

# Legislating for Growth

Since the nineteenth century statute has helped local objectors to preserve open spaces and, increasingly, to thwart unwanted development. But, as Ian Borders explains, the tide might be about to turn.

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The aim of the Growth and Infrastructure Bill, as the name suggests, is to promote economic growth by stripping away red tape and removing (or at least reducing significantly) barriers to development. The proposals are being welcomed by builders but a number of environmental campaigners argue that this is no more than a 'developer's charter'.

Of particular concern to the green lobby are the proposals in relation to Town and Village Greens. Legislation has existed to regulate the use and enjoyment of Town and Village Greens since as far back as the Inclosure Act of 1845.

This and subsequent legislation, envisaged that certain open spaces would be used for recreational purposes and should be preserved as such. Case law grew out of the legislation, which subsequently evolved. The result of which was to make it easier for new Town and Village Greens to be created where land had been used on a customary basis for a relevant qualifying period.

The Commons Act 2006 sets out in very specific terms what criteria have to be satisfied in order for a group of residents to register a parcel of land as Town or Village Green.

It even allows a period of grace for an application to be made to the relevant registration authority where the landowner has physically prevented the use of the land. This is a significant shift away from the pre-2006 position, which required the village green rights to be exercised up to the point where an application for registration as a Town or Village Green was made.

With the Commons Act 2006, local residents' groups were gifted a very powerful weapon which many have wielded with great effect the minute there has been even a suggestion of development taking place on an area of open land.

Evidence from the Department for Environment, Food and Rural Affairs 'suggests that the numbers of Town and Village Green applications has increased steadily since the 2006 Act was passed, although the numbers of successful applications has fluctuated.

Notwithstanding the disparity between the two sets of figures, this presents a worrying trend – especially for landowners and developers for whom defending a Town and Village Green challenge will incur costs even where the

challenge is spurious and based on limited evidence. At best, a Town and Village Green challenge may fall down due to the lack of sufficient evidence required to satisfy the tests in the 2006 Act.

At worst, it could end up in the court system with at least one case - Lewis v. Redcar<sup>2</sup> - going all the way to the Supreme Court. Such litigation is expensive and time-consuming. It certainly does not incentivise developers to invest in projects that might bring wider economic benefit to local communities at a time when this is greatly needed.

Since 2007/2008 the UK has witnessed substantial economic shocks including a major banking crisis, massive national and personal debt mountains, a credit crunch and two recessions. The coalition government has clearly pinned hopes of an economic recovery on the property and construction industry. The government is keen to clear any hurdles out of the way in order to attract investment and boost growth in this sector.

The Growth and Infrastructure Bill received a narrow passage to the Lords on its third reading in the Commons, just before Christmas

If it is enacted it will reduce the risks associated with Town and Village Green challenges by allowing the landowner to lodge a statement with the relevant commons registration authority effectively bringing to an end any recreational use which has been enjoyed by members of the public 'as of right'.

The proposed new legislation will also prevent village green applications from being made where planning permission has been secured to develop a site, where a site has been advertised for planning permission purposes, or where the site has been earmarked for development in a local or neighbourhood plan.

It remains to be seen whether this initiative will have the desired effect, but it is reasonable to assume that it will continue to polarise opinions and generate a new raft of case law.

<sup>1</sup>Consultation on the registration of new town or village greens July 2011.

<sup>2</sup>R (on the application of Lewis) (Appellant) v. Redcar and Cleveland Borough Council and another (Respondents) [2010] UKSC 11.

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## No Acknowledgement Given

Where no disclosure has been given, or it has not been acknowledged, then where a Green Deal is in place when the buyer receives his/her first electricity bill the Green Deal repayments will still appear on it. The buyer then has 90 days within which to dispute the charge with the Green Deal provider. If it is not disputed within this period then the buyer will be liable to continue with the loan repayments.

Where failure to comply with the regulations is alleged, this will be investigated by the Green Deal Ombudsman on behalf of the Secretary of State. Where the Secretary of State is satisfied that there has been a breach of the disclosure and acknowledgement regulations, he/she may cancel the plan. The seller will then remain liable to compensate the Green Deal provider.

## Implications

The CML Handbook was amended on July 8th 2013 adding a new provision relating to whether Green Deals (and also Solar Panels whether or not installed under a Green Deal) must be reported. Each individual lender's Part 2 must be looked at. Many lenders do require the details of the Green Deal to be reported. Note the emphasis of the word 'details'. It is not sufficient to disclose to the lender that there is a Green Deal in place; it is the details i.e. amount of loan, period of loan, repayments etc that most will require.

The other issue on a property sale is what reaction the buyer will have to being told that there is a Green Deal on the property. Will he/she be delighted that the property is so energy efficient and be prepared to take on the repayments? Or will he/she want the benefits but not the burdens and so insist on the price being reduced or the seller repaying the loan?

The fact that lenders will require the details of the loan tends to suggest that they at least fear that the existence of a Green Deal loan may affect the saleability of the property. Only time will tell, but if the seller is required to repay the loan, they should bear in mind that there might well be an early repayment penalty attached to the loan!

One thing is certain, though, conveyancers do not want to be involved with any such negotiations; these should be handled between the parties directly, or via the estate agents. After all they get paid a lot more than conveyancers do!