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My reference  
HRP/MRS/DLA0036

Your reference  
UM/AC/11080-1

Date  
30 September 1996

This matter is being dealt with by H R Perkins

Direct line: (01865) 810250

Dear Sirs

**Mr and Mrs Knight - Chalgrove Parish Council: Village Green 38**

I have now had a chance to assemble the evidence and information supporting the position on the Village Green at Chalgrove.

The Statutory provisions concerning the use and ownership of the freehold and of the rights on the green are contained in the following:-

Commons Registration Act 1965

Inclosure Act 1857: Section 12 (copy attached as Appendix A)

Commons Act 1876: Section 29 (copy attached as Appendix B)

Open Spaces Act 1906: Sections 9, 10, 14, 15, 16, 20 (copy attached as Appendix C)

The history of the green is as follows:-

The Chief Commons Commissioner, by Direction dated 21 February 1974 directed Oxfordshire County Council as Registration Authority to register the recreation ground at Chalgrove, the memorial green and the Old Ford at Chalgrove as VG 38. Copies of the Direction are also attached at Appendix D.

Pursuant to the provisions of the Open Spaces Act 1906 the Parish Council have a duty to "hold and administer the open space... in trust to allow the enjoyment thereof by the public... within the meaning of the Act."

In accordance with their powers, under sections 15 of the 1906 Act, the Parish Council have made bylaws which control the use of the green - copy attached at Appendix E. These bylaws were validly made in 1955 and prevent the use of the green by vehicles, beasts of draught or burden, cattle, sheep or pigs. Access by horses is therefore prohibited in the face of a breach.

The question which arises is therefore whether Mr Knight has private rights which override the prohibitions contained within the bylaws and which are also valid at law.

In his defence, Mr Knight has claimed the benefit of a Statutory Declaration furnished by Mr E F B Monck, dated 21 January 1995 - copy attached at Appendix F. This Statutory Declaration supports a prescriptive use of the green for a period before registration (i.e. 1957 to 1982) for a period of twenty-two years, two years in excess of the prescriptive period required to establish the right. However, the Declaration concerns and awards only an alleged right to use the track (i.e. part of the green - the Old Ford) "to pass and re-pass between the public highway at all times of the day and night on foot with or without animals of any kind including horses for all purposes connected with the use of the red land and the blue land for agriculture by me, my family, employees and invitees".

The Statutory Declaration does not give to Mr Knight any rights to use any kind of vehicle over the green whatsoever. It is clear that in view of the provisions of the bylaws and of the 1857 Act, Mr Knight does not therefore have any right to use such vehicles on the green.

There is a dispute as to whether the Statutory Declaration can possibly be correct, since the Parish Council and other people allege that the northern end of the former lane was impassable, it being a swamp between the years of 1957 and 1967/68, when the County Council acting as Local Education Authority purchased the land compulsorily for an extension to the local school. It is difficult to comment upon this, except to note that:-

- (a) According to the evidence I have, it would have been extremely difficult for continuous access to have been made over the ford at that point before 1967/68, since it was for the most part of the year covered with water and reeds. A batch of statements and correspondence with the County Horticultural Advisor during 1966/67 drew attention to the water lying around on the Old Ford being "considerable" thereby giving problems as to drainage. For reasons given in my conclusion however, I am prepared to lend credence to the contents of the Statutory Declaration but not to their legal effect. The worst that can be said is that for the most part, the de facto exercise of such rights has been questionable.
- (b) It may be that that is why the unmade path shown upon the plan attached at Appendix G was created. It enabled access to be achieved down the side of the ford, rather than going through it.

It may of course be that Mr Knight would wish to claim prescriptive rights over that path referred to in (b) above based upon his own use. Upon that I have two observations:-

- (i) He became a resident only in 1983 and on 16 October 1983, the Parish Council wrote to him to ask him to cease using the green "with horses". No prescriptive right can have arisen since that time, since the prescriptive period has not yet been achieved. A copy of the Parish Council's letter is attached as Appendix H.
- (ii) The provisions of Section 12 of the Inclosure Act 1857 and to a limited extent, Section 29 of the Commons Act 1876 materially affect the ability to acquire such rights.

The terms of Section 12 are very wide and cover any act which injures the green or interrupts its use as a place for exercise and recreation. Certain acts are offences only if done "wilfully", i.e. deliberately, even if there was no intention to injure the green. An act is "wilful" if its effect is to cause injury, whatever the motive of the doer. The phrase "do any other act whatsoever" is not qualified by "wilfully" so that any accidental act, or any act done in ignorance of the status of the land will be an offence. In practice of course it is unlikely that a person would be prosecuted in these circumstances, but if a course of deliberate conduct can be established which damages the surface of the green, then the situation might very well be otherwise. It is submitted that "any act whatsoever" includes the riding or driving of animals for agricultural purposes over the green if they cause damage to the surface.

Section 29 of the Commons Act 1876 overlaps with Section 12 of the 1957 Act to some extent, but also covers permanent encroachment or inclosures. The laying down of a private driveway across a green would be included, but this does not apply to Mr Knight. An offence is committed only where the encroachment is made "otherwise than with a view to the better enjoyment" of the green. Anything which conflicts with the enjoyment of the green is probably such an offence.

Though there is no specific legal provision which prohibits the owner of a green from granting a right of way over it, and, where this is one which does not interfere with the inhabitants' rights of recreation (e.g. a right of way on foot only) it is lawful, it is submitted that the grant of any rights which breach Section 12 of the 1957 Act has to be illegal. The reason is that it is impossible to establish by prescription a right to commit an offence and the theory behind prescription is that long use implies a grant at some time in the past. I cannot see that Mr Knight's use of the green on foot can constitute any offence, since no peculiar damage is caused by that use over and above that which would be caused by the general recreational use. I consider however that in relation to the rights of way claimed by Mr Knight for driving animals on the green:-

- (a) Such rights cannot exist in any event if they interfere with the inhabitants' rights of recreation and/or injure the surface of the green as will the driving of animals. This applies whether or not such a right is purported to be granted, since such a purported grant can give no right to break the law and has to be a nullity.

(b) Such a purported right cannot be exercised even if it is purported to be a prescriptive grant to do so, since the content of such a grant would also be a nullity. The rights were purported to be granted by Mr Monck after the 1857 Act was in force. This would apply even if Mr Monck had exercised his right between 1957 and 1982 which would have probably been difficult to do in any event because of the alleged flooding of the ford. In my opinion, Mr Knight's rights are confined to those on foot. Clearly, no prescriptive right exists for him to use the green for the purposes of vehicular access and the grant by Mr Monck to use the land for the purposes of leading agricultural animals would damage the surface of the green and constitute an offence. Mr Monck's grant of prescriptive rights cannot validate such activity and they will therefore be illegal.

Yours faithfully



H R Perkins  
Joint Head of Legal Services  
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