



Department
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Common Land consents policy

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1 Introduction

1.1 The Planning Inspectorate fulfils the Secretary of State's functions in relation to common land and town or village greens casework in England¹, and in particular determines applications for deregistration of registered common land and town or village green under section 16(1), and applications for consent for works on registered common land (and some equivalent land) under section 38(1), of the Commons Act 2006 ('the 2006 Act')². The Inspectorate is also responsible for the Secretary of State's consents, certificates and orders under various other statutory provisions in relation to common land and town or village greens (see paragraph 5.17 below). The Department for Environment, Food and Rural Affairs (Defra) retains responsibility for the Government's policy in relation to the management and protection of common land and greens.

1.2 This note sets out the Secretary of State's policy in relation to the determination of such casework, and is published for the benefit of the Planning Inspectorate, applicants for consent, and others with an interest in applications (such as objectors).

1.3 The Inspectorate seeks to adhere to this policy in determining applications under sections 16(1) and 38(1), and in recommending a decision under sections 131 and 132 of the Planning Act 2008, and so far as is relevant, in relation to other statutory provisions (see paragraph 5.17 below). However, every application must be considered on its merits, and a determination may depart from the policy if it appears appropriate to do so. In such cases, the Inspectorate will explain why it has decided not to follow the policy.

1.4 This policy applies equally to applications for deregistration and exchange under section 16(1), and for consent to works under section 38(1), and paragraph 5.17 explains its relevance to other consents. However, some provisions in the policy below may apply **only** to applications for deregistration and exchange, or consent to works, and this will often be apparent from the context.

1.5 This policy must be read in conjunction with the 2006 Act, other legislation relevant to the type of application being considered, and the guidance notes published by the Inspectorate in relation to particular types of application³.

1.6 Consultation requirements are prescribed in regulations (currently S.I. 2007/2588 and 2007/2589) made under the legislation. The Secretary of State considers the model set out in "A Common Purpose"⁴ to be good practice in consulting directly affected stakeholders and the public.

¹ Applications for the Secretary of State's approval of byelaws in relation to common land and town or village greens continue to be dealt with by Defra.

² References to "sections" in the policy refer to sections in the Commons Act 2006 unless otherwise stated.

³ Guidance notes are published on the website of the Inspectorate, at: www.planningportal.gov.uk/planning/countryside/commonland .

⁴ www.foundationforcommonland.org.uk/sites/default/files/a-common-purpose-revised-edition.pdf

2 Why is common land important?

2.1 About 3% of the land area of England is common land. Of this, 88% carries one or more national statutory designations — National Park, Area of Outstanding Natural Beauty, Site of Special Scientific Interest (SSSI)⁵ or scheduled ancient monument.

2.2 We wish to see our common land delivering a range of benefits:

Economic

- maintaining a living for commoners who use common land to graze livestock, often with benefits to the wider community (grazing can help to maintain accessibility for public recreation);
- providing employment and generating income from sporting use (*i.e.* game birds for shooting);
- providing aesthetic beauty in the landscape and access, which encourages tourism.

Agricultural

- ensuring farms, particularly in the uplands, can rely on the grazing of common land, which is a significant component of livestock production in England;
- maintaining local infrastructure and expertise capable of long term sustainable agricultural management (such as the hefting of native flocks, and the capacity to conduct gathers or drifts).

Biodiversity

- maintaining natural vegetation rich in flora and fauna;
- protecting a diversity of habitat (on common land, the diversity reflects the lack of incentive to 'improve' such land because of the absence of any single controlling interest);
- promoting SSSIs achieving favourable condition (57% of common land is designated SSSI);
- sustaining grazing systems which are responsible for maintaining many landscape and environmental values on agriculturally-active commons.

Archaeological

- preserving landforms and features in uncultivated soils (common land and greens have often been left undisturbed by ploughing for centuries);
- protection of important archaeological and historic sites.

⁵ Many SSSIs are also designated European or international Natura 2000 sites.

Recreational

- enjoyment of the landscape by visitors and tourists;
- public right to walk on all commons and horse or cycle ride on many;
- providing open space for surrounding communities;
- use for a wide range of organised activities.

Cultural

- common land and greens providing the focus of communities for ancient and traditional activities — e.g. in organising annual gathers or drifts, holding manorial courts, managing the use of the green;
- long-standing traditions associated with the use of common land and greens — e.g. fêtes, beating the bounds, shows;
- celebrating the value of open, unenclosed common land and greens as a ‘communal’ resource and providing a sense of belonging.

3 Protecting commons — our policy objectives

3.1 The 2006 Act, along with earlier legislation on common land, enables government to:

- safeguard commons for current and future generations to use and enjoy;
- ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected; and
- improve the contribution of common land to enhancing biodiversity and conserving wildlife.

3.2 To help us achieve our objectives, the consent process administered by the Planning Inspectorate seeks to achieve the following outcomes:

- our stock of common land and greens is not diminished so that any deregistration of registered land is balanced by the registration of other land of at least equal benefit;
- any use of common land or green is consistent with its status (as common land or green), so that...
- ...works take place on common land only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.

4 Assessing an application

Is the proposed approach the best approach?

4.1 Sections 16(6) and 39(1) set out the criteria to which the Secretary of State must have regard when assessing an application under these provisions.

Can the objectives be achieved within a predictable time frame?

4.2 The Secretary of State will wish to know whether the objectives motivating an application can be achieved within a predictable time frame, or should be reviewed from time to time, and if so, whether any consent to works should be time limited. For example, if an application proposes the erection of permanent fencing, but the purposes of the fencing will be achieved within fifteen years, the Secretary of State may decide to impose a condition requiring the works to be removed after that period of time.

What are the alternatives?

4.3 The Secretary of State will wish to know what alternatives have been considered to the application proposal. For example, if an application proposes the erection of temporary fencing to prevent livestock from wandering on to a road passing across a common and causing accidents, the Secretary of State may want to know whether the applicant has explored the option of asking for a temporary speed limit to be introduced on the appropriate stretch of road to mitigate the risks of an accident whilst preserving the open nature of the land, or for warning signs to be introduced (e.g. warnings of cattle on road) or traffic calming applied, that would have the effect of slowing down traffic. If these options were considered and rejected, the Secretary of State may seek an explanation.

Assessment Criteria

4.4 When an application is assessed, the following criteria will be considered:

The interests of persons having rights in relation to, or occupying the land (and in particular persons exercising rights of common over it)⁶

- **Exercise of rights** — What effect will the proposals have on the ability of commoners or other rights holders to exercise their rights? What alternatives have been explored that might reduce the impact of the proposals on the exercise of commoners' rights?
- **Rights of access** — What effect will the proposals have on other rights holders, such as those with rights of access across the land?
- **Loss or benefit** — Would the proposals cause any financial loss to rights holders, and if so, do benefits to the right holders outweigh the loss or, if not, what steps have been taken to address it?

The interests of the neighbourhood⁷

- **Positive benefits** — Will the proposed replacement land, or outcome intended by the proposed works, add something that will positively benefit the neighbourhood?

⁶ Sections 16(6)(a) and 39(1)(a).

⁷ Sections 16(6)(b) and 39(1)(b).

- **Loss of existing use** — Will the loss of the release land or the construction of the works mean that local people will be prevented from using the common or green in the way they are used to? For example, will the loss of the release land reduce the area of the cricket pitch below a viable threshold, or the works interfere with a regular riding circuit (particularly if any replacement land cannot mitigate the loss)?
- **Future use and enjoyment** — Will the removal of the release land from its status as common land or green, or the construction of the works, interfere with future use and enjoyment (whether by commoners, the public or others) of the land as a whole (e.g. will fencing sterilise part of the land, rendering it practically inaccessible)? Is it likely or possible that the release land could cease to be available as a means of access between other parts of the land as a whole (e.g. the exclusion of a vehicular access way from a green would enable the owner to fence off the access way from the green on either side, or otherwise exclude access to it)?

The public interest⁸

4.5 The public interest is defined⁹ as including 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.

- **Recreation and access** — What effect will the proposals have on those wishing to use the common for recreation and access? Where works are intended to restrict access to part of the common, e.g. fencing, how will the public continue to have access to that part after the works are in place e.g. will the fencing include stiles, gates, where the Secretary of State will consider her duty under the Equalities Act in particular, etc? In the case of deregistration and exchange, the Secretary of State would not normally grant consent where the replacement land is already subject to some form of public access, whether that access was available by right or informally, as this would diminish the total stock of access land available to the public. In the case of any exchange, it will be assumed that the release land will cease to be available for recreation and access, unless a legally binding provision is intended to be made to assure continued use.
- **Nature conservation** — Are there potential benefits to nature conservation from carrying out the proposals? Does Natural England or any other competent person agree with the assessment of any proposed benefits? It may be appropriate to consider indirect benefits — for example, if the works will facilitate the continuation of sustainable grazing systems, which in turn deliver environmental benefits. In relation to any exchange, what will be the impact of the replacement land in relation to nature conservation compared with the release land?
- **Impact on the landscape** — What will be the impact on the landscape if the proposals proceed? Is the landscape in a specially designated area, such as a National Park or Area of Outstanding Natural Beauty? Will the impact include an adverse effect on the enjoyment of the remaining part of the common or green (e.g. if development of any release land might spoil the view or impair the conservation of wildlife on the remaining part)? What consideration has been given to minimising any impact by good design (e.g. in relation to a fencing scheme, minimising the extent of new fencing by utilising the existing boundaries of the common and

⁸ Sections 16(6)(c) and 39(1)(c).

⁹ Sections 16(8) and 39(2).

avoiding the creation of sterile land between the traditional boundary and the new fence line)?

- **Protection of archaeology** — Will the proposals help protect archaeological remains and features of historic interest (particularly if there are such features on any land being deregistered)?
- **Local heritage** — How do the proposals fit into the historical context? For example, in relation to an ancient common, uniformly described in historical documentation with well-defined boundaries, what effect would they have on the local heritage?

Any other matter considered to be relevant¹⁰

4.6 This criterion allows other issues to be taken into account when assessing an application. It may include looking at the wider public interest, which may arise, for example in relation to a major infrastructure project.

4.7 In assessing these considerations, the Secretary of State will take into account any matter which is relevant. She will not necessarily rely on the applicant, supporters and objectors to bring all such matters to her attention, but will also rely on experience and insight to draw appropriate conclusions. For example, she will not assume that, because no-one objects to an application, there are no adverse impacts, but will consider what impacts might arise, taking into account these criteria, and applying knowledge and experience, together with information available in representations, to make a judgement. If necessary, if there is doubt about the extent of any impact, she will consider using her powers to conduct a site visit or public inquiry, or to seek professional advice, in order to improve understanding of the merits of the application.

5 Other Considerations

Exchange land in applications to deregister or exchange common land or town or village green under section 16(1)

5.1 The Secretary of State's primary objective in determining applications under section 16(1) is to ensure the adequacy of the exchange of land in terms of the statutory criteria. Therefore, even where an applicant makes an otherwise compelling case for an exchange, the Secretary of State's expectation will be that the interests (notably the landowner, commoners, and the wider public) will be no worse off in consequence of the exchange than without it, having regard to the objectives set out in Part 0 above. Her expectation is more likely to be realised where the replacement land is at least equal in area to the release land, and equally advantageous to the interests. So the Secretary of State will wish to evaluate the exchange in terms of both quality and quantity. An inadequate exchange will seldom be satisfactory, whatever the merits of the case for deregistration might otherwise be.

5.2 Applicants must propose the provision of replacement land if the area of the release land is more than 200m²¹¹. Even if the land to be deregistered is not more than 200m²

¹⁰ Sections 16(6)(d) and 39(1)(d).

¹¹ Section 16(2).

the Secretary of State will usually expect land to be offered in exchange for the land being deregistered as her policy is not to allow our stock of common land and greens to diminish. The Secretary of State does not interpret the purpose of section 16 as being to facilitate the deregistration of 'unwanted' or 'useless' pieces of common land or green; but to enable registered land to be released in exchange for replacement land of equal value.

Cases where no replacement land is offered

5.3 In considering an application which does not propose replacement land, the Secretary of State is required¹² to have "particular regard ... to the extent to which the absence of such a proposal is prejudicial to the interests specified in section 16(6)(a) to (c)" (*i.e.* the 'private' interests, the interests of the neighbourhood, and the public interest). In general, the Secretary of State will grant consent where no replacement land is offered only in exceptional circumstances. Such circumstances are most likely where a wider public interest is being served by the deregistration which may mitigate the prejudice caused by the loss of the release land. An example is the creation of a slipway for a lifeboat station, or the provision of a disabled access ramp to a village hall. Even in such cases, land should be offered in exchange unless there is a compelling reason why this is not possible (*e.g.* the registered land is surrounded by development, and it is not possible to provide replacement land which would be integral to the site). It follows that an application for deregistration where no replacement land is offered is most unlikely to be granted if no compelling public interest is served by the deregistration.

Wrongly registered land

5.4 Nor does the Secretary of State see the purpose of section 16 as enabling the deregistration of land which is claimed to have been wrongly registered: provision is made for that specific purpose in Schedule 2 (paragraphs 6 to 9) to the 2006 Act, and in certain cases, section 19(2)(a). These provisions are in force throughout England.

5.5 In considering an application under section 16(1), the Secretary of State will assume that the release land is correctly registered. Where access to the release land is limited by inclosure (*e.g.* by a fence or hedge), or the release land is occupied by buildings or other works, she will assume that such inclosures or works are unlawful (unless the contrary is shown, *e.g.* by reason of a consent previously granted¹³) and that they will not endure. Accordingly, in those circumstances, she will consider the proposed exchange as if the release land were an integral part of the common, and properly available for public use.

5.6 Where an applicant asserts that application is made under section 16(1) partly or wholly because the land is wrongly registered, the applicant's attention will be drawn to provision in Part 1 of the 2006 Act for the deregistration of wrongly registered land, to the criteria under section 16 for deregistration, and to this statement of policy.

¹² Section 16(7).

¹³ Under section 194 of the Law of Property Act 1925.

Works on commons under section 38¹⁴

5.7 Commons should be maintained or improved as a result of the works being proposed on them. The Secretary of State sees section 38 as conferring additional protection on common land, rather than enabling common land to be used for purposes inconsistent with its origin, status and character. In other words, consent under section 38 should be seen as a gateway, which enables the construction of works which are sympathetic to the continuing use and enjoyment of common land, but which reinforces controls on development which are inappropriate or harmful.

Are the works consistent with the use and enjoyment of the land as common land?

5.8 In deciding whether to grant consent to carry out works on common land, the Secretary of State will wish to establish whether the proposed works are consistent with the use and enjoyment of the land as common land. For example, an application for works which facilitate grazing of a common by a rights holder will be considered to be consistent with the future use of the land as common land (and will then be considered on its merits against the statutory criteria and this policy), whereas an application for works to extend a private dwelling onto common land will be considered not to be consistent with the future use of the land as common land, and will normally be refused.

Works relating to vehicular ways across common land

5.9 Where it is proposed to construct or improve a vehicular way across a common, consent will be required under section 38 if the works involve the 'laying of concrete, tarmacadam, coated roadstone or similar material' (other than for the purposes of repair of the same material)¹⁵. Such an application may be consistent with the continuing use of the land as common land, even where the vehicular way is entirely for private benefit, because the construction will not in itself prevent public access, or access for commoners' animals. However, by its very nature, paving will have an impact on the enjoyment of the common, by reducing the area available for recreation and grazing, by causing harm to habitat, perhaps by affecting drainage, and by introducing an urbanising feature into what will normally be an essentially open and natural setting. The Secretary of State takes the view that, in some circumstances, a paved vehicular way may be the only practical means of achieving access to land adjacent to the common. Where an existing unsurfaced means of access is already in use, a sympathetic paving proposal may be aesthetically preferable.

5.10 The Secretary of State also notes that the alternative of deregistration of the land covered by a vehicular way, and the substitution of replacement land elsewhere, may be undesirable in that the release land ceases to be subject to statutory protection, may cause fragmentation of the common or green, and may cease to be available to the community (the potential impact of deregistration may be greater where the release land is core or integral to the enjoyment of the common or green as a whole). These

¹⁴ Section 38 (cf. s.16) does not apply to town or village greens as such, unless such a green separately qualifies as land to which section 38 does apply, as described in section 38(5).

¹⁵ Restricted works include works for the resurfacing of land, as defined in section 38(4).

issues will vary according to the particular circumstances and no general rule can be formulated.

Works relating to driveways across a town or village green

5.11 The Secretary of State generally has no power to grant consent to construct or improve a vehicular way across a town or village green, and the construction and subsequent use of such a vehicular way may well be illegal. Where it is intended to construct a vehicular means of access across a green, the Secretary of State notes that an application may be required under section 16(1) to deregister the affected land, but where such an application relates to an area of the green which is not more than 200m² in area, the principles set out in paragraph 5.3 above (in relation to the deregistration of the release land and the provision of replacement land) will apply.

Works including means of access across fencing and other boundaries

5.12 Where consent is sought to fencing or other boundary features (such as walls and railings), the Secretary of State will expect an application to include provision for any means of access across the structure for general public use to conform to British Standard BS 5709¹⁶ (or the current standard at time of application). An applicant should justify any departure from the British Standard (e.g. to take account of local circumstances or traditional features). The Secretary of State may impose a condition in a consent requiring structures to be compliant.

Works relating to permanent buildings

5.13 Consent will not normally be granted under section 38 for permanent buildings on common land, because such development is normally incompatible with the future use of the land as common land. However, where such buildings are intrinsically related to the enjoyment or management of the common, such as a cricket pavilion, lambing shed or a keeper's hut, consent under section 38 may be considered appropriate.

Works with an underlying public benefit

5.14 Some proposed works on common land do not benefit the common but nevertheless there is a potential underlying public benefit, for example works for the generation of sustainable energy, or at a more local scale, the laying out of a cycle path to improve sustainable travel opportunities, or the installation of statutory undertakers' apparatus.

5.15 **Infrastructure projects:** The Secretary of State wishes to promote sustainable energy generation in an appropriate setting, but equally, her policy is to ensure that the stock of commons is not diminished, that works on common land must maintain or improve the condition of the common, and the use must be consistent with its status as common land (see Part 0 above). To balance these issues her expectation is that applications for such infrastructure projects on common land are more likely to be successful under section 16(1), so that an exchange of land is proposed and can be

¹⁶ An explanatory note setting out the main requirements of the current British Standard (BS5709) has been produced by the Pittecroft Trust: www.pittecroft.org.uk. Guidance to local authorities about stiles and gates on rights of way and their obligations under the Equality Act 2010 is available at <http://webarchive.nationalarchives.gov.uk/20130402151656/http://archive.defra.gov.uk/rural/documents/countryside/prow/gpg-equality.pdf>

considered on its merits. An application for consent to such works under section 38(1) will rarely be granted unless there are convincing reasons why an application under section 16(1) cannot or ought not to be pursued. (See also the Secretary of State's policy in relation to vehicular ways across common land in paragraph 5.9 above.)

5.16 **Improvements to public services:** Similarly, works may be proposed in relation to common land which do not benefit the common, but confer some wider benefit on the local community, such as minor works undertaken by a statutory undertaker (e.g. a water utility) to provide or improve the public service to local residents and businesses. In such cases, our expectation is that applications for such purposes on common land are more likely to be successful under section 16(1), so that an exchange of land is proposed and can be considered on its merits. However, consent under section 38 may be appropriate where the works are of temporary duration (such as a worksite), where the works will be installed underground (such as a pipeline or pumping station), or where their physical presence would be so slight as to cause negligible impact on the land in question (such as a control booth or manhole), and the proposals ensure the full restoration of the land affected and confer a public benefit. (See also the Secretary of State's policy in relation to vehicular ways across common land in paragraph 5.9 above.)

Applications not within scope of the 2006 Act — other provisions

5.17 Applications which are not appropriate to proceed under section 38(1) may often be eligible to be considered under section 16(1). However, in certain cases, it may be possible or more appropriate to make application under other provisions:

- **Powers of compulsory purchase** or (in relation to a local authority) appropriation, for which purposes the Secretary of State's certificate is required under the Acquisition of Land Act 1981, section 19 or paragraph 6 of Schedule 3 — these powers may be exercised only by a local authority or other body on which such powers are conferred (such as under an Act of Parliament), and may also be used to acquire rights over common land (e.g. a right to bury a pipeline in the land and to confer enduring rights of access for maintenance) instead of a right to acquire the land itself.
- **National Trust Act 1971**, section 23: in relation to works on common land owned by the National Trust.
- **Greater London Parks and Open Spaces Order 1967**¹⁷: certain works on metropolitan commons (i.e. in Greater London).
- **London County Council (General Powers) Act 1960**, section 10: use of metropolitan common in Inner London for highway purposes.
- **Countryside Act 1968**, section 9: facilities and buildings undertaken by local authorities on common land or neighbouring land in interests of promoting public access.
- **New Parishes Measure 1943**, sections 13 and 15: acquisition of common land by the Church Commissioners.

¹⁷ The Order was confirmed by the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967.

5.18 Applications under these and other statutory régimes are subject to the same policy considerations set out here in so far as the considerations are compatible with the requirements of the specific legislation.

General policy in relation to consent

5.19 This policy note explains the Secretary of State's policy in relation to consents generally. It should not be assumed that, where this policy indicates that a consent might be appropriate in the circumstances specified, an application in those circumstances will necessarily be granted. Such applications will be considered on their merits in relation to the context, this policy, and the criteria set out in the relevant legislation.

Matters to be taken into account

5.20 In considering any application for consent, the Secretary of State will have regard to the following matters:

- **Conservation of biodiversity** — her duty to conserve biodiversity¹⁸, and her duty to further the conservation of the list of features of principal importance for conserving biodiversity.
- **Conservation of flora, fauna, geological or physiographical features** — her duty (in relation to land designated as a site of special scientific interest), “to take reasonable steps, consistent with the proper exercise of the authority’s functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest”¹⁹.
- **Conservation of habitats** — her duty to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions; in particular, it may be necessary for an appropriate assessment to be carried out before consent may be granted for works which are likely to have a significant effect on an area designated as a special area of conservation under the Habitats Directive or as a special protection area under the Wild Birds Directive²⁰.
- **Protection of National Parks** — her duty (in relation to a National Park) to have regard to the purposes for which National Parks are established, and if it appears that there is a conflict between those purposes, the requirement to attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park²¹.
- **Conservation and enhancement of Areas of Outstanding Natural Beauty** — her duty (in relation to an Area of Outstanding Natural Beauty) to have regard to the

¹⁸ Sections 40 and (re the list of features) 41 of the Natural Environment and Rural Communities Act 2006.

¹⁹ Section 28G of the Wildlife and Countryside Act 1981.

²⁰ The Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716).

²¹ Section 11A of the National Parks and Access to the Countryside Act 1949. A similar duty arises in relation to the Norfolk and Suffolk Broads under section 17A of the Norfolk and Suffolk Broads Act 1988.

purpose of conserving and enhancing the natural beauty of the Area of Outstanding Natural Beauty ²².

6 Enforcement against unlawful works

6.1 Any person (including an incorporated body or local authority) may seek enforcement action against unlawful works by application to the county court under section 41. The Planning Inspectorate has published guidance on taking such action²³. Unlawful works means works which require consent under section 38, but which have not received such consent.

6.2 Responsibility for the enforcement of the requirement for consent set out in Part 3 of the 2006 Act lies with the local community. Enforcement action may be taken by any local authority (including a parish council and a National Park authority), as well as by members of the public and persons representing civic, amenity and recreational bodies. The Secretary of State will not normally take enforcement action in the case of any breach.

²² Section 85 of the Countryside and Rights of Way Act 2000.

²³ Available on the website of the Planning Inspectorate, at: www.planning-inspectorate.gov.uk/pins/common_land/guidance/index.htm, "Common Land Guidance Sheet 12 Enforcement against unlawful works on common land".