



HM Government

Memorandum to the Environment, Food and Rural Affairs Select Committee

Post-Legislative Assessment of the Commons Act 2006

February 2013



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Presented to Parliament
by the Secretary of State for Environment, Food and Rural Affairs by Command of Her Majesty
February 2013

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INTRODUCTION

1. This memorandum provides an assessment of the Commons Act 2006 (“the Act”) and has been prepared by the Department for Environment, Food and Rural Affairs.
2. This memorandum will be published as part of the process set out in the document *Post-legislative Scrutiny – The Government’s Approach (Cm 7320)*. The paragraphs below follow the order of the provisions in the Act.

OBJECTIVES OF THE COMMONS ACT 2006

3. The Commons Act 2006 received Royal Assent on 19 July 2006. The Act is the third Government Act to address common land since 1908 and the first omnibus Act.
4. Commons and greens are precious reserves for biodiversity and recreation, are a vital agricultural resource and a strong feature of the English landscape and culture. Eighty-eight per cent of common land is subject to statutory designations for nature conservation, landscape or ancient monuments and half is designated as a Site of Special Scientific Interest. Commons account for over 40% of both lowland and upland heath habitats. About three-quarters of common land is in England’s severely disadvantaged area. They are an integral part of the upland farming economy.
5. The Act had cross-party support and was intended to respond to a number of challenges which had arisen since the Commons Registration Act 1965, namely: that many commons lacked effective mechanisms to enable sustainable management at the local level; that commons were vulnerable to abuse, encroachment and illicit development; and that the existing commons registers were out-of-date and unreliable, and therefore an inadequate foundation for better protection, management and understanding.
6. The Act covers England and Wales. This memorandum covers implementation in England only.

IMPLEMENTATION

7. Almost all provisions of the Act are now in force either in limited geographic areas or across England and Wales. Most provisions of the Act (sections 1-8 and 10-53, and Schedules 2-6) were brought into force by order made by the Secretary of State. The provisions were commenced progressively in England from 1 October 2006 to 31 October 2011 by means of 7 Commencement Orders.
8. Within Part 1 of the Act (containing sections 1-25), sections 1-3, 6-8, 10-14 and 18-22 have so far only been commenced in seven “pioneer” authorities in England. Within the Act as a whole, only the provisions relating to electronic registers (section 25) and Schemes under the Commons Act 1899 (section 50) have not yet been commenced anywhere. In addition section 53 (Repeals), in so far as it relates to a few of the repeals in Schedule 6, has not been commenced. The repeal in Schedule 6, Part 1 with regards to the Courts and Legal Services Act 1990 has not, and will not be, commenced under this Act as it was found already to have been effected under the Tribunals, Courts and Enforcement Act 2007, Schedule 23, Part 2, commencement with effect from 3rd November, 2008 by S.I. 2008/2696, art.5(j).

SECONDARY LEGISLATION AND GUIDANCE

9. Comprehensive guidance documents to help Commons Registration Authorities, the Planning Inspectorate, other duty bodies, commoners and members of the public to understand the application of the duties required of them and the powers available to them, were published progressively as the Act was commenced. Comprehensive guidance was also published to support the “pioneer” Authorities in understanding the application of the powers available to them and their responsibilities in implementing Part 1 of the Act, in 2009, 2010 and 2011. Guidance published includes:
 - a. Policy guidance on consents under sections 16 and 38 of the Act
 - b. Commons Councils
 - c. Non statutory guidance on vehicular access across common land and town or village greens
 - d. Guidance to Natural England on the appropriate use of its powers under the Act
 - e. Severance
10. A number of secondary SIs were introduced to implement the provisions in the Act:
 - a. The Commons (Severance of Rights) (England) Order 2006 – SI 2006/2145
 - b. The Commons Act 2006 (Commencement No.1, Transitional Provisions and Savings) (England) Order 2006 – SI 2006/2504
 - c. The Commons Act 2006 (Commencement No.2, Transitional Provisions and Savings) (England) Order 2007 – SI 2007/456
 - d. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 – SI 2007/457
 - e. The Commons Act 2006 (Commencement No. 3, Transitional Provisions and Savings) (England) Order 2007 – SI 2007/2584
 - f. The Commons (Deregistration and Exchange Orders) (Interim Arrangements) (England) Regulations 2007 – SI 2007/2585
 - g. The Works on Common Land (Exemptions) (England) Order 2007 – SI 2007/ 2587
 - h. The Works on Common Land, etc. (Procedure) (England) Regulations 2007 – SI 2007/2588
 - i. The Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007 – SI 2007/2589
 - j. The Commons Act 2006 (Commencement No.4 and Savings) (England) Order 2008 – SI 2008/1960
 - k. The Commons Registration (England) Regulations 2008 – SI 2008/1961
 - l. The Dartmoor Commons (Authorized Severance) Order 2008 – SI 2008/1962
 - m. The Commons Registration (England) (Amendment) Regulations 2009 – SI 2009/2018
 - n. The Commons Act 2006 (Commencement No 5) (England) Order 2010 – SI 2010/61
 - o. The Commons Councils (Standard Constitution) (England) Regulations 2010 – SI 2010/1204
 - p. The Commons Act 2006 (Commencement No. 1 and Savings (England and Wales) and Commencement No 5 (England) (Amendment)) Order 2010 – SI 2010/2356
 - q. The Commons Act 2006 (Commencement No. 6) (England) Order 2011 – SI 2011/2460

PART 1 – REGISTRATION

11. This Part requires the Commons Registration Authorities (county councils in two-tier areas; district councils elsewhere and London borough councils) to update the Commons and Greens

registers created under the Commons Registration Act 1965 during a ‘transitional period’, to keep them up-to-date, and gives them new powers to rectify mistakes and omissions. Until the 1960’s the extent of common land and greens was a matter of local knowledge and conjecture. The 1965 Act therefore required Commons Registration Authorities to create for their area a conclusive record of commons and greens, and the rights exercisable over them. All such land and rights had to be registered by 1970. Whilst the 1965 Act created a legal record, there were many mistakes and anomalies and insufficient provision was made for the ongoing maintenance or correction of the registers. Consequently, the registers had not effectively been updated since 1970 and were an unreliable indicator of the present status of commons and greens.

12. This Part therefore allows for broadly 29 different types of application which can be made to reflect changes to the details held in the registers. Applications can be made to amend the register to reflect new events which have happened since the commencement of Part 1 in a Commons Registration Authority’s area. Applications can be submitted to amend the register to reflect historic events which happened between the effective closing of the registers in 1970 and before the commencement of Part 1. Applications can be made to correct anomalies in the registers: adding land that should have been registered and removing incorrectly registered land.
13. Apart from provisions concerning the registration of town or village greens or for the deregistration and exchange of registered land, which have been commenced throughout England, the provisions of Part 1 have been commenced in only seven “pioneer” authorities in England: Blackburn with Darwen, Cornwall, Devon, Herefordshire, Hertfordshire, Kent and Lancashire. The pioneer implementation took place between October 2008 and September 2010 and was intended to test the efficacy of the new regulations, support mechanisms such as guidance and to obtain cost figures to estimate the cost of national implementation. The pioneer has been fully evaluated and the evaluation published.¹ The evidence of the 246 applications submitted, and the 20 proposals made by the authorities themselves², demonstrates that Part 1 will achieve the intention of the legislation.
14. This Part replaces the provisions of the Commons Registration Act 1965, so as to abolish the system of provisional registration and the determination of provisional registrations by the Commons Commissioners. The office of the Commons Commissioners has now been abolished.
15. Part 1 also prohibits (save as authorised under Schedule 1, or by other statutes) the severance of common rights, preventing commoners from selling, leasing or letting their rights away from the property to which rights are attached and provides that any person can inspect or request copies of the registers.
16. Part 1 does not apply to the New Forest, Epping Forest or the Forest of Dean.

Registration of greens

17. Town and village greens developed under customary law as areas of land where local people indulged in lawful sports and pastimes. Most customary greens were registered in the late 1960s under the Commons Registration Act 1965. Section 15 of the 2006 Act allows for applications to register new town and village greens using new, clearer criteria. These applications are determined by the commons registration authority. Anyone can apply under this section to register land as a green if it has been used by local people for lawful sports and pastimes ‘as of right’ (i.e. without permission, force or secrecy) for at least 20 years.

1 <http://archive.defra.gov.uk/rural/documents/protected/common-land/pilot-review.pdf>

2 Figures correct as at October 2012.

18. The Growth and Infrastructure Bill includes reforms to the law for registering new town and village greens. The reforms, broadly, comprise the exclusion of new greens applications for land which has planning permission (or a publicised planning application) or is identified for potential development in a local or neighbourhood plan (including draft plans); provisions to remove unnecessary uncertainty and delays; and the introduction of landowner statements which represent a legal refutation of the use of land 'as of right'.

Deregistration and exchange

19. Under section 16 of the Act, owners of registered common land or town or village greens can apply to the Secretary of State to have the land released from registration. If the 'release land' is more than 200 square metres in area, they must make an application at the same time to register 'replacement land' as common land or green in its place. If the release land is not more than 200 square metres, a proposal to register replacement land may (but need not) be included. Applications are determined by the Planning Inspectorate on behalf of the Secretary of State, whilst reserving the right of the latter to recover jurisdiction in particular cases. Since October 2007 the Planning Inspectorate has determined 27 such applications.³

Fees

20. Regulation 17 of, and Schedule 5 to, the Commons Registration (England) Regulations 2008 specify the fees that must accompany the majority of applications (in default of Commons Registration Authorities having set alternative fees), having regard to their likely costs in dealing with applications but subject to a ceiling of £1000 (as described in paragraphs 3-5 in Schedule 5 to the 2008 Regulations). However, no fee is specified for 7 types of application because of the public interest and benefit in the outcome of such applications. During the 'transitional period', which began in October 2008 and concluded in September 2011, it was also possible to apply with no fee to bring the register up to date to reflect an historic event which was not previously registered. Now that the transitional period has ended, applications can still be made under Schedule 3 but carry a fee. The other 'free' applications are those which result in an increase to the extent of common or green or where a mistake was made by the authority when making an entry. A fee is also charged by the Planning Inspectorate for deregistration and exchange applications made under section 16. This is currently set at £4,900.
21. The Department is currently undertaking a review of the fees for applications. Accordingly, provisions in the Growth and Infrastructure Bill aim to improve the flexibility to set fees for applications under Part 1 of the Act.

Electronic Registers

22. Section 25 of the Act allows for the creation of electronic registers of common land and town and village greens. Commons and greens registers are one of the few remaining functions undertaken by Commons Registration Authorities which are officially paper-based. Although land transactions and land management grant schemes are increasingly electronic, due to the potentially high cost implications, this provision has not yet been commenced.

³ Figures correct as at 25 January 2013.

PART 2 – MANAGEMENT

23. There is no single management system for commons. Where commons remain in agricultural use, each commoner is generally entitled to exercise rights to graze stock over the whole of the common. But in practice, on many upland commons, a commoner's stock will keep to a particular part of the common (typically known as a 'heft'). Commoners may confer with each other on the overall management of the common (e.g. as regards disease control, or gathering animals for inspection, marking or sale) through commoners' associations, which are generally unincorporated, voluntary bodies, often with a constitution and appointed officers.
24. Part 2 therefore enables commons to be managed more sustainably by commoners and landowners working together through the creation of commons councils, with statutory powers to regulate grazing and other agricultural activities. Commons councils are democratic structures through which commoners, land owners and others with an interest in a common can work together to better manage agricultural activities, vegetation and the exercise of common rights on the land. Commons Councils are created by order by the Secretary of State. Three proposals are presently being considered by Defra but none has yet been established.

PART 3 – WORKS

25. Commons are vulnerable to abuse, encroachment and unauthorised development, chiefly because of their low value to the owner of the common, and because no one person has a dominant interest in its protection. Part 3 therefore introduced new, clearer measures for protecting common land from unlawful works and encroachment. The provisions recognise that the protection of common land has to be proportionate to the harm caused and that some specified works can be carried out without the need for consent. Applications for consents to works on commons under section 38 of the Act are determined by the Planning Inspectorate on behalf of the Secretary of State, whilst reserving to the latter the right to recover jurisdiction in particular cases. Consent is generally needed for any restricted works such as those which prevent or impede access to or over common land, which might include erecting fencing, constructing buildings, digging ditches but also includes the resurfacing of land with tarmac and similar materials. Since 2008, the Planning Inspectorate has determined 218⁴ such applications.
26. The Act however enables those who work and manage common land to undertake certain restricted works which are necessary for the successful management or protection of the common without needing to go through the formal consent process. These exemptions are prescribed by the Secretary of State in the Works on Common Land (Exemptions) (England) Order 2007 (SI 2007/2587). The Department is currently reviewing whether there should be a broader range of exemptions from consents in order to: reduce the need for people to submit applications that are invariably granted by the Planning Inspectorate; reduce the regulatory burden on applicants and reduce costs to the Government. There are no plans, and the Secretary of State has no powers, to exempt development on common land for wider purposes.

PARTS 4 AND 5 – MISCELLANEOUS, AND SUPPLEMENTARY AND GENERAL

27. These Parts of the Act contain miscellaneous and supplementary provisions, covering powers over unclaimed registered land and unauthorised agricultural activities, and amending previous legislation including the Inclosure Act 1845 and the Commons Act 1899.

4 Figures correct as of 25 January 2013.

Vehicular access

28. Section 68 of the Countryside and Rights of Way Act 2000 and consequent regulations were enacted because of the decision of the Court of Appeal in 1993 in *Hanning v Top Deck Travel*. Householders were being asked to pay large sums of money to establish a right to drive to their property over open land such as commons or greens. Section 68 of the 2000 Act provided a means by which the payments necessary to secure easements for this purpose could be capped. However, the judgment of the House of Lords in *Bakewell Management v Brandwood* in 2004 overruled *Hanning*. It confirmed that in certain cases where it was possible to grant lawful authority to drive over the common, a prescriptive right could be acquired. In 2005 Defra consulted on proposals to repeal section 68, having concluded that the provision and the regulations had no further purpose in the light of the *Bakewell Management* judgment. An amendment was included in the Act (section 51) for that purpose, and has been brought into force in England.

CONCLUSION

29. The primary objective of the Commons Act 2006 was to ensure that commons and greens are properly managed and protected by achieving a balance between the different uses of commons and greens. It provided a more flexible system for maintaining the registers of commons and greens, without which it would not be possible either to manage or protect both types of land. It consequently placed new duties on Commons Registration Authorities and enabled more flexible land management through applications to register and deregister common land. Implementation of the provisions in Part 1 relating to the registers in the pioneer areas demonstrated the need to correct the mistakes which were made in the late 1960's and to amend the registers to reflect historic events which affected the data in the registers but which were not recorded.
30. In recent years, common land has increasingly become valued for its natural character, its landscape features, the open space and recreational opportunities it provides and its archaeological, geological and nature conservation interest. The Act has provided protection of registered land, continued to encourage public access, and promoted modern, sustainable, agricultural management practices. It does this by providing Commons Registration Authorities and other relevant bodies with the powers to enable sustainable management at the local level and to protect commons and greens from abuse, encroachment and illicit development.
31. Since the Act received Royal Assent, several policy changes have affected the provisions in the Act. The Penfold Review has recommended reform to the registration system for town and village greens, provisions for which are included in the Growth and Infrastructure Bill currently before the House of Lords. The Government review of the regulatory framework through the Red Tape Challenge has suggested that a wider range of exemptions from consents should be considered and earmarked some secondary legislation made under the Act and previous legislation for simplification. Additionally, the Department is considering what should be the appropriate levels for fees under the Act and has included provisions for greater flexibility in this regard in the Growth and Infrastructure Bill.

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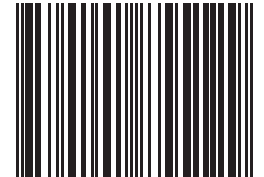
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