

BOOK REVIEW – The Law and History of Common Land and Village Greens, 7th Edition, Paul Clayden

Open Spaces Society, 2022

<https://www.oss.org.uk/our-common-land/>

Review by: Chris Hugill

This eagerly awaited update of the law relating to the law and history of commons and town and village greens was written by the late Paul Clayden and brought to publication this year with the expert assistance of his former colleagues at the Open Spaces Society after his sad death.

Despite its title, this is predominantly a book on law rather than history and those who seek the latter should look elsewhere. This is a difficult area of property law and the author has succeeded in summarising it expertly and succinctly. Although the antecedents of commons and greens lie in history, the modern system of registration of these open spaces introduced by the Commons Act 1965 and the Commons Act 2006, which will eventually fully replace it, is now fundamental to its understanding.

In the North East of England, we have been blessed with a large number of traditional village greens and some significant areas of common land registered under the 1965 Act. The City of Durham Trust was involved in the registration of land as a common in Flass Vale and recently opposed the deregistration of part of the common land in the Sands (see the Trust's May and July Assets of the Month: <https://durhamcity.org/2022/06/08/flass-vale/> and <https://durhamcity.org/2022/08/09/common-land/>)

Nevertheless, for many years, commons and greens have often seemed to involve an obscure backwater of the law. That impression was transformed in more recent years, particularly since the late 1990s, by a substantial increase in the number of applications for registration of new greens of open spaces not originally registered. These recent applications were made based on the land having been used by local people for lawful sports and pastimes for at least 20 years as of right, that is, without secrecy, without force and without permission. Such applications became a means of local people preventing the development of open land used informally for public recreation.

The people of our region have been very active in relation to the registration of such new greens and there have been three very significant legal cases concerning North East greens in recent years which went to the highest court in England and Wales.

One, *R v City of Sunderland ex parte Beresford* (2003) concerned land at Washington which had been used for over 20 years as a playing field but which the Council wished to sell to Sunderland College of Further Education for a sixth form college. This was frustrated by the House of Lords deciding that the land should be registered as a green.

The second, *R (on the application of Lewis) v Redcar and Cleveland Borough Council & Anor* (2010) concerned Council owned land in Redcar which had been used by the public for

informal recreation but, at the same time, by a golf club with express permission from the Council under a formal lease. This golf course use had ceased and the Council wanted to develop the land in partnership with Persimmon Homes. Despite the public having deferred to people playing golf, the Supreme Court found that the land should still be registered as a green. Disappointingly, this case is not mentioned in the book even though the decision, in this reviewer's opinion, remains important in showing that the owner's primary use will not always prevent registration where it is consistent with other use by the public. Both of these cases very significantly extended the rights of the public to protect open land.

The third case with which the author deals succinctly and with aplomb is the Supreme Court case, *R (on the application of Barkas) v North Yorkshire County Council (2014)* which casts doubt on the grounds for the decision in *Beresford*. The author explains that this and later decisions have resulted in it becoming unusual for land held by a public body to be eligible for registration as a green where public use is by right rather than as of right.

The author explains with admirable brevity the legislative changes in 2013 which impose restrictions on new applications by providing 16 trigger events which, where one or more is applicable, suspend the right to apply for registration of a new green. These events include where an application has been made for development of the land or where the land has been identified under a draft development plan as suitable for potential development.

Some context and recent history would assist in the next revision of the book in summarising the current state of the law in relation to new applications for the registration of greens. The combination of the Supreme Court's decision in *Barkas* and legislative changes in 2013 have restricted the use of such applications to prevent the development of open spaces. The Washington and Redcar plots of land mentioned above would probably not have been registered as greens and access to the public would have been lost if such applications had been made today. Notwithstanding that, the ability to apply for registration as a green remains a valuable weapon for those seeking to protect open spaces particularly those in private ownership. In most cases though applications need to be considered by local people and made well before there is any thought of development.

This book will be invaluable to lawyers and others seeking a better understanding of the law in this area. At a price of £25 payable to the excellent Open Spaces Society, this gem of a book is great value and forms a lasting tribute to the dedication and expertise of Mr Clayden in relation to the protection of commons and greens.