

Guidance note on adverse possession of common land and town or village greens

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Guidance note on adverse possession of common land and town or village greens

This guidance note is non-statutory and has no legal effect. It provides guidance about the circumstances in England in which a claim may be made to adverse possession of land which is registered as common land or as a town or village green. It does not provide a comprehensive explanation of every issue.

Defra cannot provide advice on individual circumstances. Anyone needing this should consider taking independent expert advice. Please note that the Land Registry does not necessarily share all statements of opinion as to the law that are expressed in this note.

Summary

1. There is no intrinsic impediment to a claim of adverse possession in relation to registered common land or town or village greens, but a claim to adverse possession will need to be supported by convincing evidence, and may be particularly difficult or in some cases impossible to sustain because of the statutory protections which apply to such land. Moreover, a successful claim to adverse possession will not affect the status of the land as registered common land or town or village green, will not affect any rights of common exercisable over the land, and may not affect any public rights of access for recreation over the land.

Introduction

2. Common land has always been susceptible to encroachment for private gain: its very nature encourages it, because the benefit gained by the individual is a powerful motivation, whereas the often minor loss is shared by a much wider community — typically the many farmers ('commoners') who exercise rights of common over the land, while the landowner (traditionally, the lord of the manor) has no particular incentive to act because the land is worth very little to him. Increasingly, however, the interests of the community in preserving such land as open space means that encroachments can cause considerable ill-feeling, but at the same time, people are uncertain about their rights and responsibilities.

3. Between 1967 and 1970, the extent and ownership of common land and town or village greens was required to be registered with local authorities, leading to greater certainty about the status of such land. Partly as a result, there is often confusion about whether the ownership of such land can be acquired through adverse possession, and this guidance note seeks to advise on that point.

4. The guidance note assumes that the Commons Act 2006 ('the 2006 Act') has been brought into force to replace the Commons Registration Act 1965 ('the 1965 Act'). At the time of writing, many provisions of the Act have not been brought fully into force, and some of these will be commenced in different areas at different

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times¹. However, except where stated, the effect of the law is the same regardless of whether the 1965 or the 2006 Act applies.

The commons registers

5. Registered common land and town or village greens are defined by the registers ('the commons registers') held by commons registration authorities. Commons registration authorities are appointed under the 2006 Act, and are county councils, metropolitan district councils and London Borough councils (including any unitary authorities). The commons registers show the extent of common land and greens, and any rights of common which are exercisable over the land (such as rights to graze cattle). The registers are open to public inspection.

6. Some common land is exempted from registration. The principal exempted areas are the New Forest, Epping Forest and the Forest of Dean². This guidance note does not apply to these exempted areas. Some other commons, chiefly in urban areas, were also exempted from registration, but in these cases, the commons registers show the exempted commons.

The register of title

7. Much land in England is registered in the 'register of title' maintained by the Land Registry³. The title to (*i.e.* ownership of) this registered land is guaranteed by the state. Broadly, the guarantee means that if a mistake occurs in the register and the owner suffers loss, the Land Registry may have to pay indemnity (*i.e.* compensation). A system of land registration also makes it simpler to buy, sell and charge (*i.e.* mortgage) land. And registration confers additional protection against adverse possession.

8. At present, around 70% of land in England and Wales is registered. The law generally requires unregistered land to be registered whenever a change occurs in ownership; moreover, the owner of unregistered land can voluntarily register that land.

9. Registration of land in the register of title is quite different from registration of common land and town or village greens in the commons registers: the register of title is held by the Land Registry, and contains information about the title, such as the owner. The commons registers are held by local authorities, and contain information about the status of land as common land or green, and the rights of common exercisable over the land.

10. The commons registers also contain information about ownership of the land, but these details have never been conclusive, have not been updated since they were recorded or confirmed, and cannot now be relied upon other than as an indication as to claims to ownership at the time of the registration, or, where the

¹ For more information on the implementation of the 2006 Act, please see: www.defra.gov.uk/rural/protected/commonland/implement.htm.

² The Forest of Dean is not recognised as common land by the Crown, but is grazed on a similar basis to commoning.

³ Under the Land Registration Act 2002.

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Commons Commissioner determined ownership, a presumption as to ownership at the date of the Commissioner's determination. (For the special position in relation to town or village greens vested in the local authority, please see paragraph 32 below.)

11. Land registered as common land or green in the commons registers has had to be registered in the register of title on any sale or conveyance since 1967⁴. So there is a presumption that registered common land or green, the ownership of which is not registered in the register of title, has not changed hands since 1967.

Adverse possession

12. An entitlement to be registered by the Land Registry as the registered proprietor (*i.e.* the owner) of land can be acquired by adverse possession over a period of time. Adverse possession requires that:

- the squatter has factual possession of the land (*e.g.* fencing the land so as to exclude others may amount to factual possession);
- the squatter has the necessary intention to possess the land; and
- the squatter's possession is without the owner's consent.

13. Up until 13 October 2003 (which is when the Land Registration Act 2002 came into force), the period of time for which the adverse possession must have continued was generally 12 years. Since then, where the land concerned is registered land, the normal period has been reduced to 10 years, but the squatter can only be registered if the registered proprietor does not oppose the application; if the application is opposed, the squatter will need to be able to establish that one of three conditions applies⁵. The existing law continues to apply to unregistered land, and to a claim to adverse possession acquired before 13 October 2003.

14. You can find out more about how the Land Registry deals with claims to adverse possession of land in its Practice Guides LRP004⁶ and LRP005⁷, available on its website at: www.landreg.gov.uk/publications/?pubtype=309.

Common land

15. In general, a claim to adverse possession of common land can be made in the same way as in relation to land generally. Moreover, at common law, the exclusion of the exercise of rights of common from a portion of common land (*e.g.* by enclosing the land to make it inaccessible to the commoners' livestock) would give rise, in time, to a presumption that the commoners had abandoned their rights over that land.

16. However, the position is complicated by statutes for the protection of common land, and the registration of common land under the 2006 Act.

⁴ Section 12(a) of the 1965 Act, now repealed.

⁵ The conditions are set out in Schedule 6 to the Land Registration Act 2002.

⁶ *Adverse possession of registered land*.

⁷ *Adverse possession of (1) unregistered land (2) registered land where a right to be registered was acquired before 13 October 2003*.

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General

17. All registered common land is subject to Part 3 of the 2006 Act⁸, which makes it unlawful to construct any works which would restrict or prevent access to the land, or to resurface the land, without the consent of the Secretary of State. This means that it is unlawful to put up a fence or wall, or for example a building, on registered common land. If you do, no offence has been committed, but any person may ask the courts to require you to remove the works⁹.

18. It is difficult for a person to show adverse possession of registered common land, because the land cannot lawfully be enclosed without consent, and therefore neither the public nor any commoners may lawfully be excluded. It follows that it will always be very difficult for the squatter to show factual possession (see paragraph 12 above).

19. Notwithstanding Part 3 of the 2006 Act, fencing or other works are sometimes put up unlawfully on registered common land without consent, and no action is taken against the person responsible (or alternatively, the works may be lawful because they do have consent). In these cases, it may be easier to show the necessary factual possession. The fact that such works may be unlawful does not, in itself, undermine a claim to adverse possession.

20. In *London Borough of Bromley v Morritt*¹⁰ and in *R (Smith) v Land Registry and Cambridgeshire County Council*¹¹, the Court of Appeal (in both cases), held that the title to highway land could not be acquired by adverse possession. However, in each case, the claimant sought to establish that, by acquiring title to an encroachment on the highway, the claimant would be immune from action to remove the encroachment as an illegal obstruction, and the judgments must be read in that context. An act of adverse possession in relation to common land may be unlawful and thus a civil wrong, but does not normally give rise to questions of criminal illegality. In Defra's view, *Morritt* and *Smith* therefore do not lend support for the proposition that title to common land cannot be acquired by adverse possession.

Schemes of regulation under the Commons Act 1899

21. Some registered common land, particularly common land which is primarily important for public recreation, is subject to a scheme of regulation made by the local authority under Part I of the Commons Act 1899¹². The effect of a scheme is that the local authority becomes responsible for managing the land. It is usual for such schemes to contain a clause which requires the managing local authority to keep the common free of encroachment. Again, while this means that any encroachment on

⁸ Previously, section 194 of the Law of Property Act 1925.

⁹ An encroachment on common land which interferes with the exercise of any rights of common may be actionable in the courts regardless of whether consent is sought or given under part 3, and a commoner may be entitled to abate (*i.e.* to personally remove) the encroachment.

¹⁰ www.bailii.org/ew/cases/EWCA/Civ/1999/1631.html.

¹¹ www.bailii.org/ew/cases/EWCA/Civ/2010/200.html.

¹² Details of most commons subject to schemes of management notified to the Secretary of State can be seen on the Defra casework database: www.defra.gov.uk/rural/protected/commonland/protect-consent.htm#pinkslip, and records of many such schemes can be found in the National Archives (in the MAF 25 series). The databases cannot be considered to be comprehensive.

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the common should be resisted by the local authority, it is possible that no action may be taken, and the squatter may be able to show the necessary factual possession¹³.

Land held under the Open Spaces Act 1906

22. Some common land may be owned by a local authority and held under the Open Spaces Act 1906. Such land can be disposed of by the local authority only in accordance with the restrictions contained in section 123 or 127 of the Local Government Act 1972, but the courts have ruled that land can be claimed by adverse possession where the owner has a power to dispose, albeit under conditions as to consent, even where those conditions have not been complied with¹⁴.

Orders of regulation under the Commons Act 1876

23. Approximately 30 commons are subject to orders for regulation under the Commons Act 1876¹⁵. Section 36 of that Act provides that a regulated common “shall not, nor shall any part thereof, be inclosed without the sanction of Parliament”. In *Collis v. Amphlett*¹⁶, the High Court held that the effect of section 36 was to render the laws of limitation ineffective in relation to adverse possession¹⁷. Section 36 was repealed on 1 October 2007¹⁸, but a claim of adverse possession on a common regulated under the 1876 Act may therefore fail¹⁹.

Inalienable land

24. Land which has been declared ‘inalienable’ (in particular, land which cannot be disposed of by the National Trust except with the authority of Parliament²⁰) cannot be acquired by adverse possession. In the *Earl of Abergavenny v. Brace*²¹, the court

¹³ In *Whitehurst & Others v Dickinson*: www.ahmlr.gov.uk/Judgments/j146/2008-0315%20Whitehurst%20and%20ors%20v%20Dickinson.doc, the deputy adjudicator to HM Land Registry found that adverse possession of common land regulated under the 1899 Act was possible, and granted title to the applicants. He concluded that the vesting of management in the local authority did not deprive the owner of the power to bring an action in trespass, and time could run against such an owner.

¹⁴ *Bobbet v South Eastern Rly Co* (1882) 9 QBD 424; *Brighton Corporation v the Guardians of the Poor of Brighton* (1880) 5 CPD 368.

¹⁵ A list of commons managed under the Commons Act 1876 can be seen on the Defra website at: www.defra.gov.uk/rural/protected/commonland/acts.htm.

¹⁶ (1917) 62 Sol Jo 37.

¹⁷ The court’s reasoning is not apparent from the report, but it appears that the court concluded that fencing the land off would amount to inclosure prohibited by Parliament under section 36 so that it was not possible to have sufficient possession of the land such that a claim for adverse possession could succeed.

¹⁸ See Part 2 of Schedule 6 to the 2006 Act and article 2(d)(ii) of the Commons Act 2006 (Commencement No. 3, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/2584).

¹⁹ For the time being: such a claim may succeed if brought in 2019 onwards, in relation to common land regulated under the 1876 Act which is not registered in the register of title.

²⁰ National Trust Act 1907, section 21, and National Trust Act 1939, section 21. Not all land owned by the National Trust is inalienable.

²¹ LR 7 Exch 145.

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said (in relation to a private Act which forbade the alienation of an estate): “I do not, however, find any case where this Act enables a man to do indirectly by his neglect anything which he could not do directly by his act.” It follows that, in Defra’s view, the rules of adverse possession cannot apply in relation to inalienable land, including inalienable common land.

25. Certain commons regulated by their own Act of Parliament may also enjoy special protection against adverse possession, where the Act provides for the land to be held inalienably. For example, the provisions of the Wimbledon & Putney Commons Act 1871 in relation to the disposal of land held by a board of conservators, have been considered by the courts on several occasions, although the position in relation to adverse possession remains uncertain²².

Effect of adverse possession on common land

26. As we have seen, a successful claim to adverse possession may sometimes be made in relation to common land. Does that mean that the squatter acquires a title free of its status as common land?

27. Whereas previously, a substantial period of adverse possession on common land could give rise to a presumption that rights of common had been abandoned, that is no longer the position in relation to registered common land. The commons registers are conclusive as to the status and extent of common land. Therefore, the owner of such land is subject to both the statutory provisions for the protection of registered common land (see paragraph 17 above), to any registered rights of common exercisable over the land, and to any statutory provision for public access to the land.

Rights of common

28. It is, in Defra’s view, not possible for a registered right of common to be abandoned by disuse. So, even where the exercise of a right of common has been excluded by, for example, fencing for many years, it remains open to a commoner to seek to resume the exercise of a right at any time.

Public rights of access

29. Most common land is subject to public rights of access for recreation. Approximately one-fifth of common land is subject to a right of access (on foot and on horseback) under section 193 of the Law of Property Act 1925, while common land subject to schemes of regulation under the Commons Act 1899 (see paragraph 21 above) are also subject to a right of access under the scheme. These rights of

²² See, for example, *Housden & Another v The Conservators of Wimbledon and Putney Commons* (www.bailii.org/ew/cases/EWCA/Civ/2008/200.html) — this case dealt with a successful claim (on appeal) to acquire an easement over Wimbledon Common by prescription, but it seems likely that a claim to acquire title to the land by adverse possession would fail as being contrary to the Wimbledon & Putney Commons Act 1871 and the principle in *Earl of Abergavenny v. Brace* (see paragraph 24). See also the decision of the High Court: www.bailii.org/ew/cases/EWHC/Ch/2007/1171.html and of the Adjudicator to HM Land Registry: www.ahmlr.gov.uk/Judgments/j21/Decision%20Housden%20v%20Conservators%20of%20Wimbledo%20n%20Common%2020050236%2021.8.06.doc. However, in *Wimbledon and Putney Commons Conservators v Nicol* (1894) 10 TLR 247, the High Court expressed a view to the contrary.

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access will apply whatever the ownership of the land, or the use to which it is put. (The Secretary of State has discretion to make an order under section 193 of the Law of Property Act 1925 to impose limitations or conditions on the public right of access in the interests of the owner, but no similar power is available in relation to the 1899 Act.)

30. Registered common land is also subject to a general right of access under Part I of the Countryside and Rights of Way Act 2000. This right does not apply where there are existing rights such as those mentioned in paragraph 29 above; nor does it apply to any 'excepted land', which includes land within the curtilage of a building, gardens, and land within 20 metres of a dwelling, even if the land is registered common land.

Management of land by a local authority

31. The management of common land subject to schemes of regulation under the Commons Act 1899 (see paragraph 21 above) is vested in the local authority. It is not possible for the owner of any part of the land to opt out of the scheme, and in Defra's view, the local authority has no power to alter the scheme to exclude any portion of the common. The owner of any land subject to a scheme will have very limited powers to manage the land and to control its use, particularly if the local authority asserts to the full its continuing right to manage the land.

Town or village greens

32. Many town or village greens were vested in the ownership of a local authority by virtue of section 8(4) of the 1965 Act²³. Others were set out under an inclosure award, and vested in a particular person or body by that award²⁴. This statutory vesting is good evidence of the ownership of the green as at the date of vesting, but a claim to adverse possession may succeed on the basis that the adverse possession has taken place since the land was vested in the local authority, person or body. Defra maintains a database of town or village greens, which contains some information about the ownership status of the greens found in the commons registers held by commons registration authorities²⁵.

²³ Section 8 was repealed by the 2006 Act, but the effect of any vesting is preserved by paragraph 9(1) of Schedule 3 to the 2006 Act. The registration of a local authority as owner of a town or village green under the 1965 Act does not necessarily attract the vesting provision in section 8(4): a vesting occurred only if the authority was registered as owner on a referral of the question of ownership to a Commons Commissioner. Copies of most decisions of the Commons Commissioners can be found at: www.acraew.org.uk/index.php?page=commissioners-decisions.

²⁴ Many inclosure awards provided for a recreational allotment or green to be vested in the churchwardens of the parish: the functions of the churchwardens are now (in relation to parishes in former rural districts) those of the parish council or parish meeting (sections 6 and 19(7) of the Local Government Act 1894), or (in relation to parishes in former urban districts or boroughs), the district council (articles 4 and 6 of the Overseers Order 1927 (SI 1927/55)).

²⁵ www.defra.gov.uk/rural/protected/commonland/tvg.htm.

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33. Any claim to adverse possession of a green must take into account the nineteenth century statutes which provide protection for common land²⁶:

- Section 12 of the Inclosure Act 1857 against injury or damage and interruption to their use or enjoyment as a place for exercise and recreation. Causing injury to village greens is a criminal offence.
- Section 29 of the Commons Act 1876 makes encroachment or inclosure of a green, and interference with or occupation of the soil, a criminal offence unless it is with the aim of improving the enjoyment of the green.

34. In paragraph 20 above, we explain that an encroachment on common land may be *unlawful* (i.e. a civil wrong) because any fencing or other works are likely to require the consent of the Secretary of State under section 38 of the 2006 Act, but that it is not *illegal* (i.e. because no criminal offence has been committed).

35. But an encroachment on a registered town or village green may very well be a criminal offence under the nineteenth century statutes set out in paragraph 33 above. Such an encroachment is illegal, and no person (such as the landowner) has any power to make the encroachment lawful. In Defra's view, the courts may not endorse a claim to adverse possession of a green acquired by illegal encroachment, even if the encroachment were unchallenged for more than twelve years.

36. Even were a claim to adverse possession of a green successful, title to the land would not affect the status of the land as a green, and the rights of the local inhabitants to use the land for sports and pastimes would be unaffected. Moreover, in Defra's view, the criminal offences in the nineteenth century statutes are continuing, and therefore, the person responsible for any encroachment on the land will remain liable to prosecution.

37. It may be possible to demonstrate adverse possession of a green by acts which are not illegal. For example, a parish council may be able to show adverse possession of a village green (not having a paper title to the green) by acts of management which are entirely consistent with the nineteenth century legislation (such acts might include mowing the grass, managing unsafe trees, repairing damage to the turf²⁷). Where the management is sufficient to show adverse possession, there is no reason in Defra's view why such a claim might not be successful, notwithstanding that the land is a registered town or village green.

²⁶ In *Oxfordshire County Council v Oxford City Council and another* [2006] 2 AC 674 (www.bailii.org/uk/cases/UKHL/2006/25.html), the House of Lords decided that these statutes applied to land registered as a town or village green.

²⁷ Defra does not intend to suggest that such acts in themselves are necessarily sufficient to establish a successful claim to adverse possession: every case will depend on the facts.