



COMMON LAND GUIDANCE SHEET 1a

CONSENT TO CONSTRUCT WORKS ON COMMON LAND

Do I need consent?

1. Under section 38 of the [Commons Act 2006](#) (“the 2006 Act”), you need our consent to carry out any restricted works on **land registered as common land** under the [Commons Registration Act 1965](#).
2. 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 do so if a green is subject to a scheme or Act.
3. Restricted works are any that prevent or impede access to or over the land, e.g. fencing, buildings, structures, ditches, trenches, embankments. They also include, in every case, new solid surfaces, such as for a new car park or access road.
4. 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).
5. For guidance on applications to carry out works on commons in London Boroughs see [Guidance Sheet 2d](#).

How do I know whether to apply for consent under section 38?

6. If you are considering carrying out works, they will fall into one of four categories:
 - A.** Works not covered by section 38, e.g. 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 works 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 (see [Guidance Sheet 1c](#)).
 - C.** Works (not covered by A or B above) which are for the management, improvement or protection (or to the negligible detriment) 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 needed (see the Annex to 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 2006 Act may be more appropriate (see the Annex to this guidance).

Retrospective applications

7. You may apply for consent for works which have already been carried out, but only if they were carried out after 1 October 2007.

What steps should I take before applying?

8. You should carry out extensive informal consultation before submitting an application. This should help identify objections to the proposal and how it can be amended to overcome them.

9. 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 e.g. 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
- the local authority archaeological service

10. Others you may want to involve at this stage include: all known commoners, whether using their rights actively or not, Wildlife Trusts, Local Access Forums, Council for the Protection of Rural England, Ramblers' Association, local amenity societies, and any others who you think may be interested.

11. 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 [Natural England](#).

What criteria are used to decide my application?

12. The criteria we will have regard to are set out in section 39 of the 2006 Act. 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.

13. We will apply these criteria in the light of Defra's policy objective of managing, improving or protecting the common and of maintaining its traditional uses and with reference to Defra's policy guidance. You will therefore need to show how the proposed works meet the criteria.

Making an application

14. See "[Notes on completing an application for consent to construct works on common land](#)"

Representations and determining your application

15. We will:-

- acknowledge receipt of your application as soon as practicable;
- manage an exchange of correspondence between you and interested parties and ask you to address any objections they may have;
- normally conclude the exchange no later than the point at which interested parties have written to us for a second time, replying to initial comments from you, and we have your comments on those representations;
- let you know 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;
- decide all applications on their individual merits whichever process (i.e. written representations, site visit, hearing or inquiry) is followed.

16. Anyone may comment on your application. Where there are no (or few) objections, and the issues are relatively straightforward, the application will be decided solely on the written evidence.

17. Where more evidence is needed, and depending on the particular circumstances of the case, the procedure may be a:-

- site visit – where an Inspector needs to see the application site at first hand. You will be invited to attend the site visit as may those objecting to the application;

- hearing – where the Inspector leads the discussion between the parties without the formal atmosphere of an inquiry. Hearings usually last one day only;
- public inquiry – more formal than a hearing where the parties are often legally represented and where they formally question each other's evidence. Inquiries may last 2 or more days.

18. Whatever the procedure, a decision will be made in writing which will be sent to all interested parties.

How long will all this take?

19. The length of time taken to decide your application will depend on the nature and extent of the works, the number of objections and the procedure followed.

20. As a guide, if there are no objections, and the issues can be determined without an exchange of written representations, we would expect to decide your application within three months of you meeting all the advertising/consultation requirements in full. This might extend to around five months if an exchange of written representations is needed, around seven months for cases involving a site visit, or around eight months for a public inquiry or hearing. More complex inquiry cases, or cases where an inquiry is held alongside a related inquiry (e.g. into a planning application) may take much longer.

30. Application forms and other Guidance Sheets are available on [Gov.UK](https://www.gov.uk).

Deregistration and exchange of common land

31. If the proposed works would not meet the section 39 criteria, 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 2006 Act to deregister common land and to offer land in exchange for the area required for the works (see the [Notes on completing a section 16 application](#) and the Annex to this Guidance Sheet for further advice).

32. 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.

Category C and D Works: Guidance on application options for proposals to carry out works on common land where the works 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 any of the example works listed 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.

<u>C. Works which are consistent with the use and enjoyment of the land as common land</u>	<u>D. Works which are not consistent with the use and enjoyment of the land as common land</u>
<u>BEST OPTION: SECTION 38</u>	<u>BEST OPTION: SECTION 16 DEREGISTRATION AND EXCHANGE</u>
<p>New fences, buildings, ditches, trenches, embankments, access roads, tracks, or other works which are consistent with the use and enjoyment of the land as common land (or which cause negligible detriment to the common).</p> <p>Alteration or extension to the type of works described in (a) which is consistent with the use and enjoyment of the land as common land (or which causes negligible detriment to the common).</p>	<p>New fences, buildings, ditches, trenches, embankments, access roads, tracks, or other works which are not consistent with the use and enjoyment of the land as common land.</p> <p>Alteration or extension to the type of works described in (a) which is not consistent with the use and enjoyment of the land as common land.</p>
DETAIL:	DETAIL:
(a) Fencing	(a) Fencing
<p><i>Any fencing that is consistent with the use and enjoyment 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 (e.g. livestock grazing). Animal health and welfare. Hefting and re-hefting of sheep. Public safety. Woodland management scheme. To facilitate the improvement of an SSSI. Fencing around a visitors' car park or construction compound.</p>	<p><i>Any fencing that is not consistent with the use and enjoyment of the land as common land.</i></p> <p><u>Examples might include:</u> Fencing of an extension of a private dwelling or its garden onto common land.</p>
(b) Buildings and other structures	(b) Buildings and other structures
<p><i>Replacement/extension/construction of buildings/structures, particularly small ones, that are consistent with the use and enjoyment of the land as common land (e.g. sporting and recreational use).</i></p> <p><u>Examples might include:</u> Sports club facilities. Cricket nets. Canoe club platforms.</p>	<p><i>Construction, extension (or replacement) of buildings/structures that are not consistent with the use and enjoyment of the land as common land.</i></p> <p><u>Examples might include:</u> Leisure centre. Supermarket. Large scale wind farms or mining works. Highway construction works. Private house.</p>

<p>Storage sheds for maintenance equipment. Greenkeepers' huts. Visitor facilities. Formation of a cricket pitch, play area/playground, golf green. Storage facilities for cricket club. Sports surfaces. Skateboard park. Small bus shelter. Landscaping schemes/enhancement works. War memorial.</p>	<p>Hotel. Airport. Burial ground.</p>
<p>(c) Ditches, trenches and embankments</p>	<p>(c) Ditches, trenches and embankments</p>
<p><i>Any ditches, trenches and embankments that are consistent with the use and enjoyment of the land as common land (e.g. for the conservation and management of the land, or for its protection against unlawful encroachment).</i></p>	<p><i>Ditches, trenches and embankments that are not consistent with the use and enjoyment of the land as common land. However, where the common is to be restored once the works are complete a s38 application may be appropriate.</i></p>
<p>(d) Resurfacing works</p>	<p>(d) Resurfacing works</p>
<p><i>(i) Construction of hard-surfaced areas (consisting of concrete, tarmacadam, roadstone or similar material), or alteration/extension of existing lawful ones which are consistent with the use and enjoyment of the land as common land (or which cause negligible detriment to the common).</i></p> <p><i>(ii) Any works carried out to an existing unlawful surface which are consistent with the use and enjoyment of the land as common land (or which cause negligible detriment to the common). [NB In these circumstances, consent should be sought for the unlawful works in their entirety, including any changes proposed - see Guidance Sheet 4 for further guidance].</i></p> <p><u>Examples might include:</u> Visitors' car park (whether temporary or permanent), (e.g. which facilitates recreational use of the common). Access tracks which are consistent with the use and enjoyment of the land as common land (e.g. which facilitate recreational use of the common) where an existing unsurfaced means of access is already in private use and a sympathetic paving proposal may be aesthetically preferable.</p>	<p><i>(i) Construction of hard-surfaced areas (consisting of concrete, tarmacadam, roadstone or similar material), or alteration/extension of existing lawful ones, which are not consistent with the use and enjoyment of the land as common land. except where an existing unsurfaced means of access is already in private use and a sympathetic paving proposal may be aesthetically preferable;</i></p> <p><i>(ii) Any works carried out to an existing unlawful surface which are not consistent with the use and enjoyment of the land as common land. [NB: in these circumstances, consent should be sought for the deregistration of part of the common concerned].</i></p> <p><u>Examples might include:</u> Car parks. Private access roads and access roads to new developments.</p>