or

⁷ See section 51 of the Commons Act 2006, which came into force on 1 October 2007 by virtue of the Commons Act 2006 (Commencement No. 1, Transitional Provisions and Savings) (England) Order 2006, art. 2(d).

⁸ Available at: www.landregistry.gov.uk/assets/library/documents/lrpg052.pdf.

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- c. if a new vehicular access is required to service neighbouring land.

In these circumstances it will be for the landowner to decide on the level of compensation in return for granting the easement. It is usual for any costs associated with the grant to be paid by the person seeking the easement.

13. However, where the grant of an easement relates to the construction of a new access way (or where it is proposed to improve any existing access way), any works which involve the resurfacing of land on registered common land will require the consent of the Secretary of State under section 38 of the Commons Act 2006. Works involve the resurfacing of land “if they consist of the laying of concrete, tarmac, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material)”⁹. You can find out more about consent under section 38 on the Defra website¹⁰.

Town and village greens

14. On registered town and village greens the situation is more complex. The *Bakewell* case did not specifically address the issue of vehicular access over greens and there has been no direct consideration of the issues in the courts. However, we are satisfied that section 68 did not alter the legal position on driving over greens and therefore did not merit retention as it was of no assistance to householders in these circumstances.

15. Two 19th century statutes protect registered greens from all kinds of damaging activities. Section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 make it an offence to damage or encroach upon a village green or to interrupt its use or enjoyment for recreation. Unlike the Acts which apply to common land, these two provisions do not allow for the landowner to regularise any of these activities by granting consent. The effect of these provisions is that works may not lawfully be undertaken on a village green, unless they are directly beneficial to recreational use, *i.e.* made with a view to the better enjoyment of the green. However, it is unclear whether the laying out or use of an unsurfaced track, or the surfacing of a track in natural materials, would amount to unlawful works in breach of the 19th century legislation.

Massey v Boulden

16. In *Massey and Drew v Boulden*¹¹, the Court of Appeal upheld a claim to a prescriptive vehicular right of way over a track across a registered village green. The court observed that there was no sufficient reason to regard the existence and use of an access track as injuring the green or interrupting its use or enjoyment by others, but it is not clear whether, in that case, the track had been made up or surfaced. The court also concluded that the prescriptive right had been acquired before the green was registered. So the court’s conclusions in *Massey* cannot be considered to set a wider precedent for access across greens generally. However, the judgment

⁹ Section 38(4) of the Commons Act 2006.

¹⁰ www.defra.gov.uk/wildlife-countryside/issues/common/protect-consents/index.htm.

¹¹ www.bailii.org/ew/cases/EWCA/Civ/2002/1634.html.

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suggests that it may be possible to claim by prescription an easement across a green in certain circumstances.

17. There is no power for the owner of a green to grant permission for actions which contravene the 19th century legislation, but whether or not driving across a green in a particular way contravenes these provisions would be a matter of fact and degree, to be decided on the circumstances of individual cases.

18. Defra does not accept that there should be an automatic right of access to any property across a town or village green, whether or not on the basis of necessity, any more than such a right should be automatically available over any other land. If the particular driving does not cause injury to the village green, and the owner of the land could lawfully give permission to drive over the land in the way the householder has done in the past, then such use will have been capable of creating a prescriptive right under the *Bakewell* principle. Alternatively, if the particular driving does not cause injury to the village green, but the use is not capable of creating a prescriptive right, it may be possible for the owner of the land to grant an easement by negotiation.

19. It has been suggested¹² that local authorities holding a green under the Open Spaces Act 1906 (many council-owned greens are likely to fall into this category) may act in breach of the duty of the authority under section 10 of that Act, to grant an easement over land held under the Act¹³. However, the point has not been tested in the courts.

Removal of green status

20. If driving does cause injury to the green, and vehicular access cannot lawfully be granted, then the only means of legitimising the access way is to remove the status of the land as green. There are two ways in which this can be done.

21. The first is an application under section 16 of the Commons Act 2006 where the landowner can apply to the Secretary of State for land to be released from registration. A section 16 application does not affect title to the land: only the status of the land will change. If the 'release land' is more than 200 square metres, an application must be made to register 'replacement land' as a green in its place. If the release land is smaller than 200 square metres, a proposal for replacement land may be included, but there is no absolute requirement. A proposed exchange under section 16 will be considered by the Secretary of State and will not be approved automatically. The Secretary of State will wish to take into account the impact of the exchange having regard to the public interest: for example, removing an access way out of the green may enable the landowner to prohibit public access across the way, so severing the green into two or more separate parts. It is seldom likely that the Secretary of State will approve an application under section 16 in relation to vehicular access which does not contain a proposal for the registration of 'replacement land' in exchange.

¹² See *The Law of Commons and of Town and Village Greens*, Ubhi and Denyer-Green, 2nd Edn., 2006, para. 5.5.

¹³ Section 10(a) of the Open Spaces Act 1906 provides that the authority must: "hold and administer the open space ... 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".

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22. Section 16 of the Commons Act 2006 replaces the previous exchange of land procedure under section 147 of the Inclosure Act 1845.

23. The second option for taking land out of a green applies powers available to local authorities under section 229 of the Town and Country Planning Act 1990, where the green is owned by the local authority. Section 299 enables a local authority (including a parish council) to appropriate land comprised in a village green to a different purpose. If it proceeds under section 229, it must seek a certificate from the Secretary of State under section 19 of the Acquisition of Land Act 1981, in which case exchange land must be given, unless the land required is under 250 square yards (in which event there is no absolute requirement for exchange land). Again, the Secretary of State has discretion as to whether to give a certificate.

24. Further information on these procedures can be found on the Defra website¹⁴.

Current position

25. Defra does not consider that special provisions are required for vehicular access over greens and, in the absence of a strong judicial precedent, we cannot advise people how to act. Defra is not in a position to interpret the law nor to provide guidance on what might, or might not, constitute injury to, or interference with, the enjoyment of greens.

26. Defra will consider the case for further legislation on town and village greens if real and widespread problems are shown to exist. Whilst we appreciate that there may be some legal difficulties for people who are seeking to regularise existing vehicular access rights to their properties across registered greens, our evidence base does not indicate that parking and access issues are a major concern. We will keep the position under review and re-examine the case for legislation if real problems are shown to exist.

Glossary

[usage] as of right	[to use another person's land] without force, without secrecy, and without the permission of the owner
easement	(in this context) a private right of way for the benefit of the owner of land (the dominant tenement) over land belonging to another (the servient tenement)
grant	(in this context) a legal document executed by the owner of the land over which the easement is exercised, showing entitlement to the easement
prescription	(in this context) acquisition of an easement by uninterrupted long use, typically over 20 years or more

¹⁴ www.defra.gov.uk/wildlife-countryside/issues/common/protect-consents/index.htm.

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register of title	the register held by the Land Registry which shows the proprietorship of land (generally, an entry in the register as to the owner of land is guaranteed by the Land Registry)
registered [common land or green]	registered in the registers of common land and town or village greens maintained by local authorities under the Commons Registration Act 1965 or the Commons Act 2006