

**Proceedings of the  
8th National Seminar  
on  
Common Land and  
Town and Village Greens**

Edited by

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## **INTRODUCTION**

***Christopher Short***, Seminar Convenor  
*Countryside & Community Research Institute*

A wide-ranging audience of over 170 delegates

Christopher Short, November 2007

## **WELCOME**

***Peter Lanfear Crail, Barrister***  
*New Square Chambers*

Good morning, ladies and gentlemen. I'd like to begin by saying it is both a pleasure and an honour to be invited to introduce this Seventh National Seminar on Common Land and Town and Village Greens. This seminar series makes an important contribution to the exchange of information and ideas on those subjects, and it's good to see it becoming established as a regular event. Long may it continue!

We look forward today to hearing what the Defra officers have to tell us about the progress of implementing the Commons Act 2006, and I expect that they in turn are looking forward to hearing from other delegates with front-line responsibility for making it work, and using that feedback in their future deliberations. I for my part certainly anticipate learning a lot from all the speakers and from this afternoon's workshop sessions and case studies. I only wish I could attend them all!

You must not make the mistake of thinking that we lawyers who work in this field know all there is to be known about common land and town or village greens – far from it. We are learning on the job all the time, and it is of particular value and interest to hear the viewpoints of those who have day to day practical experience, whether as users or registration authority officers or as the case may be. We sit in our ivory towers debating the finer points of statutory interpretation and dealing with disputes that have arisen, which is fascinating for us and (I hope) of some use to others, but we don't necessarily have as good an understanding as we might of what is actually happening on the ground. What's more, we usually get involved only when things have gone wrong, not when they go right, and it tends to be the ambiguities and lacunae in the legislation that we focus on. One of the things I'd like to do today is to redress the balance by paying tribute to the central and local government officers whose endeavours and enthusiasm go largely – and unfairly – unsung.

It might, of course, come as a surprise to some people that we are here at all in the 21st century talking about commons and town or village greens. They might think commons and town or village greens are old-fashioned things, of very little relevance to modern Britain, about which there cannot possibly be anything new to say. How wrong they would be!

What they wouldn't appreciate is how commons and greens have evolved over the centuries. Far from being quaint medieval relics, they have useful economic and social purposes to serve in today's society. In the case of commons, it may not be, or may not only be, their original function which they are performing; but fortunately we have realised what a valuable resource our commons are from an environmental and recreational point of view, even where their agricultural and economic uses are spent.

Taking steps to protect, preserve and enhance our commons is fitting for a generation which is more conscious of environmental issues than any previous generation. But we should not forget that in this (as in so many other matters) we are following precedents set by our far-sighted Victorian forbears, starting with the metropolitan commons.

It is fair to say that we could have been quicker about it. The second-stage legislation contemplated in 1965 has been a notoriously long time in the gestation; but it's been well worth waiting for. The 2000 and 2006 Acts provide a framework for making the most of our remaining commons and wastes. The details have to be worked out at central level, in secondary legislation, and at local level, in practice. However, there is more than enough expertise and goodwill to make that happen, much of which is gathered here today.

Of course it isn't only commons which our ancestors might not in all cases recognise as such. No doubt they would be surprised to find that the function of some commons today is to provide amenity and recreational opportunities, rather than basic necessities such as food and firewood. But they'd be equally surprised by how different in character some "new" greens created under the 1965 Commons Registration Act are from the traditional image of a green (i.e. a grassy sward, perhaps surrounding a pond complete with ducks). The House of Lords in the Oxfordshire (Trap Grounds) case held (without, it must be said, much enthusiasm) that it followed from the proper interpretation of the statute that any land can become a green, if used in the requisite manner for the requisite period. There is no need for it to be grassy all over (or at all); and it can contain areas which are physically inaccessible. Legislative and judicial intervention have stretched the concept of a "town or village green" to include pieces of land which it would not naturally occur to laymen to call by that name. But they are no less a valuable amenity and recreational resource for local inhabitants than the traditional greens are. Whether by accident or design (or a mixture of the two), town or village greens have become an example of our admirable national habit of keeping alive a tradition while subtly adapting it to fit contemporary circumstances.

We owe it to our ancestors and to our descendants to safeguard and carry forward our heritage and traditions as best we can. Achieving that objective is the underlying theme of this seminar. Let's go to it!

## THE COMMONS ACT 2006 IMPLEMENTATION

***Andrew Dalglish, Defra***

The Commons Act 2006 has three main parts:

- Registration: the registers of common land and greens provide conclusive evidence of the status of common land and greens, so that the special status of the land can be identified and protected.
- Management of commons: commons councils will enable commons to be managed more sustainably by commoners and landowners working together through statutory commons associations, with powers to regulate grazing and other agricultural activities
- Protection: which overhauls the consents system for works and fencing on commons and ensures that existing statutory protections are applied consistently.

The passing of the Commons Act is very significant. First it proved those who thought the subject too complex and too low profile wrong. The Commons Act is the first ever Act to present reasonably comprehensive measures on common land, dealing with registration, management and protection in one place. So it's quite an achievement.

The reasons underpinning the Commons Act centre around the fact that common land is an important part of our national heritage and that much of this land is at risk. The legislation is essential to help the Government meet its PSA target for sites of special scientific interest (SSSIs). The Act will protect common land for current and future generations and it will underpinning reforms to commons registers.

The process of formulating the Act, has done much to raise the profile of common land among our stakeholders and the public. Many more people are now are talking about the needs of common land, rather than treating common land as a rather irritating designation which restricts what can be done with land, as will become clear today. Defra plan to continue seeking greater engagement with our stakeholders during this implementation period.

## REGISTRATION OF COMMON LAND

### *Hugh Craddock, Defra*

Within the registration section of the Act, the starting point is that commons and greens were already registered under the Commons Registration Act 1965. However, the 1965 Act was flawed as it was intended only as a fact-finding exercise, with further legislation intended to follow at short order. Hence the 1965 Act represented a historical snapshot and, perhaps because it wasn't intended to stand the test of time, the Act also brought about many mistakes and omissions in the commons registers, which could not and cannot be corrected.

So Part 1 of the 2006 Act makes provision for improvements to the commons registers. In particular under 'Improvements to commons registers' the Act provides for accurate and up-to-date commons registers to underpin commons management. It does this in three main ways. First there is a duty on local authorities to update and maintain registers of common land and town and village greens, a duty they can only fulfil by working with the interests in common land and the public to ensure 'missed' events can be registered. Second the Act includes provisions to ensure that future transactions will have no legal effect unless they are registered. Meaning that, for example, if a landowner buys out a right of common, his efforts will count for nothing unless the transaction is properly registered. Lastly the Act enables local authorities to correct some clerical errors, but it is not an unlimited power to change the registers to correct past mistakes. For example, it will be possible to correct the definition of a dominant tenement to which rights of common are attached, but not change the quantification of a right, such as the number of sheep, which can be grazed by virtue of the right.

Since last year there have been a number of new developments notably:

- new legislation and guidance on registering new town or village greens
- consultation on implementation of part 1 launched on 3 July 2007 (closes 28 September)
- new commons search arrangements from 1 August 2007.

In the coming months the registration team will be reviewing the responses to the consultation and publishing the results in autumn 2007. Further regulations relating to part 1 will be published in December 2007, together with guidance in January 2008. The pilot areas will begin implementation of Part 1 in April 2008 with national implementation between 2010–12.

The outcomes Defra are seeking from the implementation of Part 1 are that:

- statutory registers are brought back up-to-date and kept up-to-date,
- eligible errors and omissions are resolved
- commons and greens remain permanently registered and therefore protected
- 20-year greens become registered without undue delay together with greater clarity about the status of such areas



- registers are converted to electronic form, so that data can be more effectively and widely shared

## **THE MANAGEMENT OF COMMONS,**

***Marian Jenner, Defra***

The Commons Act responds to concerns about the lack of effective mechanisms to manage commons by providing for:

- self-regulating statutory commons councils
- power to deal with unauthorised agricultural activities
- ban on severance of rights (with exceptions)

### *Commons Councils*

By establishing commons councils; commoners, owners of common land and other legal interests in the common will be able to work together to manage the agriculture, vegetation and common rights on the common through binding rules. We expect they will be one of the key tools in improving the environmental and agricultural management of commons. Commons councils will make it easier to enter into agri-environment agreements — that is, government-funded schemes under which farmers sign long-term agreements to manage the land in particular ways in order to protect, enhance or restore biodiversity, landscape features and the environment in return for annual payments to offset the income forgone and additional costs of changed farming practices. They will be able to secure compliance with the conditions of such agreements through their rule-making function (which enables a commons council to make legally binding rules which may be enforced through the courts where non-compliance occurs).

Commons councils will not be imposed by government: we see them as a bottom-up approach rather than top down. Although each commons council will be established by Defra (or NAW) through a statutory instrument, we can only do so where there is substantial local support. In their conception it is up to those at the local level to determine if they represent individual commons or groups of commons. The process is for broad local support to be established and then to create a formal group submitting an application to Defra that will go through the agreed process. The operation of these bodies is outlined in the establishment order.

Defra is working towards the first commons councils being established in 2008. Defra is working closely with Natural England on all this, through developing our priorities for commons councils; identifying opportunities for the early establishment of pilot councils; determining how best to establish common councils; and the development of the standard constitution and establishment orders for initial councils.

In implementing this part of the Act Defra propose to target our resources where commons councils are most likely to help us meet our wider public benefit objectives, and to establish common councils in the best possible way that will enable them to operate effectively.

*Other management tools*

The Act includes a ban on severance of rights to ensure that common rights largely remain attached to local holdings (with exceptions). There is also a power for Defra/NAW to take action against unauthorised agricultural activities that are detrimental to the common

## PROTECTION OF COMMON LAND

*Elaine Kendall, Defra*

The present position is that most (but not all) commons are already subject to controls on works and fencing through the Inclosure Act 1845, Law of Property Act 1925 or the numerous other functions assigned to the Secretary of State. Powers of enforcement are also limited to specified persons.

Part 3 of the Act introduces a more consistent and modern control regime which applies the controls to *all* registered common land and extends the provisions for taking enforcement action against unlawful works to “any person”. The core of the previous acts remains as works on commons will remain prohibited unless consent is given by the Secretary of State. There will be some exemptions from the consent regime.

In developing the Act, Defra has looked closely at how the system can be improved for those wishing to make an exchange of common land. Under Section 16 & 17, owners of registered common land or town and village greens can apply for the land to be deregistered. If the release land is more than 200m<sup>2</sup> replacement land must be offered. If the release land is less than 200m<sup>2</sup> replacement land may be offered. Full cost recovery is to be sought for applications to deregister land, £4900.

The enforcement regime has now changed so that there is now a consistent statutory protection for commons. The new regulations came into force on October 1 with the transfer of Defra’s consent functions to Planning Inspectorate. The new regime encourages people to undertake wide consultation before making application. The application forms have been reformed to reflect this. There is also improved guidance on procedures and an indicative route for applications to take. Finally there is guidance on what is exempt from or outside the scope of Section 38. Applications for works not to be charged from 1 October.

View the new guidance at: [www.defra.gov.uk/wildlife-countryside/issues/common/protect-consents/newproc.htm](http://www.defra.gov.uk/wildlife-countryside/issues/common/protect-consents/newproc.htm)

## IMPLEMENTATION OF THE COMMONS ACT IN WALES

***Buddug Jones***, Agricultural Officer  
*Countryside Council for Wales*

The Countryside Council for Wales (CCW), is currently involved with work in assisting the Welsh Assembly Government in taking forward provisions within the Commons Act. The work of CCW is divided into four categories:

- Registers
- Management
- Severance
- Common Land Stakeholder groups.

### **Registers**

In 2006 the Welsh Assembly Government asked CCW to investigate the condition of Registers of Common Land in Wales and to estimate the resources required to bring them up to standard. The study was carried out by GeoData institute at Southampton University.

Assessing the scale of the data capture and conversion process was difficult because not all the Registration Authorities responded to the questionnaire. However, based on the CRoW mapping of Wales and those Registration Authorities who responded GeoData were able to estimate the following figures:

- 8% (1732 km<sup>2</sup>) of Wales is common land
- There are 1,592 Common Land units Registered in Wales
- The Textual Registers have in the order of 45,000 registration entries (based on Powys records and extrapolating for Wales).
- The Map Registers contain some 7,500 maps and associated references
- 6 out of the 22 authorities in Wales have already created copies of their paper registers in a digital form, but in different formats, to different extents and to different standards.

In addition, when considering the conversion of the registers to electronic form we need to think about including associated records such as dominant tenements, and incorporating the new requirements of the Commons Act 2006. The register maps' scale of 1:10,560 also limits the ability to show the registered units against other information, for example the modern Ordnance Survey topographic base map, aerial photography or land use maps. The second issue to do with the register maps is that there are a number of cartographic depiction issues and the conversion process needs to be addressed by standardised approaches. Issues to do with The Textual Registers (standard forms) are that amendments (including deletions and deregistrations over the years), make the document more difficult to interpret and additional textual/map based records associated with the registered parcels (e.g. supplemental maps), are often deteriorating and complex.

From GeoData's questionnaire results it was learnt that 6 Authorities have digital data (i.e. whole or partial coverage of the registers) including Ceredigion, Powys, Carmarthenshire, Pembrokeshire, and Swansea/Neath and Port Talbot. The systems used were predominantly MapInfo GIS and MS Access for databases. Staff allocated to Registers in the Commons Registration Authorities are minimal and often part-time. There was no

national standard approach to digitising the registers has been adopted in Wales. Powys has taken a leading role in developing standards for the data capture. Data capture scale for 3 of the Registration Authorities is at the highest resolution of 1:1250 scale against Ordnance Survey digital topographic mapping. The digital map data are used for commons searches and general enquiries, whilst the textual databases (where they exist) are used for the ownership and rights of commons enquiries.

GeoData's review of a proposed conversion process suggests the following key component stages are:

- 1) Collating and Analysing existing digital textual and map-based records
- 2) Scanning the textual and map registers
- 3) The Creation of a single, national CL/TVG database register – that can be distributed to the Commons Registration Authorities for the operation of their registers.
- 4) Population of the national database register from paper registers
- 5) Validation and Correction – involving the Commons Registration Officers
- 6) A consultation process
- 7) Registers in statutory electronic form.

The Overarching Principles are that:

- The conversion process will not seek to bring registers up to date or correct errors.
- Each step of the conversion process will be subject to detailed specifications CROS will be consulted on these at the outset.
- A national agency will create/manage the standardised system (this avoids Registration Authorities adopting separate standards and implementations).
- The data model for the management of the registers includes a geodatabase or linked spatial and attribute data (i.e. maps cross-reference to the entry number in the Register unit).
- The national standard CL/TVG database will be specified and mandatory but not the software or hardware system for subsequent implementation
- Support and training are provided to Commons Registration Authorities to enable them to make effective use of the database.
- The digitisation process should not only produce legal registers in electronic form but it should be flexible enough to incorporate proposed changes to the records by virtue of new requirements introduced by the Commons Act 2006.

It is difficult to accurately estimate resources for the electronic conversion of the registers to electronic format. There will be direct and in-direct costs, including staffing, hardware, software, development tasks, training and support and on-going maintenance costs. Bilingual records publications have to be in Welsh and in English. CCW will be piloting a data capture and

conversion exercise to develop conversion procedures, and to detail the scope and costs of the exercise.

### **Management**

In July 2007 CCW sponsored and took part in PONT's (Wales' Grazing Animals Project) Common Land Event. PONT stands for Pori, Natur a Threftadaeth, which translates as 'Grazing Nature and Heritage'. Launched in 2005, PONT aims to help bridge the gap between those responsible for land which needs to be managed for nature and those who have the appropriate livestock by supporting and establishing new Local Grazing Schemes. The objective of the common land event was to discuss the implications of the provisions within Part 2 (Management) of the Commons Act 2006 in the context of facilitating the sustainable grazing management of Wales' commons. There were 48 delegates who represented a cross-section of different common land interests in Wales.

### **Severance**

The Welsh Assembly Government consulted on proposals for an order to allow for the temporary severance of common rights from the land to which they are attached in September 2006. An order (which came into effect March 1st 2007) allowed for Temporary Severance of rights of common in 2 specific circumstances: Leasing/licensing of the rights to a 3rd party for up to 3 years and for owners of land to lease the land but to retain the rights attached for their own benefit. In preparation for further legislation (replacing these temporary exceptions), the Assembly Government has asked CCW to investigate, and consult on, possible long-term exceptions to the ban on severance that should qualify under a new order.

### **The Common Land Stakeholder group in Wales**

The group was established by the Assembly Government in June 2005. The purpose of the group is to keep members up-to-date on common land legislation and on progress with its implementation in Wales. Members also have the opportunity to raise and discuss issues of concern at meetings. They have an early input (pre-consultation) into the development of secondary legislation. The last meeting was held in March 2007 and the Agenda included a presentation by Chris Hill of GeoData Institute's report on common land registers in Wales and John Thorley gave a presentation on the Welsh Commons Forum.

### **The update on recent legislation**

The first commencement order relating to the Commons Act 2006 (conferring powers or imposing duties on Welsh Ministers to make regulations/give guidance or directions) and the regulations provided for under section 15 of the 2006 Act in respect of the Registration of land as a Town or Village Green came into force on the 6th September 2007.



## **COMMON LAND: HISTORICAL AND CULTURAL REFLECTIONS**

**Graham Bathe**, *Common Land Major Project Manager*  
*Natural England*

### **Context**

This paper is an attempt to address some of the criticisms which have arisen in previous years, when it was felt that there was over-emphasis on the environmental qualities of Common Land, without hearing enough about their human and cultural values.

Commencing with a sense of proportion: The Commons Act of 2006 ... repeals the Commons Act of 1285 – the so-called Statute of Westminster. Some of the oldest legislation in England relates to Common Land, showing that it was exceptionally important in our early history, and for many of us it remains important today. Common Land certainly reaches back to Anglo-Norman times, and may be as old as England itself. Beowulf, the oldest surviving book written in the English language, probably written in the 8<sup>th</sup> century and hence before the current Kingdom of England was formed, makes reference to inheriting land with rights attached, which seems to have resonance with common land. Also there may be references in the Laws of the Wessex Kings. These also pre-date the formation of England, and establish what are effectively 'fixed penalties' for various misdemeanours which range from killing someone else's slave, to fondling a nun! Amongst these are references to fixed penalties for tearing down enclosures, and whilst this does not prove that people had common rights, evidence that enclosures were being pulled down suggests that the perpetrators felt that they had a legitimate right to be on the land.

### **The Origin of Common Lands**

In 2008 the International Association for the Study of the Commons will hold a major conference at the University of Gloucestershire. This body studies commons in their very widest meaning, in the sense of anything which is used communally and shared. Hence it includes fisheries, water, space and even knowledge. Sociological studies of governance and the way that people relate when sharing something of value may seem esoteric to those of us concentrating on land and rights. However, it provides an insight into the way that common land became established.

*“Common is obtained by long sufferance and also it may be lost by long negligence”.*

This quotation from a legal case of 400 years ago (Gateward 1607) seems quite telling in this respect, and even has significance today. In their simplest form, commons arose from some “Common Pool Resource” – the informal mutual sharing of a facility through practice, without the concept of “rights”. In due course such action became codified and regularised into true rights, through custom and practice, squatting, prescription and established use, or by long sufferance or grant. Different types of rights became recognised, including those that are acknowledged today, including *pasturage*, *pannage*,

*turbary*, *estovers* and *piscary*. In medieval times, common land probably covered half of England, and included the common arable, mead, waste and Forest. This was managed through a variety of local mechanisms, including Manorial Courts and Forest Courts, with national legislation also emerging. The Inclosure movement increasingly removed land from the commons, until today they cover just 399,040 ha, of England.

### **The Outstanding Significance of Commons Today**

The tiny area of common land surviving, equating with just 3% of England, is of overwhelming importance for a wide range of local and public benefits. These include (in no particular order), Environmental, Socio-economic, Artistic/Cultural, Historical, Archaeological, and Social Benefits.

It may be impossible to find any other designated area of land that “pushes more buttons” in terms of providing overall benefit, than common land.

### **Historical and Surviving Examples**

Minchinhampton Common in the Cotswolds is an example of a working common, managed by commoners exercising their rights, which provides diverse benefits for the local community. It is situated on the hilltop above the town of Stroud, and along with its neighbour of Rodborough, in many ways it defines what it is like to live in this area. It is a major recreational resource for the benefit of those in the town and the local villages. It is covered with archaeological remains, ranging from stones and tumuli, to ancient rabbit warrens, iron age ditches and earthworks. And it is designated a Site of Special scientific Interest, having a very rich limestone flora, and its associated butterflies and other invertebrates, all dependent on the continued grazing of the commoners.

Minchinhampton is also exceptional, for having some of the best preserved and earliest records of manorial customs in the country. The Manor of Minchinhampton had been gifted to the Abbess of Caen, in France, to whom surplus funds were sent. When England was at war with France towards the end of the 13th century, the Manor came into the King's hands, and perhaps because of this, records from the time have been preserved. In particular the records contain a Custumal, meaning the established and agreed customs of the Manor.

The Custumal lays down the Duties which had to be performed by some 157 named individuals and their families, who were resident in the Manor, and the Rights to which they were entitled. These are extra-ordinarily detailed, and specifically tailored according to the holding of each, but they include:

- Duties:
- Brewing, ploughing, and collecting nuts,
- Haymaking at Burymore (whose bounds can still be traced but which is now pasture)
- Taking charge of the hare [=rabbit] warren,
- Driving pigs to the beechmast,
- Paying Peter's Pence (tax to Rome),
- Providing a fowl at Christmas and 5 eggs at Easter,
- Watching on St John's Eve (before midsummer day, when spirits might rise from their graves), and
- Providing a lighted lamp in the chapel.
- Rights:
- Weavers' Rights: the ability of weavers to erect a dwelling on the waste,
- Certain rights to fullers earth, stone, wood for charcoal, and bracken, and
- 'The right of the wood'.

This last right, which was almost universal, seems surprising when surveying the exposed treeless landscape of Minchinhampton today. However, what is clear is that a significant part of the common was once woodland. Manorial tenants had the right to take certain limbs of trees for repairing their ploughs and houses, or for other specific purposes. People who transgressed their legitimate rights could have the sanction of being forbidden from carrying an axe, an implement which could serve no purpose if carried today.

Whilst on Minchinhampton the changes in habitat and environment have occurred since the 1300s, elsewhere changes are more recent. At The Hudnalls in the Forest of Dean, there are records of squatters establishing new settlements in the 19th century. Reports from 1805 and 1806 state:

*“At the Hudnalls, poor people cut wood into faggots, and send them by water to Bristol, where it is purchased by the bakers .”  
: “... the oak pollards have been so destroyed, as not to leave a twig behind”.*

The records also reiterate a reported custom from all over Britain, that if a settler could establish a new house and have a fire going before the officials arrived, they were powerless to evict them:

*“The part most important is that the smoke be kept going from sunset to sunrise, [for] that ensures that it became your habitation thereafter”.*

Woodgreen in the New Forest, which appears idyllic, with its vast village green grazed by cattle and ponies, thatched cottages, used by locals for cricket, and visitors generally for picnics, is also a relatively recently established squatters settlement. Earthen banks across the village green reveal former land uses. Surviving documents show that until the 17th century the land was unsettled. Then a wave of migrants moved in together, and settled on the extra-parochial land (ie not falling within any parish) of the New Forest. They appear to have been poor people, and they annoyed the neighbouring parish of Breamore, demanding alms. Breamore parishioners were obliged to look after their own poor, but not anyone else's. The names recorded reveal that these were not local people. They may have been displaced from other commons inclosed elsewhere. They established their cottages, and reputedly these were pulled down by Forest officials. But eventually they succeeded, and a new settlement became established, which enjoyed, and continue to enjoy, common rights in the Forest.

### **Surviving Ancient Customs**

For many hundreds of years commons were often managed using a principle of *levancy* and *couchancy*. The literal translation of this is simply “getting up and lying down”. It refers to a customary yardstick of what would be called sustainability in modern parlance. It basically refers to the principle that commoners could put out as many animals in summer as they could look after on their own holding during the winter. Where levancy and couchancy was employed, it was un-necessary to quantify rights. They were effectively self-

regulating. When the Commons Registration Act was introduced in 1965, it required all registered rights to be quantified. This effectively eliminated levancy and couchancy from the whole country, after its successful application for nearly a millennium. However, there is one area where it has persisted.

Because of uncertainties over rights, the Forest of Dean was omitted from the requirements of the 1965 Commons Registration Act. The Dean was also omitted from the Commons Act 2006. (These Acts do not state whether such rights really do, or do not, exist, and simply remains silent on the issue). One consequence of this, is that people grazing sheep in the Forest of Dean (such people are locally termed 'badgers'), still use the terms, and they feature in grazing agreements signed between the graziers and the Forestry Commission and elsewhere.

### **The Concept of Approvement**

The Commons Act 2006 repeals the right of Approvement. This was given status in both the 1285 Act (Statute of Westminster) and an earlier Act of 1235 (Statute of Merton). Approvement was the provision whereby Lords of the Manor could enclose lands that were surplus to the commoners' requirements. This was an important step, and it gave recognition to a number of things. First, it recognised that the rights of the commoners must not be prejudiced, since land could only be taken if it was surplus to commoners' needs. Second, it confirmed that the Lord of the Manor really was the owner of this land, and also had rights. Whilst this may seem strange today, the rights of Lords of the Manor may have been uncertain in England (and several areas of Europe at this time), until the law on Approvement clarified the extent to which Lord could make use of the land. Third, it enabled land to be set aside for protecting woodland, at a time when nearly all woodlands were being grazed, and this was inhibiting regrowth and regeneration.

### **Forest Lands and Commons**

The role of the Royal Forests in the protection of common land has probably not been given adequate recognition. Royal Forests (which were not necessarily areas with woodland in the modern sense, but designated areas which were subject to stringent Forest Law), once covered one third of England. Within two years of the issuing of the Magna Carta in 1215, the Forests had their own charter, the Carta de Foresta. Whilst Forest Law imposed heavy controls on the Barons, the rights of commoners were given strong recognition.

Manwood's Treatise on the Laws of the Forest, which was produced in Elizabethan times, emphasises that even the King must not prejudice rights of commoners. The Treatise reads:

*'Although the King by his prerogative Royal, may afforest the demesne woods and lands, pastures and waste soil of every man within the realm, wheresoever he will, yet by such afforestation of such woods and lands, pastures and waste*

*soil, the king doth not at any time thereby restrain, abridge or prejudice any man of his right or interest of common for such beasts as are commonable within the Forest, as it doth appear by the Carta de Foresta’.*

### **Commoners’ Courts**

Various Manorial Courts and Forest Courts of medieval times, from which many thousands of records survive, list many transgressions, and we should not assume that commons have ever, in their entire history, been stable or placid places. Examples of transgressions from court rolls of one site in the 1500s include:

*Pasturing in summer more beasts than tenements can sustain in winter.*

*Oppressing commons with hundreds more sheep than allowed.*

*15 cottages have been erected on the wastes in one year, and every of them claims common pasture.*

*The village is grieved because the inhabitants have put their cattle out before Holyrood Day.*

*The shepherds hath pulled down the Lord’s fence between the commons to let in their sheep, to the annoyance of the Lord.*

### **Common Messages**

Hitherto commoners have not integrated much from different commons across the country. By their very nature they tend to be insular. However it appears that a number of common messages are appearing from commoners ranging from Cumbria to Cornwall. These include such comments as:

- Hefts, once lost cannot be regained.
- Restocked animals are more vulnerable to disease.
- Hill farming is barely viable.
- Next generations are less willing to take on farms.
- There are anxieties about the loss of Hill Farming Allowance.
- Some areas are scrubbing over and bracken.
- Continued grazing is the solution to the provision of all public goods – wildlife, access, landscape and archaeology.
- We all need better listening, dialogue & understanding.

### **The North-South Divide**

We also need to recognise the major divide between commons to the north and west, and those to the south and east. The northern and western commons still form a significant part of agricultural economies, and are integral to farming enterprises. However, those closer to London often have few or no practising commoners, and suffer from neglect and undergrazing. Given current trends, it is essential that the pattern seen in the lowlands does not begin to march north.

### **Protecting Common Lands for the Future.**

Alongside proper recognition of the fact that commoners desire to manage their own affairs with minimal interference, we have to recognise that commoning may be barely viable at the moment and hence may need public

funding, and also that commons provide outstanding contributions to public interests:

- Commons provide 38% of all Access Land.
- 31% of them are within Areas of Outstanding Natural Beauty.
- 55% of common land is designated as Site of Special Scientific Interest. SSSI
- They have outstanding numbers of Scheduled Ancient Monuments amongst the unploughed soils.
- They feature significantly in local folklore, art and culture.

Continued commoning is the only realistic way of providing these public benefits in many circumstances – there is often no viable alternative.

### **Historical and Cultural Reflections - Conclusions.**

Commons are a mix of ancient and modern, a landscape of linkages, reaching back as old as England itself, and recognised concepts of shared land resources before that. Commoners were a powerful and recognised force, even in Norman times. Conflict is part of the very fabric of common land. And throughout their history, including today, commoners have protected their rights vigorously, seeking minimal interference, something we all need to remember. Commons have never quite been stable. However change has been evolutionary, not revolutionary, involving adapting and surviving, and these changes remain inter-woven into the landscape. Commons are a Landscape of Linkages and they remain very important for rural communities, wildlife, access, landscape, history.

Now and in the future, we need to consider:

- Is there prospect of a real decline of commoning? How can it be addressed?
- How can we best ensure the survival of the commons through the current century?
- How can we raise the profile of common land to ensure that it is properly recognised?

We all need to work together for a joint vision, to ensure that they can continue to provide public and community benefits in the current millennium, as they did in the last.

## **THE CHALLENGES FACING AN UPLAND COMMONERS**

***Harry Hutchinson***, *Upland commoner*  
*Federation of Cumbria Commoners*

requested



## **COMMUNITY COMMONS**

**Tim Breakwell, Project Officer**  
*Herefordshire Wildlife Trust*

## **Introduction** - How the Community Commons Project came about

The Rural Surveys Research Unit of the University of Wales, Aberystwyth produced “The Common Lands of Herefordshire – A Biological Survey” in September 2000. This report revealed that Herefordshire’s commons are islands of high biodiversity value within the county’s intensively farmed landscape. It was also apparent that changes in traditional forms of management, such as reductions in grazing levels were causing habitats to change from open grassland, to bracken dominated habitats and then through to scrub and woodland.

It became evident that many commons would benefit from some intervention management to allow commoners to continue exercising their grazing rights whilst at the same time maximising the biodiversity interest of the commons. Some community consultation events in 2000 –1 also showed just how highly local people valued the commons as places of solitude, beauty and fresh air.

The Community Commons Project was thus born aiming to maintain and enhance biodiversity, whilst protecting commoners’ rights and putting local peoples’ concerns and aspirations at the heart of the process. A short-list of commons was drawn up and after much debate was narrowed down to the 12 commons that would be included within the project.

The project is run by Herefordshire Nature Trust in partnership with Herefordshire Council and Natural England. 83% of the funding is provided by the Heritage Lottery Fund and the remainder comes from the project partners. The project has been divided into two very distinct phases.

### **Phase 1** – development phase

This started in January 2005 with the of producing 12 costed management plans (one for each common within the project) by June 2006. The process of producing these plans was to include full public consultation.

Ecological data supplied by Herefordshire Biological Records Centre was supplemented by surveys commissioned by the project. Groups surveyed included reptiles, butterflies and moths, spiders, lichens and fungi.

Once all of the information gained in this way was distilled into a draft management plan, a series of public meetings were held to further discuss and refine ideas. From this process emerged a set of management plans whose work plans had solid community support. A spin-off of this process was that two new commoners’ associations were formed in relation to three of the commons within the project.

These plans along with a full budget were submitted to the Heritage Lottery Fund (HLF) in May 2006. These were approved and HLF agreed to fund 83% of the costs of phase 2 of the project.

**Phase 2 – implementation phase**

This commenced in December 2006 and runs until the end of 2009. This second phase of the project is primarily concerned with the implementation of the work plans for each of the 12 commons within the project.

This revolves around practical work such as management tasks to help re-introduce grazing and tackle bracken domination. Training of volunteers has been another aspect to assist in the management tasks as well as the purchase of machinery to manage the bracken and scrub. The involvement of children from local primary schools is a crucial aspect for the project, this includes nest boxes and subsequent monitoring. The guided walks introduced in phase 1 continue as they have proved very popular and include training for species survey work.

The project is hoping to ensure that some of the commons will be managed through Higher Level Stewardship. This shows how important partnership working is for projects such as this, in our case this involves Herefordshire Nature Trust, Herefordshire Council, Natural England, The Heritage Lottery Fund, the Forestry Commission and the Farming and Wildlife Advisory Group. However, the real key to the project's success has been the coming together of commoners, local residents and wildlife specialists to work co-operatively together on a shared set of aims for the positive management of the 12 commons within the Community Commons Project.

For more information visit:

[http://www.wildlifetrust.org.uk/hereford/community\\_commons.htm](http://www.wildlifetrust.org.uk/hereford/community_commons.htm)

## **ISSUES FACING A LOWLAND COMMONER**

**Sue King**, *Lowland commoner*

*Minchinhampton and Rodborough Graziers Associations*

Sue King has two farms one at Whiteshill and the second one is Little Britain Farm, Woodchester. Little Britain Farm has grazing rights on both Minchinhampton and Rodborough commons. Both farms are run under an existing ESA agreement and they are predominantly traditional beef with Pedigree Longhorns and a commercial herd of native Sucklers put to a pedigree Aberdeen Angus Bull, the progeny of which is sold to Waitrose or has been marketed as Commons Beef in boxes; direct from Commons to Slaughter and retailed locally in 10-12kg boxes. This box scheme has had limited success and is ably run by Mark Dawkins the Hayward. The farms are totally organic though they cannot gain organic status as they graze the Common and the cattle mixes with other herds who are not necessarily from an organic holding.

Sue's family have grazed the beautiful Commons of Minchinhampton and Rodborough for about 100 years, Sue is a third generation Commoner, her Grandfather and Father being staunch annual graziers of both horses and cattle. Her nephew David is fourth generation and works along-side Sue on the farms and common. To say she is passionate about the common would be an understatement, it is a way of life, a tradition, the Kings of Little Britain have always been graziers, and she has never known anything else, Sue hopes she always will be, her two young daughters already help with the cattle. These cattle pace the fence when April/May comes, they can't wait to get out there and graze and in the autumn they come home. Sue's Grandfather used to refer to the commons as 'Brandy Land' because any animals turned out there in the spring came back in the autumn transformed and in some cases unrecognisable, due to the herbage on the mineral rich limestone grassland wide open spaces enabling them to graze somewhere 'fresh' everyday. In those earlier days of course, there were many more small organisations turning out a few head each, with even the local riding school in Amberley turning their horses out in the evening and getting them back first thing in the morning. Now there are far fewer graziers turning out larger numbers of cattle, Sue's family turned out 100 head this year with her fellow graziers turning out similar numbers so that the land can be grazed adequately.

Of course there have always been problems grazing the animals there; one of the major problems being road traffic accidents. The roads that cross the commons are very busy at all times of the day and night. A 40mph speed limit was brought in a few years ago, sadly this is not policed and the amount of accidents are still too numerous and the worst of these are hit and run. When an injured animal is discovered, sometimes fatally, they are always a constant worry. Of course insurance is also a big worry; the excess payable almost outweighs the value of the animal involved so farmers end up out of pocket.

There are many reasons why British agriculture is on a downer at the moment with BSE in the 1990's and foot and mouth in 2001 and then rearing its ugly head again this August; thankfully, this had no immediate repercussions for commoners except of course the price of Store Cattle etc has taken yet another tumble. T.B is a huge problem for Sue and at some point over the

past 10 years she recons that all graziers have been under restriction. When this happens, the holdings under restriction cannot graze the commons therefore miss out on both the grazing and any grants that may be available. Committees are trying to get permission and funding to install very much needed cattle grids as there still are some un-gridded lanes causing cattle straying every summer.

Over the last 10 years the commons have been run under the ESA, and this gave commoners' headage payments, this scheme has just finished and Sue is in the process of signing up for the HLS. She hopes this will give her a larger headage payment and enable her to get more grants for such things as those much needed cattle grids, scrub clearance and with the help of Jenny Phelps from the Cotswold Conservation Board Sue has got funds for electric fencing. She can now do some restricted grazing on some of the lower slopes and parts of the common that are in less favourable conditions. She also needs some basic machinery such as a topper to sort out some scrub and thistle problems. So there is a lot going on at present and times are indeed changing, Sue is hoping that they will change for the best and that the beautiful commons will be there for generations to come and will be appreciated for keeping it grazed, tidy and in a favourable condition.

# Summary of workshops

## **1. Commons Act 2006: how will it work?**

### **REGISTRATION: CONSULTATION ON PART 1 OF THE ACT – EMERGING ISSUES**

*Hugh Craddock, Defra*

#### **Issues discussed**

##### Declaration of entitlement to rights

The group agreed that declarations would be useful as it would mean that the registers would be up-to-date, but discussed whether the common land registers were the right place for them. It was stated that commoners would be too busy to make them unless it affected government grants. There were concerns over how declarations would be policed and it was suggested that rights could be extinguished or suspended until a declaration is made.

The discussion went on to fees where a minimal fee of £25 was suggested. Having a fee too high would deter people from making a declaration.

##### Copies of the register and ancillary documents

The group discussed if any papers should be withheld on data privacy grounds and it was agreed that bank statements/proof of ID and commercially sensitive documents should be withheld. It was also agreed that registration authorities should be able to charge the same as Land Registry for copies/official copies of the registers.

##### Applications under sections 5 to 15

##### *Publicity*

The group discussed how regulations should maximise awareness and it was suggested that regulations should specify the media to be used. Defra should look at the very prescriptive Commons Commissioners regulations for advertising and use this as a benchmark / comparative.

It was suggested that a pilot study / survey should be carried out to ask CROs which media generate the most feedback currently.

The discussions went on further to discuss the need to prescribe advertising in local newspapers (as oppose to prescribing advertising in suitable local print media). It was felt that newspapers are the most costly form of advertising and probably a dying source of information locally. Other alternatives could be parish magazines, local / district council newsletters (where they exist) and direct mailing to people most affected e.g. those overlooking a possible TVG.

All agreed that digital media should be prescribed (web sites, email to commoners and other stakeholders), parish councillors should be informed and asked to raise at meetings, on parish noticeboards, at Neighbourhood Forums and other community group networks; advertising on site, notices in libraries, local shops etc

##### *Fees*

The group talked about fees for applications. They discussed the fact that there is currently no charge for TVG applications and that the CRA bears the

costs. CROs believe the process is for the public benefit and therefore should remain free.

Concerns were expressed about the fact that landowners being the only ones picking up costs of defending applications at present and that this caused some unfair situations to develop.

The group discussed that communities are generally very apprehensive about entering a process that could involve legal costs. Whatever happens the cost implications, and, if possible, actual costs need to be specified to the community before they enter the application process.

The length of time, personal costs and effort and stages of the application process need to be made explicit at the outset – and independent help / advice should be available (i.e. not CRO) at the form filling in stage to facilitate better quality applications thus speeding up the process (and saving time and effort for CROs) without compromising the CROs neutrality.

#### 3.4 Registration of Apportionment

There were discussions about the registration of apportionment. It was agreed that it should be possible to register apportionment voluntarily and that a fee similar to the Land Registry should be charged.

#### 3.5 Early implementation of Schedule 2 deregistration

It was agreed that provisions to deregister land should be implemented ASAP.

#### 3.6 Electronic Registers

It was agreed that appropriate steps should be taken by registration authorities to consult on draft electronic maps. It was agreed that people should not try and re-invent the wheel, but to use existing resources such as CROW maps which need refining.



## **PROTECTION OF COMMON LAND**

### ***Elaine Kendall, Defra***

The workshop included a Power Point presentation (Annex 1) followed by questions and answers.

**Question 1:** Does the National Trust need consent to erect bollards to prevent unlawful parking?

*Answer: Defra explained the provisions of s23 of the National Trust Act. Guidance sheet 2a refers.*

**Question 2:** Will the new consenting regimes be the same in Wales?

*Answer: Possibly, but Wales may choose to do things differently. Defra is aware that the s194 process in Wales varies slightly from that in England, so s38 and s16 processes may also vary.*

**Question 3:** Exemption provisions: to allow 1 tree to be planted on a common without consent could lead to wider abuse. If a row of trees were planted (using a succession of single-tree exemptions), they would grow into a hedge which could impede access. If no-one enforces the exemption provisions, it could encourage abuse.

*Answer: The planting of trees on commons has always been a grey area (are they 'works?'), and this is still the case. The exemptions from s38 consent do not mean that those actions are exempt from the requirement for any other necessary consents (eg SSSIs retain their own protections). Defra's intention was to issue cautious guidance on exempt works, and to review the situation if case law developed. Defra will look again at guidance on this to attempt to make it clear that nothing should be planted that will create a continuous impediment either now or after a period of growth.*

**Question 4:** Exemption provisions: can a claimed exemption be appealed against by someone who thinks the exemption does not apply, or is abusing the exemption provisions?

*Answer: No there is not an appeal process. Defra's intention was to identify those works which would have always gained consent if it had been applied for, saving time and expense for both parties. If someone believed that works required consent, but had been constructed without it, they can take enforcement action.*

**Question 5:** Would Defra reject a declaration for an exemption if it appeared to exceed the criteria in the exemption order?

*Answer: No. The declaration will be posted on site and if it is believed that the works are not the usual route for enforcement action can be taken.*

**Question 6:** What if local legislation allows certain works on commons – would s38 consent still be required?

*Answer: If local or national legislation specifically allowed such works on common land, then s38 consent would not be required (see s38(6)). Not to be confused with local legislation that allows expenditure on certain types of works.*

**Question 7:** Are cattle grids exempt from the need for s38 consent?

*Answer: The Highways Act 1980 allows the installation of cattle grids and bypasses in highways (see Guidance Sheet 10), so they would be exempt under s38(6). But the proposer would need to check the 1980 Act to see what associated works are included within its terms. Any incursion of works onto the common that go beyond the terms of the 1980 Act would need consent.*

**Question 8:** Will the new procedures speed up the application process?

*Answer: Probably not by much, although clear guidance should significantly reduce the amount of pre-application correspondence needed, and ensure that applications are made more often under the correct provisions. The guidance will also encourage applicants to build consensus around their proposals, which in turn will assist of the decision-making process.*

**Question 9:** Does Defra take action against existing works on commons which have been constructed without the necessary consent?

*Answer: No. Defra widened the enforcement provisions to allow “any person” to take action, but Defra itself does not become involved in local enforcement matters.*

**Question 10:** What about works constructed before 1/10/07 without the necessary s194 consent – can the person responsible apply for (retrospective) consent under s38?

*Answer: It will not be possible to apply after 1st October 2007 for retrospective consent for works constructed before that date. Such works do not require section 38 consent, because section 38 was not in force when they were carried out. And the transitional provisions in the commencement order only allow existing section 194 consent applications to continue, they don't allow new section 194 applications to be made.*

## **GOOD MANAGEMENT AND COMMONS COUNCILS**

***Marian Jenner, Defra***

### **Good management of Commons**

In this workshop examples of existing management arrangements on commons were provided to encourage discussion on the issues affecting good management and the various ways it can be achieved. This included brief presentations from Mervyn Edwards, Natural England (a background to commons management structures with examples), Julia Aglionby, H & H Bowe Ltd. (achieving an agri-environment agreement on Buttermere commons); and Kath Daly, Conservation Officer from the Chilterns Conservation Board (Chiltern Commons Network).

It was noted that management of agriculturally-active commons had changed since the introduction of agri-environment schemes in the 1980s. These schemes had led to management arrangements (often facilitated by land agents) covering broader issues than previously, such as stocking rates and animal husbandry. The example of the Chilterns AONB commons network – where the commons provided a significant resource for wildlife and amenity value rather than for agriculture – suggested that management arrangements for non-agricultural commons were also important. It was generally agreed that some form of management was important on most commons, and that they fulfilled various objectives (e.g. a social role, animal husbandry, encouraging suitable management and supporting land managers).

This followed onto some discussion on the effectiveness of both informal and formal management arrangements, and their enforcement powers. The ineffectiveness of fines set through constitutions (with no legal standing) in the past was noted, and withholding of agri-environment payments was seen as the only remaining option on some commons.

The lack of incentives to work together on agriculturally-active commons to carry out the necessary practical management was discussed, as were difficulties between active and non-active graziers. This was becoming more acute as grazing levels declined on many agricultural commons and would not be resolved through cross compliance and other requirements. On the other hand, it was felt that the informal management arrangements on non-agricultural commons in the South and East were working as well as could be expected.

### **Commons Councils**

This workshop explored in more detail some of the key issues that affect the establishment and operation of statutory commons councils. The outcomes of this workshop would inform Defra's consultation of Part 2 of the Commons Act 2006 on commons councils.

Workshop members were asked to consider the benefits and disadvantages associated with setting up a commons council as opposed to a voluntary

association, and subsequently determine where a commons council might work.

The key advantages identified by workshop members with the formation of a statutory commons council included the establishment of accountability and transparency mechanisms. The process of creating a statutory commons council would in itself enable closer working from the outset; therefore allowing for an environment of open dialogue through a formal process. It was felt there would be easier enforcement of rules on a common due to the legally binding powers – and particularly for larger councils formed at a higher level where enforcement would not be carried out by neighbours. The power to purchase severed rights was also seen by some as an advantage to help to better manage a common to deliver environmental and public benefits. Many attendees felt the management of commons could be future proofed with the creation of a statutory commons council.

The disadvantages identified by workshop members included a concern regarding the dominance of non-active graziers on a common and how they could affect the establishment and subsequent running of a statutory commons council. Workshop members were reminded that the Commons Act 2006 allows the Secretary of State to take greater regard of the views of active commoners. However, this could be an issue for non-agricultural commons where conservation groups wish to improve management of a particular common.

Other key points arising from the discussion were as follows:

- Careful consideration would be given to recognising whether substantial support existed for the establishment of a commons council.
- Natural England would play a key role. However, the specific role of Natural England in the management of a common needs to be explored in the public consultation of statutory commons council.
- The benefits of establishing a statutory commons council needs to be clearly articulated in Defra's public consultation paper on this.
- The management tools available under a commons council need to ensure that a land manager can be profitable.
- Commons councils need to be flexible and the standard constitution should not be too prescriptive to help address specific circumstances at the local level.

## **OSS CASE STUDY OF GREEN REGISTRATION**

***Nicola Hodgson and Tim Budd, OSS***

### ***Introduction***

In September 2000 High Peak Borough Council (HPBC) published an amendment to its local plan for Buxton. This changed the means of access to a proposed new development of 330 houses, from a signal-controlled junction to a roundabout. The roundabout would be 60 metres across and sited in the middle of Fairfield Common, much-loved open land on the edge of Buxton. Part of the land was owned and mown by HPBC whilst part was leased to a local Golf Club (although crucially it did not form part of the golf course).

For those in favour of the development, this change was to be pushed through as 'a matter of detail'. But the impact on the open space was more than local people could tolerate. The roundabout was the catalyst for strenuous objections to the entire development.

### **Opposition**

When, despite strong local opposition, the development received planning permission, that seemed to be the end of the matter. However, nearby Hogshaw Wood had recently been protected from development by registration as a town green, a success which prompted me to make a similar application for Fairfield Common.

I applied in December 2000, ignorant of the law of greens and the amount of time and effort which would be required to complete the process. In many ways I was a typical Applicant – maps were poorly scaled, inaccurate and badly drawn, proposed a neighbourhood which included half of several houses. Fortunately, the OSS was able to help me. My first indication of the complexities came a couple of months later, when I received copies of “the Pack” - objections from four bodies, including HPBC and two firms of developers. These objections ran to over 150 pages and were written in that arcane form of English used by solicitors.

Once I was over the initial shock, two things occurred to me. First, if it was necessary for the objectors to work so hard to fight their corner I might well have a case. That gave me the motivation to go through the documents carefully, and to discover that a large percentage of their content was nonsense.

### **Tactic**

I have subsequently learned that throwing a large volume of paperwork at applicants, in the hope that it will deter them from pursuing their applications, is a common tactic among developers. For anybody here who might be tempted – it doesn't work any more because you are dealing with a more intelligent market – applicants do talk to each other and you are unlikely to be the first Objector to succeed with the “Dog walking isn't an LSP” line.

The second point which struck me was that, although the objectors knew a great deal about the ownership of the land (which had been common but was not registered under the 1965 Commons Registration Act, and which had been subsequently acquired by the council from the Public Trustee), they knew little about its day-to-day use.

There was much discussion in their evidence about whether people 'would' use the land to play games, or could 'reasonably be expected' to fly kites there and so forth. As the front of my house looked over the application site, I knew what it was used for, and that several of the objections relating to use were founded on ignorance. I rebutted the objections.

Derbyshire County Council, the registration authority, then sought external legal advice and turned to barrister Philip Petchey, a well-known name in this field. He drew the conclusion, based on the objectors' (albeit inconsistent) evidence, that the application should be rejected without holding an inquiry. However he allowed me to respond to his conclusions.

After two further rounds of representations, and almost a year, he acknowledged that the case in favour of registration was strong enough to justify a non-statutory inquiry and advised the registration authority accordingly. At this point the objectors contested his continued involvement because he was a member of the Ramblers' Association and they considered he might therefore be unable to make an unbiased judgment.

### **Expert**

In his stead, the registration authority invited Charles Mynors, another expert in this area, to conduct a public inquiry. This was held over four days in January 2003. I called 16 witnesses in support of my case: there was no time to hear the evidence of a further 33. The objectors produced seven witnesses including the borough solicitor, the head of planning and the director of environmental services. All were robustly cross-examined.

A preliminary judgment was issued in May 2003 which recommended rejection of my application.

The main grounds were that

- the inclusion of the A6 was an "egregious error" (Spring Common)
- local use deferred to permitted use for the land not leased to the Golf Club (an annual fair and an occasional circus was allowed on part of the relevant land) whilst
- the land leased to the Golf Club was materially different from the land the subject of the Application and I could not therefore rely on the Staffordshire judgment to see me home.

However Mr Mynors felt that the judgment in *R v City of Sunderland ex parte Beresford* [2003] UKHL 60 (OS, spring 04 p2), and the other outstanding cases at that time, might be material and he recommended that the

registration authority await the Beresford result and schedule a further hearing before determining the application.

After the excellent result in Beresford, I was hopeful of at least partial success when the further hearing took place over two days in March 2004. This confidence was finally vindicated when, although the land not leased to the Golf Club was not registered, the Inspector set aside his provisional rulings regarding the inclusion of the A6 and reversed his view on material similarity (based on the lightman judgement). Thus three acres of the common were registered as a green on 27 September 2004, exactly four years after the first exchanges.

HPBC is challenging the decision in the High Court. Their grounds were various alleged errors of law and one of fact. Their section 14 Application named DCC and T Budd as defendants – scared me to the extent that I agreed not to participate provided no claim of costs was made against me.

Derbyshire CC chose not to defend the facts but defended the legal aspects. The only witness evidence was two statements by the inspector and a written statement by an ex-employee of the Golf Club which essentially regurgitated the case the Inspector had found wanting at the Inquiries. (None of the Inquiry evidence was adduced before the judge). On the basis that he had only this new and unchallenged evidence in front of him the Judge decided the case in favour of the Objectors and the registration was overturned last April.

A new Application was made under the 2006 Commons Act on May 1 which I am confident will succeed.

I would summarise the process after 7 years or experience as follows:

- Demanding (Good)
  - Prove all the ingredients
  - Objectors have a commercial interest
  
- Demanding (bad)
  - Protracted process
  - Maintaining momentum is difficult (move away, deaths, inevitability – council presentations & spin)
  - Opportunity to be sandbagged by court proceedings
  
- Intimidating
  - Nature of communications
  - Objectors tactics
    - Press
    - Abuse
    - Court action

- Inquiry process

My main suggestions to improve the process would be:

- Triage more effectively
- Develop local expertise and confidence
- Make decisions locally

Despite issues, I am confident that the green registration will prevail and will allow local people to continue to enjoy Fairfield Common as they have done without interruption since 1776.

Annex 3 and 4 contain the summary sheets used in the session, amended to incorporate the discussion.



## **2. Case studies of positive management and protection**

### **HEREFORDSHIRE COMMUNITY COMMONS PROJECTS**

*Tim Breakwell, Project Officer  
Herefordshire Wildlife Trust*

#### **Introduction**

The aim of the project is to help local communities increase their understanding and appreciation of commons and to plan and take practical action to protect, conserve and celebrate them. The project will target 12 commons in Herefordshire for community involvement leading to the production of 12 management plans. The communities around the 12 commons will then be helped to directly implement management regimes. The project will also support the employment of two members of staff for facilitation of community groups, to lead conservation work and manage the project. The project funding will also be used to purchase tools for conservation groups, conservation equipment necessary to establish local machinery rings, interpretative material, access way markers and training.

The Community Commons Project was thus born aiming to maintain and enhance biodiversity, whilst protecting commoners' rights and putting local peoples' concerns and aspirations at the heart of the process. A short-list of commons was drawn up and after much debate was narrowed down to the 12 commons that would be included within the project.

#### **Phase 1 – development**

On many of the commons within the project the best way of starting community consultation was found to be simply knocking on people's doors. We would introduce ourselves and the project and ask for peoples views about the common and its current and potential future management. This was followed up by postal questionnaires.

Once all of the information gained in this way was distilled into a draft management plan, a series of public meetings were held to further discuss and refine ideas. From this process emerged a set of management plans whose work plans had solid community support. A spin-off of this process was that two new commoners' associations were formed in relation to three of the commons within the project.

#### **Phase 2 – implementation**

The three-years of funding under Phase 2 will help local communities to implement their action plans. This phase of the project could for example pay for a machinery ring to harvest bracken and training for the local community to use this equipment. Wildlife interpretation, remedying access difficulties, or reinstating sufficient grazing levels on the commons are other possible actions that may come out of the project.

Ewyas Harold common was one of the first commons where practical works were commenced. This common is of national importance for the pearl-bordered fritillary butterfly and is also of importance for reptiles. During the previous summer a series of site visits had taken place involving commoners, local residents and wildlife specialists. This resulted in the production of a zoned plan. This included a central non-intervention area for reptiles, a series of compartments that would be managed to maintain and increase numbers of pearl-bordered fritillaries and areas of the common where bracken and other vegetation would be managed to benefit grazing and also to comply with the Entry Level Stewardship agri-environmental scheme.

In January 2007 the project paid for four volunteers to be trained in the use of chainsaws and some trees were cut back that were encroaching on areas of prime importance for the pearl-bordered fritillary. "Tram-lines" were also cut through some of the bracken areas to further diversify the habitat for this species. In June a series of timed counts of numbers of pearl-bordered fritillaries was made along with a survey of the condition of the habitat. This will be repeated next year.

We have worked with children from Clifford Primary School to make a set of nest-boxes which have been installed on Merbach Hill common. A local volunteer has been trained to monitor the species of birds using these boxes and their nesting success.

Also on this common we have had a series of volunteer work parties opening up and widening the network of paths on the common which had been badly neglected.

In the spring, Nigel Hand, the county recorder for reptiles did a whole series of guided walks on different commons looking for reptiles. These were well attended and resulted in a new record for adders at one common.

At Badley Wood common local people will be trained to survey for dormice and we also hope to confirm whether dormice are present on a further two commons.

Climbing Jack common, which is in the north of Herefordshire towards Ludlow, is totally surrounded by land belonging to the Forestry Commission. In April, the project paid for a training day in reptile monitoring and ecology for Forestry Commission staff, which was very well attended.

On most of the commons in the project encroaching bracken has become an increasing problem in recent years. The project has, therefore, purchased several sets of bracken bruisers. Each set consists of three metal rollers which are towed behind a tractor. They run over the bracken, bending it over. This damages the stems and the bracken continues to "bleed" through these damaged parts, weakening the plant.

Bracken has been bruised on three commons over the summer and a further common has had areas of bracken cut. We intend to follow this up next year with more extensive bracken bruising and cutting.

The project is in the process of purchasing two heavy duty scrub-cutters. These will be primarily used for cutting gorse where this species is becoming invasive. The objective for managing both bracken and gorse is to open up more grassland for grazing and as a wildlife habitat whilst at the same time retaining uncut areas so that the optimal mosaic of habitats for wildlife is maintained.

In June, applications for Higher Level Stewardship were submitted for Garway Hill and Hergest Ridge commons. The current indications from Natural England are that both applications have been successful and both schemes should start in late 2007. This will mean that funding will be available for the effective management of both commons for a ten year period, which is excellent news in terms of ensuring the sustainable management of the commons in the long-term.

It has not all been hard work! In August we helped organise and fund a barbecue for everyone involved with Garway Hill common with burgers, real ale and singing!

Future plans include re-instating fencing so that livestock can graze on commons where this has not happened for several years, restoring ponds and further biodiversity projects to enhance habitat for species such as adders and great crested newts.

For the project to achieve so much in a relatively short time has involved effective partnership working between agencies such as Herefordshire Nature Trust, Herefordshire Council, Natural England, The Heritage Lottery Fund, the Forestry Commission and the Farming and Wildlife Advisory Group. However, the real key to the project's success has been the coming together of commoners, local residents and wildlife specialists to work co-operatively together on a shared set of aims for the positive management of the 12 commons within the Community Commons Project.

## **PICTURING THE UPLANDS – THE NEED FOR JOINED UP THINKING**

***Martin Varley, Flora for the Fells Project***

To come.

## **RURAL GREENS PROJECT – BUILDING MANAGEMENT CAPACITY ON LOCAL SPACES**

*Jo Chaffer, Project Officer Rural Greens Project  
Friends of the Lake District*

### **Overview**

Managing local green spaces: how TVG & CL laws are understood and used by green space managers in practice, the common problems faced by green space managers (and some solutions).

### **Introduction to the project**

Rural Greens – a project running from January 2007 until March 2008. Supported by Defra's RSCP & FLD (CALC, VAC, CCC provide officer time and guidance). It's about helping communities in Cumbria better care for their green spaces (capacity building in official speak).

### **Green spaces – what do we mean?**

Places in or on the edges of your towns and villages that local people (and others) can use (sport, recreation, dog walking, relaxing, community events and get-togethers) or just enjoy (nice to look at / balance of buildings and green space gives character). This would include village green, riverbanks, wide green verges, recreation areas (not formal parks or sports fields) – places that are primarily for communal (not private or business) use.

### **Why bother?**

Parish Plans, previous work in Open Spaces, Green Places (OSGP) project planning year shows lots of people's quality of life and community is affected in some way by the quality and use of the communal areas. People report many problems and also ideas.

### **What does the project do to help?**

- Information, advice and guidance (IAG) – on everything from funding, insurance, legal issues, getting people together, mediating, practical work tips, ecological assessments ...
- Publications – general management guide, a legal guide, managing for wildlife, a newsletter, a fund raising guide, and guide to registering ownership of land (see the FLD web site for download copies). We're also developing case studies (of communities who've had help from FLD's Environmental Improvement Grants (EIG), from the Rural Greens project, from OSGP etc)
- Access to funding – EIG, Community Initiatives, Lottery etc
- Casework – direct ongoing support for individual communities
- Training sessions – four in the summer on TVG and other laws; four in autumn on problem solving; one-off workshops on specialist topics including encroachment on TVGs
- Working with OSS, CALC and LRO to encourage Parish Councils to register green spaces they own with LRO; with Defra on interpretation

of new Act; with LAs on planning and development issues related to green space

### **Workshop discussions**

In general Parish Councillors tend to be responsible for their communities' village greens etc and are also on the front line of dealing with problems etc. However because they are PCs they have limited access to funding beyond the precept, limited legal understanding and, as a local authority body, may be viewed as 'them' rather than 'us' by people locally.

The project worked with images of greens from Cumbria to understand those that might be managed by Parish Councils, that might be TVGs or that might have issues associated with them. This was to get a grasp of the sorts of issues facing green space managers. The group discussed the range of laws that govern open spaces and how useful or otherwise they are in reality.

Working in small groups we then looked at how TVG law translates into practicalities: what we can or can't do on a village green. This activity threw up many issues, which we developed using case studies and examples from the project and participants own experiences. Finally we worked through some typical scenarios relating to green spaces including development on green space and adversarial TVG application from the developer's point of view; land exchange on a TVG; dog fouling and littering from the Parish Councils position and encroachment (a driveway).

For more information on any of the above please contact Jo Chaffer, Rural Greens via [jo-chaffer@fld.org.uk](mailto:jo-chaffer@fld.org.uk) or on 01539 720788.

## SUMMARY OF FIELD TRIP AROUND STROUD COMMONS

*Jenny Phelps, Project Officer  
Cotswold Conservation Board*

The aim of the field trip for the National Seminar was to demonstrate delivering sustainable management of common land through structured, supported local delivery and partnership working. The Cotswolds Conservation Board has been working in partnership for 4 years toward the sustainable management of the commons<sup>1</sup>. The Cotswolds Conservation Board's Caring for the Cotswolds Grasslands Project took the delegates to 5 commons around the Painswick area and met with farmers, commoners and local enthusiasts who demonstrated their interest and dedication to being part of the management of the commons.

The visitors could see clearly from the view point of Painswick Beacon how the small fragmented areas of common land were situated in the landscape of the Cotswolds Area of Outstanding Natural Beauty. It was shown how besides their contribution to public enjoyment, these commons were key to the survival of species associated with the limestone grassland priority habitat. It was demonstrated how restoring them and targeting adjacent land for arable reversion through agri – environment schemes could contribute to the delivery of Nature Map.

At Cud Hill common, one of the small commons seen from Painswick Beacon, delegates saw how the project, working closely with the community and Natural England, had linked the commons to adjacent farmland for ease of management. How together, (eventually!) cattle grids, associated fencing and water supplies had been successfully implemented. This infra structure enables local farmers/commoners to easily manage the commons and seasonally adjust grazing levels by opening and shutting a gate.

At Huddinknoll Common, the visitors saw how the same process had been followed, including the restoration of a mile of historic iron railings that had been re-forged by local craftsmen.

At Rudge Hill (Edge Common National Nature Reserve) the delegates met with commoner Paul Griffiths who is now helping Natural England deliver the grazing and cutting on the common of this important SSSI. Paul Griffiths demonstrated his detailed knowledge and understanding of the common and how important it is to him to be a part of the protection of the land he loves.

At Juniper Hill common, delegates met Joy Elworthy who has monitored the decline of butterfly species for nearly 30 years. Now, connected to 20ha of

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<sup>1</sup> A case study fact sheet which outlines the project outcomes is available as a pdf at <http://www.cotswoldsaonb.org.uk/files/uploads/CaseStudiesFactSheet.pdf>. The Project identified that it was necessary to have a strategic approach to partnership working and community delivery and as a result the Cotswold Limestone Grassland Strategy was produced, supported by English Nature and The National Trust. The Strategy can be downloaded at <http://www.cotswoldsaonb.org.uk/files/uploads/GrasslandStrategyFinal.pdf>

arable reversion, linking SSSIs at landscape scale, the common can be easily grazed locally by the now friendly farming community, who feel valued and integral to its protection.

These sites, together with other commons encompassed in the project, like Minchinhampton and Rodborough Commons, show how government targets for common land can be sustainably and harmoniously delivered with the local community. This is done by valuing the cultural association of people with the places they love, and integrating their knowledge of the historic management as an essential part of delivering the protection of common land.

Caption for picture:

David Allott from Painswick Beacon conservation group with delegates from the conference (Picture)

Caption for picture

Bunny Burcombe telling his story of how he remembers grazing Huddinknoll common 78 years ago. (Picture)



## CONCLUDING COMMENTS

**Ross Crail**, Barrister  
*New Square Chambers*

I began the day by saying that we all had a lot to learn from one another, and I hope that we will all be leaving having learned something. I'd be surprised if that wasn't the case, given the breadth of issues addressed and the range of speakers and workshop presenters participating in today's proceedings. Sadly, the unavoidable time constraints have prevented us from going as deeply into the issues as we would no doubt like.

But obviously there will be a further opportunity tomorrow to discuss some of the matters raised, and debate will continue on all the issues outside the parameters of this seminar. As you've heard, there are many points on which Defra's mind is still open. Take the opportunity to make your views known while you have the chance.

The main lesson I have learned is that the challenges and difficulties facing commoners are greater than I had realised. In making my opening remarks, I was taking as read the importance and value of protecting and preserving commons which are still used by commoners as working commons (if I may call them that). It seemed to me so obvious as to go without saying. But I should have said it anyway, and I say it now.

Thank you, ladies and gentlemen.

## Annex 1

### COMMON LAND GUIDANCE SHEET 1a: CONSENT TO CONSTRUCT WORKS ON COMMON LAND

#### Do I need consent?

Under section 38 of the Commons Act 2006, you need our consent to carry out any restricted works on **land registered as common land** under the Commons Registration Act 1965.

Section 38 also applies to land that is not registered as common land which is regulated by a Provisional Order Confirmation Act under the Commons Act 1876, or which is subject to a scheme of management under the Metropolitan Commons Act 1866 or Commons Act 1899. Section 38 does not generally apply to registered town or village greens (see **Guidance Sheet 2b** for more information on town or village greens), but it may occasionally do so if a green is subject to a scheme or Act. Section 38 may also apply in certain circumstances to unregistered land in the New Forest which is subject to rights of common.

Restricted works are any that prevent or impede access to or over the land. They include fencing, buildings, structures, ditches, trenches, embankments and other works, where the effect of those works is to prevent or impede access. They also include, in every case, new solid surfaces, such as for a new car park or access road.

The National Trust commons are covered by different law to section 38 commons. If you are proposing to construct works on a National Trust common, read **Guidance Sheet 2a** (instead of this one).

For guidance on applications under Articles 12 or 17 of the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967, read **Guidance Sheet 2b**, alongside pages 3 to 8 of this note.

#### How do I know that making a section 38 application is the best way forward?

If you are considering works, they will fall into one of four categories:

**A.** Works not covered by section 38, eg which facilitate rather than impede access, or are on such a small scale as not to impede access (see **Guidance Sheet 1b**). Some management measures which may be taken on commons, such as cutting or burning vegetation, are not considered to constitute works at all, and therefore do not need consent.

**B.** Works listed in the Exemptions Order which defines a small number of categories of works where consent is not required on registered common land (see **Guidance Sheet 1c**).

**C.** Works (not covered by A or B above) which are for the management, improvement or protection of the common or are otherwise consistent with the traditional uses of the common (e.g. grazing, public recreation), for which a section 38 application may be appropriate (see **Annex A** of this Guidance Sheet).

**D.** Works that are not consistent with the traditional use of the common, or for its management, improvement or protection, for which a deregistration and exchange application under section 16 of the Commons Act 2006 may be more appropriate (see **Annex A**).

The process to be followed if you are considering carrying out works on a common is summarised in the flowchart at Annex B.

### **What steps should I take before applying?**

You should carry out extensive informal consultation **before** submitting an application. This will help you to identify any differences and find early solutions. Good communication at this stage is vital if you are to maximise the possibility of developing a proposal with a high degree of consensus among interested parties. The greater the consensus that you can achieve before submitting your application, the smoother the processing of your application is likely to be.

Among those you should consider consulting informally are those who you will later need to consult formally if you decide to apply:

- the owners of the land
- the commons council or association (if there is one)
- all active commoners
- others with a legal interest eg tenants, those with easements, other rights or covenants over the land
- any parish, district, city or county council
- Natural England
- English Heritage
- National Park Authority (if the proposal is in a National Park)
- AONB Conservation Board or Joint Advisory Committee (if the proposal is in an AONB)
- Open Spaces Society

Others you may want to involve at this stage include: all known commoners, whether using their rights actively or not, Wildlife Trusts, Local Access Fora, Council for the Protection of Rural England, Ramblers' Association, local amenity societies, and any individual inhabitants who you believe will be directly affected by the proposed works.

You should follow the principles set out in the multi-agency document: “A Common Purpose: A guide to agreeing management on common land,” available from: <http://naturalengland.twoten.com/naturalenglandshop/docs/CP1.pdf> This guidance is particularly helpful if you are considering management options for a common, but the principles put forward can also be proportionately applied to other kinds of application. These include:

- Open, inclusive communication;
- Stakeholder identification and engagement;
- Identification, and full consideration, of options;
- Early planning, research and information gathering.

This process will help you to decide:

- Are the fencing or works necessary? Are they desirable?
- If yes to either of these questions, what kind of fencing/works are needed/desirable? Are there better alternatives available?

Identify clearly **at this stage** what your aims are, and give full consideration to all possible options for achieving them, **before** developing a formal proposal. Recognise and consider the aims and perspectives of other stakeholders in the common as a central part of this process.

If you conclude that the proposed works are:

- (a) for the management, improvement or protection of the common or otherwise consistent with its traditional uses (eg grazing, public recreation), and
- (b) not exempt or so small as to fall outside the controls altogether,

then apply under section 38.

#### *Section 16 – Deregistration and exchange of common land*

If the proposed works would not, on balance, meet the criteria specified in the above paragraph (eg, where the proposal is to extend a shop or private garden), then it is unlikely that consent would be given under section 38. In such cases, it would be more appropriate to apply instead under section 16 of the Act, and to offer land in exchange for the area required for the works (see “Notes on completing an application to deregister and/or exchange common land or town or village greens” and **Annex A** of this Guidance Sheet for further guidance).

An application under section 16 would also be appropriate in situations where works were not anticipated, but an owner nevertheless required the removal of common land status.

#### *Environmental Impact Assessment (EIA)*

You may need to ask Natural England whether an Environmental Impact Assessment (EIA) is appropriate or necessary to assess the likely

environmental effects of the proposed works on the common and surrounding area. Further information on EIAs can be found at: <http://www.defra.gov.uk/farm/environment/land-use/eia/index.htm>. If your project is above prescribed thresholds, you will need to make a screening application to Natural England **at a very early stage** in the development of your proposals.

### **If I apply under section 38, is my application likely to succeed?**

Our decision will be based on the merits of your proposal, and will balance all the interests in the common, taking account of all views expressed. The criteria we will have regard to are set out in section 39 of the Act (see **Annex E** of *Notes on completing an application for consent to construct works on common land* for full text of sections 38 and 39). These are:

- (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
- (b) the interests of the neighbourhood;
- (c) the public interest, which includes the public interest in:
  - nature conservation
  - the conservation of the landscape
  - the protection of public rights of access to any area of land, and
  - the protection of archaeological remains and features of historic interest;
- (d) any other matter considered relevant.

We will view these criteria in the light of our policy objective of managing, improving or protecting the common, of maintaining its traditional uses, and of ensuring that the overall stock of common land is not diminished. This enables us to safeguard the diversity, variety, and overall extent, of common land. You will therefore need to demonstrate, with regard to the section 39 criteria, how the proposed works address those considerations.

The information you provide with your application should be as full as possible, particularly with regard to the various interests in the land. As well as providing sufficient facts (eg, the nature of the proposal and the extent to which common rights are used), you should develop your argument as to why you consider your proposal to be justified.

### **How do I make an application, and what will happen to it?**

#### *Steps for you to take*

- Prepare your application, referring to “*Notes on completing an application for consent to construct works on common land*” and send it to us, on or just before the date on which you advertise it. You must advertise it within 7 days of making your application.
- Advertise your proposal at the main entry points to the common (or in another conspicuous place) and in the main local newspaper, and send a copy to key stakeholders (see list at Section J of Application Form).

- Allow a minimum of 28 days, from full compliance with the advertising requirements, for people to write to us with their views.

### *Responses, and determining your application*

- We will acknowledge receipt of your application as soon as practicable.
- Anyone will be entitled to comment on your application.
- We will manage an exchange of correspondence between you and respondents and ask you to address any objections.
- The exchange will normally conclude no later than the point at which respondents have written to us for a second time, reacting to initial comments from you, and we have your comments on those letters.
- We will inform you as soon as possible whether we can decide your application based solely on the written evidence or whether an inquiry, hearing or site visit is needed.
- All applications are subject to the same rigorous examination, whichever process is followed in determining them.

Where there are no (or few) objections, and the issues are relatively straightforward, an early decision is likely to be possible. You will be informed of the decision in writing.

Where more evidence is needed, we may proceed by one of the following options, depending on the particular circumstances of the case:

- site visit – where outstanding queries are resolved by a visit to the area by a planning inspector, who will invite you and may invite objectors to attend;
- hearing – where the outstanding issues can be resolved within one day by an informal meeting of interested parties, facilitated by an inspector;
- public inquiry – where the issues are complex or finely balanced, contentious or raise issues that have wider than local significance. This is a meeting, open to the public and facilitated by an inspector, normally lasting between 1 and 2 days.

In each of the above cases, all the evidence will be considered and a decision made in writing.

If consent is given, we will attach your own plan to the decision letter. We will send copies of the letter to all interested parties.

### **How long will all this take?**

The length of time your application will take will depend on the nature and extent of the works, the quality of the information you provide, the number of letters received, and the procedure followed (exchange of letters, public inquiry, hearing or site visit).

Whilst the exchange of correspondence is likely to end after the second round, we may cut this short if, for example, the objections are withdrawn or, in a more complex case, it becomes clear early on that an inquiry or hearing will be needed. Conversely, we may extend the exchange of letters, where this would be useful in clarifying any outstanding points.

As a guide, if there are no objections, and the issues can be resolved by correspondence, we would expect to determine your application within three months of receiving the complete application papers from you. This might extend to five months if an exchange of correspondence is needed, seven months for cases involving a site visit, or eight months for a public inquiry or hearing. More complex inquiry cases, or cases where an inquiry is held alongside a related inquiry (eg into a planning application) may take much longer.

### **What happens if I make a mistake with my application?**

Your application should be complete in all respects when you submit it (see checklist at end of Application Form). If it is incomplete, incorrect, or some aspects of it are unclear, we will write to you for the missing information. If a lot of essential information is missing, we will send the papers back to you and ask you to return them only when the application is complete.

We cannot promise to make any progress on your application until all the required information is received, including your letter confirming that you have met the advertising requirements (see **Annex D** of *Notes on completing an application for consent to construct works on common land*). Whilst we will process a partial application as far as possible, any omissions will almost certainly lead to delays in the process.

### **What should I do if I need to carry out emergency work on a common?**

We recognise that from time to time emergencies occur that need intervention to preserve safety. For example we have been asked in the past whether works can proceed to prevent access to commons in the event of fire or to fence mine shafts. The Act allows us to give consent in relation to works which have been commenced or completed, so you may take necessary action and follow it up with an application. You should bear in mind that the work undertaken should be proportionate to the particular emergency and that the same considerations will be applied to commenced or completed works as to an application made in advance of work commencing.

Application forms and further Guidance Sheets are available here:

CLP2      *Application form to construct works on common land (under section 38)*

*Notes on completing an application for consent to construct works on common land*

CLP1      *Application form to deregister and/or exchange common land or town or village greens (under section 16)*

*Notes on completing an application to deregister and/or exchange common land or town or village greens.*

Guidance Sheet 1b    *Works and processes that do not need section 38 consent*

Guidance Sheet 1c    *Works exempt from the section 38 consent process*

Guidance Sheet 2a    *Special consent provisions – National Trust commons*

Guidance Sheet 2b    *Special consent provisions*

Guidance Sheet 3     *Public inquiry or Hearing*

Guidance Sheets 4 to 12    *Car parks, access roads, tracks and footpaths; Maintaining and extending existing works; Applications to vary or revoke a modification or condition; Possible modifications and conditions; Sites of Special Scientific Interest and other European conservation sites; Works that are exempt from section 38 controls under section 38(6); Highways and cattle grids; Malvern Hills; Rights of Way.*



## Annex A

**Category C and D Works: Guidance on application options for those proposing to carry out works on common land, where their proposals are neither small scale nor exempt from the need to obtain consent.**

**NOTE: This is guidance only, and does not mean that an application for the works stated will necessarily succeed. Each case must be judged on its own individual merits, and an element of judgment will always be needed in deciding which application route to follow.**

<p><b><u>C. Works for the management, improvement or protection of the common, or which would be otherwise consistent with its traditional uses (eg grazing, public recreation)</u></b></p> <p><b><u>BEST OPTION: SECTION 38</u></b></p>	<p><b><u>D. Works that would not be consistent with the traditional use of the common, or for its management, improvement or protection (eg works for purely private benefit, or which would be to the detriment of the common)</u></b></p> <p><b><u>BEST OPTION: SECTION 16/17 DEREGISTRATION AND EXCHANGE</u></b></p>
<p><b>General Guide:</b></p> <p><b>(a) New fences, buildings, ditches, trenches, embankments, access roads, tracks, or other works to the benefit (or negligible detriment) of the common.</b></p> <p><b>(b) Maintenance of, alteration or extension to, the type of works described in (a) to the benefit (or negligible detriment) of the common.</b></p>	<p><b>General Guide:</b></p> <p><b>(a) New fences, buildings, ditches, trenches, embankments, access roads, tracks, or other works for purely private benefit.</b></p> <p><b>(b) Maintenance of, alteration or extension to, the type of works described in (a) for purely private benefit.</b></p>
<p><b>DETAIL:</b></p>	<p><b>DETAIL:</b></p>
<p><b>(a) Fencing</b></p> <p><i>(i) Permanent, temporary or movable fencing for conservation or other purposes connected with the continued use of the land as common land</i></p> <p><u>Examples might include:</u>            Boundary fencing on the common for conservation or management purposes            Fencing as part of an agricultural management scheme            Animal health and welfare            Hefting and re-hefting of sheep            Public safety            Woodland management scheme            Improvement of an SSSI</p>	<p><b>(a) Fencing</b></p> <p><i>(i) Fencing of any scale or type by any person for purely private benefit</i></p> <p><u>Examples might include:</u>            Extension of a private garden or dwelling house</p>
<p><i>(ii) Other types of fencing in conjunction with a legitimate use of the common</i></p> <p><u>Examples might include:</u>            Around visitors' car park            Temporary site compound, where land will be restored            Cricket pitch            Play area/playground</p>	<p><i>(ii) Fencing that fails to provide an appropriate level of access to any lawful user</i></p>

Golf greens Storage facilities for cricket club	
<b>(b) Buildings and other structures</b>	<b>(b) Buildings and other structures</b>
<i>(i) Replacement (or extension or construction) of buildings/structures, particularly small ones, that are consistent with continued sporting, recreational (or other legitimate) uses of the land</i>	<i>(i) Construction, extension (or replacement) of <b>large</b> buildings/structures, particularly those that are not consistent with continued sporting, recreational (or other legitimate) uses of the land</i>
<u>Examples might include:</u>  Sports club facilities Cricket nets Canoe club platforms Storage sheds for maintenance equipment Greenkeepers' huts Visitor facilities	<u>Examples might include:</u>  Large sports buildings, eg clubhouses, pavilions Visitor centres Buildings for other purposes
<i>(ii) Construction, extension (or replacement) of buildings/structures in connection with new uses of the common or adjoining land that could be said to benefit the common (or have only negligible detriment which is compensated for by other factors)</i>	<i>(ii) Construction, extension (or replacement) of buildings/structures in connection with new uses of the common or adjoining land that do not benefit the common</i>
<u>Examples might include:</u> Children's play areas Sports surfaces Skateboard park Small bus shelter Landscaping schemes/enhancement works War memorial	<u>Examples might include:</u> Leisure centre Supermarket Large scale wind farms or mining works Highway construction works Private house Hotel Airport Burial ground
<b>(c) Ditches, trenches and embankments</b>	<b>(c) Ditches, trenches and embankments</b>
<i>(i) Any ditches, trenches and embankments for the conservation and management of the land, or for its protection against unlawful encroachment</i>	<i>(i) Ditches, trenches and embankments for private benefit</i>
<b>(d) Resurfacing works</b>	<b>(d) Resurfacing works</b>
<i>(i) New construction of hard-surfaced areas, or alteration/extension of existing lawful ones, to the benefit (or negligible detriment) of the common.</i>	<i>(i) New construction of hard-surfaced areas, or alteration/extension of existing lawful ones, for purely private benefit.</i>
<i>(ii) Any works carried out to an existing unlawful surface, to the benefit (or negligible detriment) of the common [NB In these circumstances, consent should be sought for the unlawful works in their entirety, including any changes proposed - see <b>Guidance Sheet 4</b> for further guidance].</i>	<i>(ii) Any works carried out to an existing unlawful surface, for purely private benefit. [NB In these circumstances, consent should be sought for the unlawful works in their entirety, including any changes proposed - see <b>Guidance Sheet 4</b> for further guidance].</i>
<u>Examples might include:</u> Visitors' car park (whether temporary or permanent), where use is connected with use of the common for recreation Access tracks which facilitate legitimate (e.g.	<u>Examples might include:</u> Car parks on the common for private use, where use has no connection with legitimate uses of the common for recreation

recreational) uses	Private access roads, and access roads to new developments.
<b>(e) Other</b>	<b>(e) Other</b>
	<p><i>(i) Fixing an earlier mistake</i></p> <p><u>Examples might include:</u></p> <p>Land with a building on was wrongly registered  Common land was built on before it came to light that it was common land  Re-adjusting the boundaries of a property</p>

## **Annex 2 Commons Act 2006: protection issues presentation**

## Annex 3 Commons Act 2006



### COMMONS ACT 2006

Section 15 of the Commons Act 2006 was commenced, on 6 April 2007 in England (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, s12007 no 456), and in Wales on 6 September 2007 (commencement No 1, Transitional Provisions and Savings) (Wales) Order 2007.

Schedule 6 Part 1 repeals 13(b) of the Commons Registration Act 1965. (powers to amend registers) savings under Article 4(3) and Article 4(4)

Any applications made prior to 6 April, in England, and 6 September in Wales, will, as a result of schedule 6 Part 1 be dealt with under the old legislation.

#### Issues discussed in the workshop were:

##### *1. Issues associated with the new forms*

Problems with the 'summary' section. One CRA indicated that this is what should be included in the advertisement. Also unclear how many witness statements should be included.

##### *2. Other issues*

The grace period. Impact of backlog for both old system and new registrations

##### *3. Distinction between material and submission*

Distinction between 'Not duly made' and 'Duly made' could be clearer.

#### SECTION 15 Registration of greens

- |                    |               |  |
|--------------------|---------------|--|
| <b>15(2)</b>       | Issues remain | locality<br>neighbourhood<br>20 year period (up to date of application)  |
| <b>15(3)(b)(c)</b> |               | use may cease prior to application   |
| <b>15(4)(b)(c)</b> |               | application to be made within a period of 2 or 5 years   |
| <b>15(5)</b>       |               | 15(4) does not apply where planning permission was granted before 23 June 2006, construction works were commenced before that date and the land will be permanently unusable for lawful sports and pastimes. |

**15(6)** was disregard any period during which access to the land prohibited under any statute.

**15(7)(b)** where permission is granted it is to be disregarded in determining whether use is 'as of right'

**15(8)** voluntary registration by owner of land

**SECTION 16 Deregistration and exchange** (due to be commenced 1/10/2007)

It replaces S147 Inclosure Act 1845

**16(6) Criteria:** appropriate national authority should have regard to (a-d)

**SECTION 17 Orders**

**SECTION 19 Correction**

**SECTION 22 and Schedule 1 Rectification of mistakes under the 1965 Act**

**Schedule 1** Para 3 certain common land to be transferred to register of village Greens

Para 5 deregistration of registered town or village greens

**NOT INCLUDED IN THE ACT:**

**Works on village greens**

The new part 3 will not apply to town and village greens. Instead s12 of the Inclosure Act 1857 and s29 of the Commons Act 1876 will be the only protection. A recommendation in the Common Land Policy Statement 2002 to enable local planning authorities to issue enforcement notices in respect of breaches of village green legislation has not been taken forward.

**Vehicular access**

Section 68 was repealed by section 51 of the Commons Act 2006 on 1 October 2006, in England and on 6 September 2007 in Wales.

Nicola Hodgson  
Case Officer  
September 2007

## Annex 4 Exchange Land Procedure



### EXCHANGE LAND PROCEDURE

At present land may cease to be common land if the rights of common over it are extinguished i.e. by:-

- (i) union of ownership of the common land
- (ii) the commoners' property
- (iii) release by deed
- (iv) exhaustion of the product
- (v) enclosure
- (vi) abandonment
- (vii) severance
- (viii) failure to register

#### **Surrender and extinguishment section 13**

Any common law mechanism by which registered rights of common may cease to exist is abolished.

Now deregistration of common land will not be allowed except under section 16/17 or by appropriation or compulsory acquisition.

Statutory deed or disposition – regulations will be made.

Section 147 Inclosure Act 1845 – which provided for voluntary exchanges of land will be repealed.

#### **Applications section 16**

The owner of any land registered as common land may apply to the appropriate national authority for the land to cease to be so registered.

If release land is more than 200 sq meters the application **must** include land to be given in exchange.

If not more than 200 sq meters application **may** include provision of exchange land .

#### **Requirements**

- (i) replacement land must not already be registered as common land or as a town or village green
- (ii) if the owner of the release does not own the replacement land, the owner of the replacement land must join in the application.

## **Criteria**

National authority shall have regard to –

- (i) the interest of persons having rights in relation to, or occupying the release land (in particular those existing rights of common)
- (ii) the interests of the neighbourhood
- (iii) the public interest
- (iv) any other matter considered to be relevant

*New:-* where release land is not more than 200 sq meters and there is no provision of exchange land – national authority must have particular regard (to the above criteria) to the extent to which the absence of such a proposal is prejudicial to the interests above.

## **Definition on the face of the bill**

Public interest:-

- (i) nature conservation
- (ii) conservation of the landscape
- (iii) protection of public rights of access
- (iv) protection of archaeological remains and features of historical interest

Consent to an exchange is required by any leaseholder and proprietor of any relevant charge over:-

- (i) the release land
- (ii) any replacement land

## **Orders section 17**

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September 2007