

CAR PARK CHARGES AND SCOTCH COMMON

Information from Ms Nicola Hodgson of The Open Spaces Society

Questions posed:

- 1) Background information
Scotch Common has been used as a car park for more than 20 years and indeed for more than twenty years before it became a village green in 1979. This usage has been open, continuous and long-established. This usage is widely supported by the people of Sandbach.
- 2) It is contended that s193 of the Law of Property Act 1925 (“Rights of the public over commons and waste lands”) applies to Scotch Common because it is “manorial waste or common land within the area of a pre 1st April 1974 borough or urban district”. What is your opinion?
- 3) Following the case of *Bakewell Management Ltd v Brandwood and others* [2004] UKHL14 it has been argued that a right to park on Scotch Common has been established by prescription. STC contends that it is lawful for Scotch Common to continue to be used as a car park and that any attempt to prevent such use would be unlawful.
Do you agree?
- 4) The practice of regulating parking on Scotch Common is well established and the outer spaces are already subject to a 2 hour limit (see photos of existing signs in Appendix 2). The practice of fines for misuse of Scotch Common is also well established and can be traced back to October 1583 when 32 men were fined because they “made use of an unlawful game viz; Bowling upon the common green or commons” (reference *History of the Ancient Parish of Sandbach* p8 *Earwaker*). In *Bakewell* in obiter dicta Lord Hope of Craighead drew a distinction with the earlier case of *Hanning v Top Deck Travel Group Limited* (1993) 68 P & CR 14. In *Hanning* the aim was to preserve the amenity of the common, of which his lordship approved, whereas in the case of *Bakewell* the aim was to make money, of which his lordship disapproved. Applying those principles to Scotch Common it appears that any attempt to raise money by charging for parking will be unlawful, but that penalties for misuse designed to preserve the amenity of the common will be lawful. STC contends that fines designed to preserve the amenity of Scotch Common and regulate its use for the benefit of the people of Sandbach are lawful. Do you agree?

Is it lawful to fine people for misuse on Sandbach Common which is registered as a village green?

In the very unusual situation where a 'right to park' has been established through long usage by prescription, is it possible to fine people for parking for more than 2 hours?

Response:

I have read the report and regret that I am unable to check whether the land is registered as a village green as there is no national database of village greens. If you have not already done so I would be happy to write to Cheshire East Council for confirmation.

If the land is registered as a village green it is protected for local people to use for recreation.

If the land is registered as a village green it is protected under section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876, it is an offence to damage or encroach upon a town or village green. The terms are very wide and cover any act which injures the green or interrupts its use for recreation.

Section 29 also covers permanent encroachment or enclosure, i.e. fencing off part of a green, erecting a building. However the offence is only committed where the encroachment is made 'otherwise than with a view to the better enjoyment of the green'. The provision of facilities to assist in 'the enjoyment' of recreation is not a breach of the sections.

Section 193 of the Law of Property Act 1925 which gives the public the right of access for 'air and exercise' as long as it was within an urban borough before 1 April 1974. However such rights are subject to any 'Act, scheme, or provisional order for the registration of land, and to any by-law'.

The rights of access only cease to apply if the commonable rights have been extinguished under any statutory provision or if there has been a council resolution assenting to exclusion of the land from the provisions.

You may need to carry out further research of minutes to check this aspect.

In general it would be a breach of the above protective legislation to allow parking. However, though very unusual it is possible in certain circumstances to obtain a 'right to park' through long usage by prescription.

In view of the reference to the case of Bakewell I thought it would be useful to clarify some of the points made in that case.

The issue concerning vehicular access over village greens as you may be aware is unfortunately quite complex, however as a result of the House of Lords case in Bakewell Management Ltd v Brandwood [2004] which overruled previous case law. There has been considerable debate about this issue. The House of Lords decided in favour of the residents and confirmed that provided the owner of the land (which in that case was common land) could lawfully have granted permission to use the land for vehicular access, there was no bar on a householder relying on their actual use of the land for access, even without the owners expressed permission, to establish a prescriptive right to do so. As a consequence of this decision section 68 of the Countryside and Rights of Way Act 2000 which established various criteria for registering and obtaining easements for vehicular access became redundant.

Easements can still be negotiated with the owner of the land even if it is registered as a village green. However the Bakewell case did not specifically address the issue of vehicular access over land registered as a town or village green and there has been no direct consideration of this issue in the courts.

In the Court of Appeal the case of Massey & Drew v Boulden & Boulden [2002] the Court of Appeal upheld a claim to a prescriptive vehicular right of way over a track across a registered

village green. The court said that there was no 'sufficient reason' to regard the existence in use of an access track as injuring the green or interrupting its use or enjoyment by others. It is a matter of fact and degree as to whether or not driving across a green in a particular way would contravene these provisions and should be decided on the circumstances of individual cases. If a 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, then it may indeed be possible for the owner to grant an easement by negotiation.

I apologise that this is quite detailed about particular case law but there have been various developments, as above, which you will appreciate are relevant to the questions you have asked.

However using obiter dicta as justification for charging is fraught with difficulties because as you will be aware, they are merely comments and do not form part of the judgment itself.

If there are byelaws which limit activities these may be enforced by the use of a fine as a penalty, and to that extent it may then be lawful to fine people for misuse of Sandbach Common.

If a 'right' to has been obtained by prescription then no charge at all could be made, on the basis of the Bakewell decision.

The copy of the Commons Commissioners decision appears to confirm that the land is registered as a village green, in which case the comments in my previous email about the protective legislation will apply.
