

– VILLAGE GREEN UPDATE –

1. Since my last TVG update in March on the *Barratt Homes'* case there have been some interesting developments.

DEFRA Consultation

2. DEFRA is consulting on proposals to make changes to the law. The options being canvassed are these:
 - (A) Streamlining the sifting of applications to ensure that weak or vexatious applications may be sifted out by the registration authority at an early stage.
 - (B) A proposal similar to section 31(6) of the *Highways Act 1980* whereby a landowner would be able to deposit a map of the land, and make a direction, to be renewed every 10 years, that any use of that land for LSP is with his permission and thereby preclude user as of right. An application to register on the basis of use for at least 20 years before the date of the declaration would have to be brought within 2 years of that date.
 - (C) The introduction of a test of character which would mean that a green could not be registered unless it can be shown that the land is open and unenclosed in character and recognisably similar to the popular perception of a traditional green.
 - (D) The exclusion of any land from registration in respect of which there was an application for full or outline planning permission or on which there was statutory pre-application consultation. Nor could an

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application be made in respect of land in respect of which planning permission had been granted until either the development was complete or the planning permission had expired. Similarly no application could be made in relation to any land designated for development or protected by the *Local Green Spaces Designation* in an adopted or draft local plan (the government is committed to create a new designation – similar to SSSIs – to protect green areas of particular importance to local communities). The same principles would apply to land designated for development or protected by the *Local Green Spaces Designation* in a neighbourhood plan envisaged by the Localism Bill, either at consultation stage or after formal adoption.

- (E) The payment of an application fee to be set by the registration authority with a suggested ceiling of £1,000. The possibility of the fee being refunded if the application is granted is also considered.
3. In his forward to DEFRA's consultation paper, Richard Benyon, the Minister for the Natural Environment, says that the government will be announcing their conclusions on how they intend to take forward any reforms to greens registration early in 2012. It is obvious that if this package of proposals became law it would make it much more difficult to register land as a TVG and any change in the law is bound to be robustly defended by environmental bodies. Whether the government would actually choose to become embroiled in such contentious reforms in the lead up to the next election is perhaps open to question anyway.
4. There is though one undeniable mischief in the system at the moment which will have to be cured sooner or later and that concerns applications to register which are submitted after planning permission

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for development has already been granted. It hardly seems unfair for there to be an enforced flushing out of applications to register within a limited period of applications for planning permission being made.

5. I will keep you informed of the progress of the *DEFRA* consultation and any proposed legislation which arises out of it.

Leeds, Paddico and Betterment

6. The second appeal in ***Leeds Group PLC v Leeds City Council*** [2010] EWHC 810 (Ch) and [2010] EWCA Civ 1438 is due to be heard by the Court of Appeal in October. The landowner is arguing that neighbourhood applications reliant on pre-30th January 2001 user must fail as the changes introduced by the *Countryside and Rights of Way Act 2000* were not retrospective. The landowner is also taking a human rights point. If the landowner is successful it would mean in practice that neighbourhood claims could not succeed before 2021 which, on the face of it, parliament is unlikely to have intended when it changed the law to make registration of greens easier by introducing of the concept of neighbourhood.
7. On 23/06/2011 judgment was handed down in ***Paddico Ltd v Kirklees Metropolitan Council and others*** [2011] EWHC 1606 (Ch). The litigation concerned a landowner's application under section 14 of the *Commons Registration Act 1965* to rectify the register of TVGs to remove from it a parcel of land (Clayton Fields) which had been registered as a green in 1997.
8. The claimed locality at the time of registration was that of Edgerton/Birkby which were districts of Huddersfield but which were not legally recognised administrative districts known to the law. It seems evident that the members of the decision-making sub-

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committee before whom there had been an oral hearing may not have fully understood the objector's submission on the highly technical meaning of the term '*any locality*' under the 1965 Act. In the result, the law in 1997 was such that the two mentioned districts, although areas of Huddersfield, were non-qualifying as (a) neither were of legal significance and (b) even if they had been, user by the residents of two localities did not allow the land to qualify for registration in 1997 unless it could be said that the users came predominantly from one locality.

Vos J reviewed alternative localities put forward to him by the residents but when he looked at the distribution of users it could not be said, on the evidence, that any of the users from these valid localities were predominant. The application was always therefore doomed to fail simply because Clayton Fields was positioned between multiple localities and used by people from each. Vos J was reluctant to come to the conclusion which he did on the locality issue, indicating that he felt that it was somewhat of an absurdity, but felt constrained to do so by authority '*at too high a level*'.

9. Even if the original registration was erroneous section 14 still requires the court to deem it just to rectify the register. In ***Betterment Properties (Weymouth) Ltd v Dorset County Council*** [2010] EWHC 3045 (Ch) (another claim to rectify under section 14) Morgan J had said that the *prima facie* position in a case where the registration should not have been made was that rectification should be ordered as it would free the landowners from burdens which should not have been placed on them. The view taken by Vos J in ***Paddico*** was that the justice question should be at large so that the court should be at liberty to take into account any matter that it thinks relevant to the rectification of the register. In both cases, rectification was ordered.

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10. Section 14 arises where the register has been amended in pursuance of section 13 of the 1965 Act (section 15 of the *Commons Act 2006* governs applications for registration made after 6/04/2007). Section 14 has, however, been repealed in respect of registrations after 1/10/2008 in the pilot areas but it survives to govern registrations made under the 1965 Act. The importance of section 14 now is that section 19 of the 2006 Act (which will replace section 14) provides for a mistake in making an entry on the register to be corrected. Section 19(5) provides that a register may not be corrected if the authority considers that, by reason of reliance reasonably placed on the register by any person, it would *'in all the circumstances be unfair to do so'*. This contrasts with the requirement for it to be *'just'* to rectify the register under section 14. The approach of the court in cases under the 1965 Act is more than likely to impact on the correct approach when it comes to the correction of mistakes under section 19 of the 2006 Act.
11. Permission to appeal was given in *Paddico* on both the locality and justice issues. In *Betterment* Morgan J ordered rectification on the basis of non-peaceable user and, in relation to part of the land, interruption arising from engineering works which had taken place on the land for a material period. Permission to appeal has also been granted in *Betterment* but only on the non-peaceable user issue although it is anticipated that the appellant will renew her application for permission to appeal on the justice issue at the substantive appeal which is listed to be heard in November. However in granting permission to appeal in *Paddico* Arden LJ directed that the appeals in *Paddico* and *Betterment* should be heard at the same time.

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12. At [97] in *Paddico Vos J* very helpfully summarised the current position in relation to the terms 'locality' and 'neighbourhood within a locality'. Put shortly, the position is this:
- (A) A 'locality' under the Acts of 1965 and 2006 means an administrative district or an area within legally significant boundaries.
 - (B) To qualify under the original section 22(1) of the 1965 Act or under the first limb of section 22(1A), the land to be registered as a TVG must be used by the inhabitants of a single 'locality'.
 - (C) In section 22(1A) the term 'neighbourhood' is to be understood as being a cohesive area and must be capable of meaningful description in some way.
 - (D) In section 22(1A) the term 'neighbourhood within any locality' can mean either a locality or localities.
 - (E) In section 22(1A) the term 'neighbourhood within any locality' can mean either a neighbourhood or neighbourhoods and the neighbourhoods concerned do not need to be located within a single locality.
 - (F) In the original class c definition in section 22(1) (but not the new class c definition in section 22(1A) in which the predominance test has been replaced by the requirement for usage by 'a significant number' of inhabitants), not all the users of the TVG need to be inhabitants of the locality in question, but it is sufficient that the land is used 'predominantly' by such inhabitants.
13. Whether the Court of Appeal will hold that the term 'locality' is satisfied in a case where the inhabitants come from an area that is sufficiently cohesive to be described in ordinary language as a locality even if it is

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NOT an administrative district or an area within legally significant boundaries, remains to be seen. If it did it would produce a somewhat anomalous situation in which there was no distinction in practice between a 'locality' and a 'neighbourhood'. It is doubtful whether this could have been intended by parliament and that any change would require new primary legislation.

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