

Fore! Another warning shot across the bows for developers and landowners

March 2010



Among many hazards for developers and landowners, a claim for a registration of a town or village green (TVG) is, or certainly should be, amongst the most feared. At best, development may be delayed by months or even years whilst a claim is considered, investigated and despatched. At worst, it may lead to an expensive public inquiry, even more expensive court proceedings, and the permanent sterilisation of land, jeopardising even desperately needed affordable housing development projects and the provision of community facilities.

Who wields this draconian power to stop development in its tracks? The answer is, a significant number of the inhabitants of a locality or neighbourhood who have indulged in lawful sports and pastimes on the land for at least 20 years “as of right”. The actual definition is legalistic and technical and has been referred to the highest court in the land on four occasions over the past decade, most recently last week, when the Supreme Court handed down its judgment in *R (Lewis) -v- Redcar and Cleveland Borough Council and Persimmon Homes (Teesside) Limited*.

“As of right”

This case considered the meaning of “as of right”. The land subject to the TVG claim was owned by the Council and was used as a private members' golf club. It was also used by

local residents for recreation. In 2003, the Council granted itself planning permission for major development on the land (over 300 houses and a sports centre) and, in an effort to defeat the development proposal, objectors applied to have the land registered as a TVG.

To be “as of right”, use of land has to be carried on without force, without secrecy and without permission. At a public inquiry about the TVG application, an independent Inspector held that recreational users of the claimed land had not used it “as of right” as they had overwhelmingly deferred to the golfers. Registration of the land as a TVG was refused by the Council as Registration Authority, which decision was then judicially reviewed in the High Court. The judge agreed with the Inspector and, in due course, so did the Court of Appeal. That decision has however now been overturned by the Supreme Court.

Lord Walker said: “I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the Inspector's word, deference) towards members of the golf club who were out playing golf... A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it.”

Development prevented

As to whether the registration of land as a TVG would enable recreational users to assert greater rights over the land than before, the judges thought that the golfers and the recreational users would have to continue to act civilly to one another. This question was not however resolved finally by the judgment, and in fact, no longer arises in this case, as the land is not now used for golf. However, after five years of delay whilst two TVG applications were determined, one thing is now certain - that the £55M development which was intended for the site will not take place.

Reform of the law?

The government last considered TVG law in proposals which became the *Commons Act 2006*. In so doing, its primary aim was to be seen as the protector of green spaces and to make it easier for local inhabitants to claim TVGs. It was clear even then that a thriving anti-development industry had already become established and was benefitting from this attitude.

There is however some cause for cautious optimism. DEFRA has announced that it intends to consult this Spring on whether there is a need for reform of the registration system and, if so, on the options for reform. Developers and landowners must seize this opportunity to try to ensure that the current system is replaced with one which is fairer and which allows a proper balance to be found between the protection of precious green spaces and the requirement for orderly development to satisfy community needs.

For further information about this subject contact:



Jim Ryan

Tel: +44(0)117 902 6689
jim.ryan@burges-salmon.com



Julian Boswall

Tel: +44(0)117 307 6851
julian.boswall@burges-salmon.com